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A Discourse on Althusius: An Investigation into *Sui Generic*
Constitutionalism

by

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Abstract

This thesis aims at furthering our understanding of the constitutional structures and processes of *sui generic* associations such as the European Union. The thesis argues that the problematical constitutionalisation of the European Union has highlighted the limitations of the political thought that has served as the basis of political associationalism since the Treaty of Westphalia (1648) and the publication of Thomas Hobbes' *Leviathan* (1651). These limitations have resulted in the European Union being described, for want of a better expression, as *sui generis*. The thesis advances the argument that in order to be in a position to understand constitutional relations in a 'non-statal' setting, what is needed is an alternative variant of political thought that is not based in or dependent on the *societas* canon that originates with Hobbes. One source of such political thought can be located in the work of Johannes Althusius (1557-1638) who, writing in the city of Emden in the Holy Roman Empire in the early 17th Century, described a constitutional structure of a political association that differs in significant features to the centralised state theories of the *societas* canon.

The thesis also argues that the traditional concepts of constitutionalism and political association applied to *sui generic* constitutionalism are hampered by the inherent weaknesses of modern political and legal vocabulary. Despite being used *ad infinitum* in the constitutional discussions on the European Union, there is not a precise definition of either the term 'constitution' or treaty' in political or legal theory. Althusius' work avoids this weakness, due to the fact that the centralised state does not enjoy the same position it does in the *societas* canon, and so the need to classify 'intra' or 'inter' state relationships does not exist to the same degree.

While taking the European Union as a workable model of a *sui generic* association, this thesis does not aim at solving the European Union's constitutional problems or offering a more suitable term to describe its nature. Rather, based on an analysis of Althusius' work, the thesis aims to offer an alternative understanding of the problems that result from the constitutionalisation of *sui generic* associations.

Key Words: Johannes Althusius, Thomas Hobbes, Edvard Kardelj, *sui generic* associations, constitutions, social contract, sovereignty, federalism, European Union

"Men nearly always follow the tracks made by others and proceed in their affairs by imitation, even though they cannot entirely keep to the tracks of others or emulate the prowess of their models. So a prudent man should always follow in the footsteps of great men and imitate those who have been outstanding. If his own prowess fails to compare to theirs, at least it has an air of greatness about it. He should behave like those archers who, if they are skilful, when the target seems too distant, know the capabilities of their bow and aim a good deal higher than their objective, not in order to shoot high but so that by aiming high they can reach their target"

Machiavelli The Prince: 49

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> I would like to dedicate this thesis to my maternal grandmother Alice Edna Munday, and to Harry Bear and Alibet

Ps. I should also like to thank Johannes Althusius, so cheers mate: *factum est*? & to Tito and Edvard Kardelj: *hvala*.

Contents

List of Abbreviations

Books

The Prince:	Niccolo Machiavelli (1516) *The Prince*
Six Books:	Jean Bodin (1576) *Six Books of the Commonwealth*
Politica:	Johannes Althusius (1603) *Politica Methodice Digesta, Atque Exemplis Sacris Et Profanis Illustrata* (Politics Methodically Set Forth, and Illustrated with Sacred and Profane Examples)
The Rights of War:	Hugo Grotius (1625) *The Rights of War and Peace including the law of Nature and of Nations*
De Cive:	Thomas Hobbes (1642) *De Cive*
Leviathan:	Thomas Hobbes (1651) *Leviathan or* The Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil
Law of Nature:	Samuel Pufendorf (1672) *Of the Law of Nature and of Nations*
Patriarcha:	Robert Filmer (1680) *Patriarcha or the Natural Power of Kings*
Treatise:	John Locke (1690) *The Second Treatise of Government*
The Spirit of Laws:	Baron de Montesquieu (1748) *The Spirit of Laws*
Original Contract:	David Hume (1748) *Of The Original Contract*
Inequality:	Jean-Jacques Rousseau (1754) *A Discourse on the Origins of Inequality*
Social Contract:	Jean-Jacques Rousseau (1762) *The Social Contract*
Publius:	James Madison, Alexander Hamilton & John Jay (1787-1788) *Publius*
Reflections:	Edmund Burke (1790) *Reflections on the Revolution in France*
Rights of Man:	Thomas Paine (1791-2) *The Rights of Man*
Peace:	Immanuel Kant (1795) *Perpetual Peace*
Du Principe Fédératif:	Pierre-Joseph Proudhon (1863) *Du Principe Fédératif*

Political Terminology

Bundesrat: Upper Chamber of German Parliament

Bundesverfassungsgericht: German Constitutional Court

Conseil Constitutionnel: French Constitutional Council

ECB: European Central Bank

ECJ: European Court of Justice

ECSC: European Coal and Steel Community

EEC: European Economic Community

Empire: Holy Roman Empire

EU: European Union

FOCJ: Federal Overlapping Competing Jurisdictions

Huguenot: The name given to French Calvinists. The origin of the name is uncertain, but has been connected with Charles Hugues, who lead the Patriotic Party of Geneva in their struggle against the Duke of Savoy (Green 1952: 173), with the Swiss confederates or *Eydgenots* (*Eidgenossen*) and with the night walking ghost of King Hugh Capet (936-998), the lay abbot of the Monastery of St. Martin, Tours. (McNeil 1962: 247)

KPJ: Kommunistične Partija Jugoslavije

Nato: North Atlantic Treaty Organisation

Respublica Christiana: A religiously-based, homogenous order that received its validity from God as mediated by the right ecclesiastic and secular authorities claiming universal jurisdiction. It was replaced by the territorial state as the principle of delimitation of spatial authority in Europe that realised a sharp distinction between secular and Church jurisdiction. (Koskenniemi 2004: 494)

SAWPY: Socialist Alliance of Working People of Yugoslavia

SFRY: Socialist Federal Republic of Yugoslavia

SKJ: Savez Kommunistične Jugoslavije (League of Communists of Yugoslavia)

Societas: A form of political association based on individuals coming together to form a centralised state, via some

	form of contract, typified in the work of Hobbes, Locke and Rousseau
Sui Generis/Generic:	An association that is without comparison; *sui* meaning of its own or itself and *generis/generic* meaning group or class.
Universitas:	A form of political association based on consensual, communal living typified in the work of Calvin and Marx
Vienna:	(1969) *The Convention on the Law of Treaties*
Vindiciae Contra Tyrannos **(*Tyrannos*):**	(1579) Written by Philippe Duplessis-Mornay (1549-1623) and Hubert Languet (1518-1581), it became the main Calvin text on the right of resistance
Zoon Politikon:	A term used by Aristotle to donate an individual could only realise himself within naturally occurring social or political groups. The basis of the *universitas* theory

Introduction

> Classical political theory, for example, by which I mean the kind of political theory traditionally taught to students of politics and history, the kind that begins with Machiavelli or Hobbes and ends somewhere in the nineteenth century, seemed to be of little direct help in comprehending the process by which states unite with one another after the fashion of the Treaty of Rome.
>
> *Murray Forsyth 1981: ix-x*

Recent attempts to constitutionalise *sui generic* associations such as the European Union (EU), have largely failed to achieve their aims: namely, to get to grips with the 'nature of the beast'. One consequence of these failures has been to highlight the weaknesses of contemporary constitutional theory when applied to a non-statal or *sui generic* association. There are three main aspects to these weaknesses. First, the constitution is a by-product of the creation of the 'modern state', which began to emerge in Reformation Europe and was consolidated by the Treaty of Westphalia (1648). Consequently, to apply a 'state dependent' concept to a *sui generic* association is akin to a taking 'fish out of water'. Second, the use of the 'constitution' in unfamiliar political associations is further weakened by the nature of the vocabulary of contemporary political thought. The argument that constitutions are the basis of states, while treaties are the basis of international organisations is still prevalent in political theory. While correct, this stance nevertheless overlooks two related factors: first, there is no common definition for either term; second, what happens if the political association has evolved from a traditional international organisation, but will never evolve into a 'traditional' state; as is the case of the EU? Or what if an association is purposefully founded, but neither as an international organisation or a state? The limited nature of political vocabulary results in there being insufficient terms to describe the structure of the *sui generic* association.

Third, the understanding of *sui generic* constitutionalism is laden by the nature of political theory. The vocabulary and practices that are the basis of modern political activity originated in a political canon, or collection of political thinkers, that began with Thomas Hobbes' *Leviathan* (1651) and culminated in Thomas Paine's *The Rights of Man* (1791-2). Consequently, 'non-statal' or *sui generic* political theories

are often viewed as utopian or trivial, as they do not reflect the dominant trends of political theory.

The aim of this thesis is to further the revival of Johannes Althusius' *Politica Methodice Digesta, Atque Exemplis Sacris Et Profanis Illustrata*[1] (1603) (*Politica*), as in this work can be found a comprehensive and coherent model of constitutionalism that was written before the dominance of the modern state. The thesis will offer a contribution to the study of Althusius, who has in the late 20th Century experienced increased attention from scholars (Hueglin 1999, Carney 1995, Elazar 1995a). This 'revival' can either be viewed in relation to the search for constitutional understanding of *sui generic* associations, such as the EU, or in the wider context of the 'rediscovery' of medieval[2] political thought. As Nederman argues:

> ...large numbers of previously unknown or unavailable texts have been edited or translated, surprising new connections have been uncovered, and entirely fresh lines of interpretation have been explored. Scholarly interest in medieval topics has been stimulated, in particular, by growing recognition that we must abandon a strict division between 'medieval' and 'modern' political mentalities (1996: 180).

Although taking the EU as an example of a *sui generic* association, the thesis will not solely focus on contributing to the increasing literature on the constitutionalisation of the EU. Rather, using *Politica* as a guide, the thesis will present a theoretical system of constitutionalism that can be used to understand *sui generic* associations, of which the EU is a prime example.

The Constitutionalisation of the European Union

The European Union has undergone a continual process of constitutionalisation since its initial inception in the Schuman Plan (1950): indeed, the initial years of the

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[1] *Politics Methodically Set Forth, and Illustrated with Sacred and Profane Examples.*
[2] Although 'medieval' is used in the existing literature, the author's preference for the period in which Althusius wrote would be 'Reformation' or 'late-Reformation', as the term 'medieval' can be used to include history from centuries before. In this way, 'late-Reformation' reflects the precise few decades in the late 16th and early 17th Century, in which *Politica* was written.

European Coal and Steel Community (ECSC), saw constitutional progression, the like of which was not seen again until the Laeken Declaration (1999) announced a Constitutional Convention was to be convened to write a constitution for the European Union. As Figure 1 shows, in the period from 1948 to 1955, the leading European nations: Germany, France, Italy, the Netherlands, Belgium and Luxembourg, discussed issues ranging from customs union to the creation of a European Army. Although this constitutional process was principally stopped by the French Prime Minister, Paul Mendes France's refusal to discuss the European Political Community treaty in the French Parliament,[3] valuable lessons were learnt in the drafting of the Treaties of Rome, which led to the creation of the European Economic Community.

The next 'round' of constitutionalism came in the mid-1960s, when the European Court of Justice (ECJ) published two rulings that were to fundamentally alter the legal foundations of the EC. Ironically, Alter, quoting Weiler, notes that much of the landmark cases occurred 'at the same time that member states were scaling back the supranational pretensions of the Treaty of Rome and reasserting national prerogatives' (Alter 1998: 128): but, it must be noted here that in this early period the ECJ decision, although bold, were cautious; "Although bold in doctrinal rhetoric, the ECJ made sure that the political impact was minimal in terms of both financial consequences and political consequences" (Alter 1998: 131). The two most important decisions at this time were the Van Gend en Loos and the Costa v. Enel cases.[4]

The ECJ, in the Van Gend en Loos case, found that the EEC law gave rise to individual rights, which could be invoked, in national courts. Interestingly, this decision could not have been derived from specific provisions of the Treaties (Douglas-Scott 2002: 282). Karen Alter continues 'the ECJ was not designed as a tool for domestic actors to challenge national policies; these powers the ECJ created for itself' (1996: 491).

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[3] By 1954, all countries except France had both signed and ratified the Treaty European Political Community; Mendes France's refusal to discuss the treaty in the French Parliament meant that France could not ratify the treaty.
[4] These have been discussed in greater detail elsewhere and will only be briefly covered here. See Renaud Dehousse The European Court of Justice (1998) Chapter 2, Sionaidh Douglas-Scott Constitutional Law of the European Union (2002) Chapters 7 & 8, Anthony Arnull The European Union and its Court of Justice (1999) Chapter 3 & 4, and A.W. Green Political Integration by Jurisprudence (1969) Chapter 5 & 6.

Figure 1: European 'Constitutional' Activity 1948-1955

Year	Treaty/Discussion	Purpose of Discussion
1948	BENELUX Treaty	Facilitate free flow of goods between Belgium, The Netherlands and Luxembourg
1948	Brussels Treaty	Established the Western Union Treaty of economic, social and cultural collaboration and collective defence
1950	Stikker Plan	Plan of action for European economic integration
1950	Mansholt Plan	European Collaboration on Agriculture
1950	Plevén Plan	On the Creation of a European Army
1950	Schuman Declaration	French proposal to place Franco-German coal and steel production under a common High Authority
1951	Paris Treaty	Established European Coal and Steel Community (ECSC)
1952	Luxembourg Resolution	Adopted by ECSC Foreign Minister concerning the drafting of a Treaty constituting a European Political Community
1952	European Defence Community	Treaty to establish a European Army
1953	European Political Community	Designed to democratically control the European Defence Community
1954	Paris Protocols to the Brussels Treaty	Western Union Treaty becomes the Western European Union, as West Germany and Italy join
1955	Messina Declaration	Launched negotiations that led to the Treaties of Rome

Source: the author

In the Costa case, the Court established the Supremacy of Community law over that of Member States; this meant that 'Community laws could trump national laws, even if the latter were constitutional entrenched'. Weiler, in a similar vein to Douglas-Scott, argues that the Court acted beyond its sphere of competences, as there is no

supremacy clause specified in the Treaties (1994: 514). Weiler continues on to explain the full impact of the two decisions in tandem:

> ...in the Community because of the doctrine of supremacy, the EC norm, which by the doctrine of direct effect must be regarded as part of the law of the land, will prevail...The combination of the two doctrines means that the Community norms that produce direct effect are not merely the law of the land, but the "higher law" of the land (Weiler 1994: 514).

What is also important is the principle of 'preliminary ruling' in which national courts ask the Court for an initial advice. This principle, coupled with the two other doctrines not only enabled the Court to transform the preliminary ruling procedure from a mechanism designed to allow individuals and national courts to question *EC law*, into a mechanism for individuals to challenge *national law* (Alter 1996: 472. Emphasis in original), but also meant that by using the two doctrines as legal crutches, the Court does not exceed its authority by reviewing the compatibility of national law with EU law (Alter 1998: 126). This procedure also meant that the 'battle to reassert national government control then involves harnessing national courts and not just a supranational court than can be cast as 'foreign' (Heisenberg & Richmond 2002: 207).

The ECJ was allowed to act as 'political entrepreneur' (Heisenberg & Richmond 2002: 206), due to vague reference to the Court's powers in the Rome Treaty. This coupled with the limited relationship between the Court and national and sub national courts have allowed the Court to an even greater extent to 'fill in the gaps'. More importantly by defining these 'grey areas' the Court has been able to retain the right to determine their scope. In effect, an organ of the *sui generic association* now reserves to itself the power to determine the extent of its power to define the conduct parameters of all subordinate entities.

The importance of these decisions is that it took the constitutional initiative *away from* the Member States, and placed it with the ECJ and national courts. While there was rhetoric from Member States about the actions of the ECJ,[5] the decisions, coupled

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[5] The then French President, Valery Giscard d'Estaing, called on the Council to do something about the 'European Court and its illegal decisions' (Brown & Kennedy 1994: 371), and one unnamed British

with the increasing promotion of EC law to sub-national courts, meant that increasingly sub national (and increasingly national) courts *spoke EC law*, but remained *national* courts. In this manner, while governments can relatively easily ignore the rulings of international tribunals:

> ...an ECJ decision now meant disobeying national courts, and all the enforcement power of the national courts could be used in the enforcement of EC law (Alter 1996: 460).

The next major constitutional event of the EC was the Draft Constitution written by Alterio Spinneli (1984). Whilst Spinelli's fellow European Parliamentarians warmly received the Draft Constitution, the nature of the document appears to have been too radical in terms of power transferral for the Member States. Whether Spinelli seriously expected the Constitution to adopted is open to contention, but it did act as a focal point for both the European institutions and Member States, and this is reflected in the fact that many of the Constitutions features, such as European citizenship and the institutionalisation of the principle of subsidiarity, were subsequently adapted into the Maastricht Treaty (1992).

The most recent period of constitutionalism covered the period from 2002 to 2005, and included the Enlargement of 2004, the European Constitutional Convention, the European Council negotiations on the text the convention produced, and the subsequent ratification process. While the rejection of the Constitutional Treaty by the French and Dutch electorate represented a postponement of the constitutional process, it also highlighted three theoretical problems associated with constitutionalising such a *sui generic* association: firstly, the sporadic nature of the EU constitutional history means that it is difficult to trace a continual process. What is more, even during times of constitutional 'idleness'; when there are no obvious significant changes, there are subtle changes occurring 'behind the scenes', that may have a significant affect on the community's structure or everyday processes; secondly, there is a lack of a definition of the EU, and as will be discussed in Chapter Three, the failure to identify or define the actors in any political process leads to confusion, and this is replicated in the EU constitutionalism to date; thirdly, whilst the

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MP stated that a ruling of the Court 'had set aside the British constitution as we have understood it for several hundred years' (in Alter 1996: 474).

EU exists, but nobody can produce a convincing definition to explain its political structure, due to the *limitations of the contemporary statal political theory* in a *sui generic* setting. While the thesis does not propose to address the former, it does propose that using a constitutional theory that is not dependent on contemporary theory will address many of the problems caused by the latter: and this proposal is increasingly reflected in the EU constitutional literature as authors attempt to define alternative approaches to overcome these limitations.

Alternative Approaches to Constitutionalism in the Literature

Due to its predominance in the contemporary political arena, the majority of alternative approaches to constitutionalism have focused on redressing the constitutional issues of the EU, but this is not to say that alternative approaches are confined to the EU. Indeed, due to its 'detachment' from the specifics of the EU debate, Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995), appears to go to the very source the problems of contemporary constitutionalism:

> What we need to understand today is the extent to which the solutions advanced by Hobbes and the other modern theorists of constitutionalism are now part of the problem...hence, to overcome the partiality of the inherited language of modern constitutionalism we need to retrace our steps, recover the arguments the modern theorists used to set this imposing edifice in place... (1995: 15 & 59).

In the literature of the constitutionalisation of the EU, there are two arguments that encapsulate a similar position: Joseph Weiler's (1999: 27) and Neil Walker's (2003: 27) 'problems of translation'; and Jo Shaw's concept of 'post-national constitutionalism'. (1999: 581-582) The fundamental aspect of both is the problems that arise from 'translating' statal constitutionalism onto the EU arena. As Shaw argues

> ...such attempts to match theory and reality have quickly demonstrated that constitutionalist ideas and thinking are not capable of simple transmission to

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the supranational level, without considering how many of the conditions underpinning them at national level are changed by the shift in register (1999: 586).

The problem identified here is one of adapting statist constitutionalist theory in order for it to be of relevance for the EU. In his discussion on 'translation', Neil Walker notes two positions. The first he terms 'refuseniks', who are those authors who view

> ...constitutionalism as a state-centred idea in terms of its historical elaboration, preconditions of a settled political community and symbolic associations...[and so] would reject the transposition of constitutionalism to non-state contexts as illegitimate, and perhaps impossible (Walker 2003: 28).

In contrast, the second group Walker identifies are those who have a tendency to:

> ...measure many of the supposed shortcomings of post-state associations such as 'deficits of democracy, legitimacy, accountability, equality and security' in terms of a statist template and against the benchmark of a (real or imagined) statist standard (Ibid: 30).

One concurrent thread in both sides of the debate is the view that the state is the predominant mode of political association. However, Walker argues that the issue of translation 'requires us to demonstrate that there *is something of value in our statist constitutional heritage* that is worth preserving and applying to the non-state context of political organisation'. (Ibid: 32) Subsequent authors writing on the EU have explored this challenge. Dehousse, addressing the idea of representative democracy, notes that 'this model is analytically weak, and normatively ill-adapted to the specificity of the European Union'. (2003: 136) Poiares Maduro, in tackling the issue of constitutionalism, argues that: "in many respects, the problems of the European Constitution are simply reflections of the limits of national constitutionalism that we have for long ignored" (2003: 75).

While Walker concentrates on the issues of translation, Shaw focuses on identifying the weakness of the process of applying statal constitutionalism to the EU and argues that there needs to be:

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...inquiries into alternative state forms of participation and representation which examine the roles of the states and sub-state associations such as regions, the 'people' themselves, as well as intermediate representative associations such as non-governmental organisations (NGOs), trade unions and firms (1999: 581-582. Emphasis mine).

The resemblance to Daniel Elazar's paradigm of shifting post-national federalism (1995b) in this definition is striking. In this paradigm there is a shift from "a world modelled after the concept of the nation-state developed in the seventeenth century to a world of reduced state sovereignty and increasingly constitutionalised interstate linkages of a federal character" (Watts 2000: 166). The resemblance here is that both Shaw and Elazar recognise both the constitutional role of sub- or non-state actors and that representation contains a non-territorial aspect, that is, that individuals do not have to be represented solely in territorial terms.

Having identified the inadequacy of statal constitutional theory in explaining the constitutional nature of the *sui generic* association, in this case the EU, this thesis proposes to elaborate on the political writings of Althusius in order to be able to offer a theory of constitutionalism that can be used to describe and help our understanding of *sui generic* associations. To achieve this aim, it is important to define the theoretical actors and concepts that will feature in our discussion.

The Statal or *Societas* canon

Traditional constitutional theory is derived from a canon of political thinkers linking Thomas Hobbes in 1651 to Thomas Paine in 1791. These dates are offered as representing the beginning and end of the canon, as after this time constitutional *theory* began to give way to constitutional *practice*, in that, as we shall see in Chapters Two and Four, the French and US revolutions used the theory of this canon to solve their respective constitutional questions. Thereafter, a significant proportion of constitutional problems facing other countries and *sui generic* associations have been solved, not by turning to political theory directly, but by referring to and adapting features of existing constitutional models.

The spectrum of authors from Hobbes to Paine will be called the *societas* canon, which is a description borrowed from a traditional distinction between two opposing forms of political association: *societas* and *universitas*. The use of these terms can be found throughout much of medieval history, but in this context, they are based on the distinction initially made by Otto von Gierke (1841-1921), who identified *societas* and *universitas* as two forms of association in the 'pre-modern' or medieval era. Most recently, Michael Oakeshott (1901-1990) refined this distinction by arguing that due to their use in the Middle Ages these terms 'came to represent two exclusively alternative interpretations of a state, such that to cleave to the one was to reject the other' (1975: 200).

The *societas* mode of association was ruthlessly individualistic and absolutist, favoured by rulers seeking to remove all challenges to their authority. By contrast, the *universitas* mode of association was communal, consensual and protective of its members (O'Sullivan 2000: 135). Of significance to this thesis, and an explanation for the dominance of the *societas* canon, is the argument that the communal life of the *universitas* was destroyed by the increasing predominance of *societas* contractarian forms of association, and especially by the idea of the state as a contractual grouping (O'Sullivan 2000: 141) that began to be exemplified in the Reformation era in Western Europe.

The *societas* mode of association was associated with the social contract treatises of Thomas Hobbes, John Locke and Jean-Jacques Rousseau, and also writers such as Niccolo Machiavelli, Spinoza, Montesquieu, de Tocqueville, Burke, Paine, Kant, Fichte and Hegel, while the *universitas* authors were typified by the writings of Calvin, Bacon, St. Simon and more recently Marx and Lenin (Parekh 1979: 498). The two canons, first, reflect the historical victory of the *societas* conception of the 'state'; where one canon ends, the second one begins. Secondly, Althusius does not appear in either canon, although he can be viewed as the rearguard of the *universitas* canon,[6]

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[6] Not only does Althusius use the term *Universitas* with reference to community or city, (*Politica*: 39-40) but also he 'does not attribute systematic importance to the word *Societas*, probably because of its individualistic connotations' (Friedrich 1932: lxxxiv).

since we shall see that *Politica* represents the last comprehensive *universitas* model, before the *societas* authors became dominant.[7]

Figure 2: Diagrammatical representation of Althusius *v.* the *Societas* canon
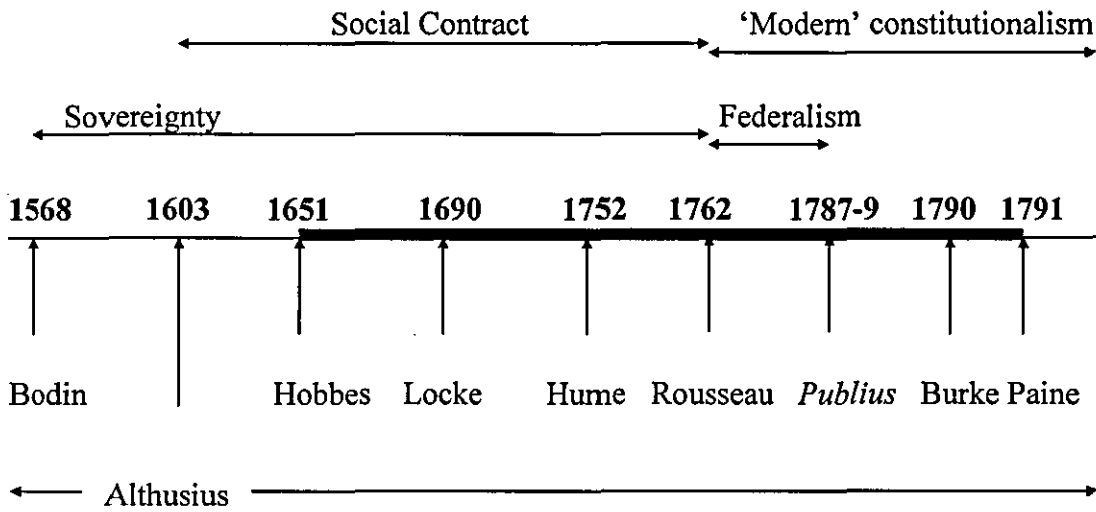
Key:

━━━ The *Societas* canon.

Althusius *v.* The *Societas* Canon

Although pitting one man against an entire canon can be viewed as a grandiose ambition, the enterprise becomes more realistic when the overall approach of Althusius' work is recognised, a fact not overlooked by analysts of Althusius' writings. Thomas Hueglin claims that in *Politica*, Althusius covered the three main 'constitutional' issues of the *societas* authors namely: sovereignty, the social contract and federalism. Indeed, Hueglin argues that Althusius composed a thorough working definition of sovereignty almost half a century before the celebrated *Leviathan* of Thomas Hobbes. In this way, and as can be seen in figure 2, the comprehensive

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[7] This thesis does recognise the role played by Marxism in the latter half of the 20th Century as a form of political association, but the 'victory' of the West in the Cold War reinforced the dominance of the *societas* canon.

nature of Althusius' discussion in *Politica* enables us to compare one man's work against an entire canon of thought.

The Theoretical Basis of the 'State': The *Societas* 'Scientific Approach' v. the Althusian 'Natural Approach'

Inspired largely by Hobbes' rejection of Aristotle's method of political thinking, and reflecting the academic backgrounds of the early *societas* thinkers, the *societas* canon adopted a 'scientific approach' to the understanding of politics. As we shall see in Chapter Three, Hobbesian and post-Hobbesian discussions started with a 'state of nature', not because this was the state of man in pre-political times, but because it represented a descriptive tool with which to argue for the theoretical foundation of the state. Likewise, the social contract represented a logical manner in which individuals could come to an agreement to form an association, which in this case was the state. In this scientific approach, 'man'[8] through the social contract, agreed with others to form the state, which provided a framework in which each individual actor could make autonomous decisions. Although this individualism was championed by Hobbes, it is also evident in the work of Locke, Rousseau, the *Publius* authors, Burke and Paine. In opposition to this 'scientific individualism', the *universitas* authors developed the Aristotelian view of man as a *Zoon Politikon*, whereby man could only realise himself within the confines of naturally occurring groups (such as the family) or political groupings (such as the guild etc.) Althusius takes this argument to its logical extreme:

> The commonwealth, or civil society, exists by nature, and that man is by nature a civil animal who strives eagerly for association. If, however, anyone wishes not to live in society, or needs nothing because of his own abundance, he is not considered a part of the commonwealth. He is therefore either a beast or a god, as Aristotle asserts (*Politica*: 25).

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[8] The gender bias in political theory will be discussed later in the chapter – see pp. 23-26.

Ultimately, however, by the time of the French Revolution, this communitarian view of society had been attacked to such an extent that 'the medieval notion of a society made of smaller societies was utterly discredited' (Riley 1976: 16).

It is apparent that Althusius' work cannot simply be transposed onto the modern world. *Politica* was written in 1603, with further editions in 1610 and 1614, and Europe in this period differs fundamentally from Europe at the beginning of the 21st century. Consequently, any interpretation of Althusius will need to take into account certain methodological issues, which will be addressed below.

Methodological Issues

Vocabulary Used in *Politica*

The first issue revolves around the vocabulary used by Althusius in *Politica*. Whilst some contemporary words, such as 'city', 'senate' or 'confederation' are used, they are done so in a specific context, which changes the meaning of the word. In addition, the issues of the Holy Roman Empire and the Latin language need to be borne in mind. *Politica* was greatly influenced by the structure of the Holy Roman Empire, and many of the terms in *Politica*, such as 'nobility', 'burghers' and 'ephors' reflect this fact. With regards to the Latin language, it must be remembered that although the edition of *Politica* used in this thesis is an abridged translation, many of the original Latin terms remain. Due to these factors, it is paramount to offer a definition of the key terms that will be used in the thesis, in order to avoid confusion.

Consociatio:	*The subject matter of politics* is therefore association (*consociatio*), in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life (*Politica*: 17).
Symbiotic:	Politics is the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them (*Politica*: 17).

Symbiote *(symbiotici)*:	Are co-workers who, by the bond of an associating and uniting agreement, communicate among themselves whatever is appropriate for a comfortable life of soul and body. *In other words, they are participants or partners in a common life* (*Politica*: 19).
Symbiosis:	Living Together (*Politica*: 17).
Simple and private Association (family & guild):	A society and symbiosis initiated by a special covenant (*pactum*) among the members for the purpose of bringing together and holding in common a particular interest (*quid peculiare*) (*Politica*: 27).
The family (Natural simple & private consociation):	An association in which married persons, blood relatives, and in-laws, in response to a natural affection and necessity, agree to a definite communication among themselves (*Politica*: 28). There are two types; the first is conjugal (*conjugalis*), and the second is kinship (*propinqua*) (*Politica*: 29).
Conjugal association:	An association in which the husband and wife, who are bound each to the other, communicate the advantages and responsibilities of married life (*Politica*: 29).
Kinship association:	An association in which relatives and in-laws are united for the purpose of communicating advantages and responsibilities (*Politica*: 30).
Collegium, guild or corporation (civil simple & private Consociation):	An association in which "three or more men of the same trade, training, or profession are united for the purpose of holding in common such things as they jointly profess as duty, way of life, or craft" (*Politica*: 34).
The Community (Public Association):	The public association exists when many private associations are linked together for the purpose of establishing an inclusive

political order (*politeuma*). It can be called a community (*universitas*), an associated body, or the pre-eminent political association (*Politica*: 39).

It is formed by fixed laws and composed of many families and collegia living in the same place. It is elsewhere called a city (*civitas*) in the broadest sense, or a body of many and diverse associations (*Politica*: 40). Furthermore, this community is either rural or urban. An urban community is composed of those who practice industrial functions and pursuits while living an urban life (*Politica*: 42). A rural community is composed of those who cultivate the fields and exercise rural functions (*Politica*: 41).

City (civitas): A community of citizens dwelling in the same urban area (*urbs*), and content with the same communication and government. (*Politica*: 42). May either be free, municipal, mixed or metropolitan (*Politica*: 45).

Free City: Recognises as its immediate superior the supreme magistrate, and is free from the rule of other princes, dukes, and counts (*Politica*: 45).

Municipal City: A city subject to a territorial lord. It recognises a superior other than the supreme magistrate (*Politica*: 45).

Mixed City: Recognises partly the emperor and partly a duke or count as its superior, and enjoys both imperial and provincial privileges (*Politica*: 45).

Metropolis: The mother of other cities that it brings forth as colonies, or because it is pre-eminent among them and is recognised by them as a mother by whom they are ruled and defended as children. The metropolis is therefore a large and populous city (*Politica*: 45-46).

Prefect or superior of the city: The administrator and leader of the citizens, having authority and power over individuals by general mandate of the organised community, but not over the group (*Politica*: 42).

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The Senate:	A collegium of wise and honest select men to whom is entrusted the care and administration of the affairs of the city. This collegium, when legitimately convoked, represents the entire people and the whole city. It does not, however, have as much power, authority, and jurisdiction as the community, unless it is given such by law (lex) or covenant (Politica: 43).
The senatorial Collegium:	Composed of the president and senators, the collegium binds itself by oath at the beginning of its administration to the prescribed articles of administration, and collectively fulfills the functions of the entrusted office (*Politica*: 42).

The Rural Community

Hamlet (vicus):	A settlement of a few houses situated around a small open place (*Politica*: 41).
Village (pagus):	Consists of two or more hamlets without fortifications or surrounding wall (*Politica*: 41).
Town (oppidum):	A larger village girded and fortified by a ditch, stockade, or wall (*Politica*: 41).
Province, region, district, diocese, or community The particular public Association:	Contains within its territory many villages, towns, outposts, and cities united under the communion and administration of one right (jus) (*Politica*: 51).
Nobility (*status nobilitatis*) Burghers *(status civitatum)* Agrarians (*status Agrariorum*):	The three levels of secular estate identified within the province (*Politica*: 60).
Universal Public Association (consociatio universalis):	Is a polity in the fullest sense, an imperium, realm, commonwealth, and people united in one body by the

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Mutual Communication:	A sharing, making common. Involves (1) things, (2) services, and (3) common rights *(jura)* by which the numerous and various needs of each and every symbiote are supplied, the self-sufficiency and mutuality of life and human society are achieved, and social life is established and conserved *(Politica:* 19).
Communication of Things (res):	The bringing of useful and necessary goods to the social life by the symbiotes for the common advantage of the symbiotes individually and collectively *(Politica:* 19).
Communication of *Services (operae):*	The contributing by the symbiotes of their labors and occupations for the sake of social life *(Politica:* 19).
Communication of Right (jus):	The process by which the symbiotes live and are ruled by just laws in a common life among themselves *(Politica:* 19). Also called the law of Association and Symbiosis *(Lex consocationis et symbioticum)* or the symbiotic right *(Jus symbioticum)* and consists of common law *(lex communis)* and proper law *(lex propriae).*
Lex Communis:	Unchanging law that indicates that in every association and type of symbiosis some persons are rulers (heads, overseers, prefects) or superiors, others are subjects or inferiors *(Politica:* 20).
Lex Propiae:	Those enactments by which particular associations are ruled. They differ in each specie of association according as the nature of each requires *(Politica:* 21-22).
Zunftbücher:	The corporate book of a collegium in which the covenants and laws *(pacta et leges)* of the colleagues relating to the

agreement of many symbiotic associations and particular bodies, and brought together under one right *(Politica:* 66).

	communication of things, services, right, and mutual benevolence are described (*Politica*: 34-35).
Jus regni:	The right of the realm (*Politica*: 66). Also called the;
Jus majestatis:	The right of sovereignty (*Politica*: 69).
Jus majestatis et regni:	The rights of sovereignty and of the realm (*Politica*: 71).
Posestas regni:	The power of the realm (*Politica*: 71).
Covenant(s):	The basic agreement of an association. In *Politica* examples are offered for the covenants that establish the association, such as the family 'special covenant (*pactum*)' (*Politica*: 27) or the Collegium (*Politica*: 34-35), the covenants of which are held in the *Zunftbücher*. The term is also used to denote the contract that mandates of the rulers, such as the Supreme Magistrate '(*contractum mandati*)' (*Politica*: 121).
Ephors:	One of the two kinds of the Administrators of this universal association, the Ephors are the representatives of the commonwealth or universal association to whom, by the consent of the people associated in a political body, the supreme responsibility has been entrusted for employing its power and right in constituting the supreme magistrate and in assisting him with aid and counsel in the activities of the associated body (*Politica*: 99). Ephors can either be permanent (rendered hereditary by the consent of the universal association) or temporal. Permanent Ephors have their responsibility so assigned to them that they may even transfer it to their heirs. Temporary Ephors, on the other hand, perform this office for a prescribed time only, after which they lay it aside (*Politica*: 115-116).
Supreme Magistrate:	He who, having been constituted according to the laws (*leges*) of the universal association for its welfare and utility, administers its rights (*jura*) and commands compliance with them (*Politica*: 120).

Confederation:	The augmentation and extension of the goods of the associated body is accomplished through confederation or association with others, or through other legitimate means and titles. In such a confederation other realms, provinces, cities, villages, or towns are received into and associated with the communion and society of the one body. By their admission, the body of the universal association is extended, and made stronger and more secure (*Politica*: 89).

Confederation with a foreign people or another body is either complete or partial. (Politica: 89)

Complete Confederation (Plena consociatio & confederatio):	A confederation in which a foreign realm, province, or any other universal association, together with its inhabitants, are fully and integrally co-opted and admitted into the right and communion of the realm by a communicating of its fundamental laws and right of sovereignty. To the extent that they coalesce and are united into one and the same body they become members of that one and same body (*Politica*: 89-90).
Partial Confederation (Non—plena confederatio & consociatio):	A confederation in which various realms or provinces, while reserving their rights of sovereignty, solemnly obligate themselves one to the other by a treaty or covenant made preferably for a fixed period of time. Such a partial confederation is for the purpose of conducting mutual defense against enemies, for extending trust and cultivating peace and friendship among themselves, and for holding common friends and enemies, with a sharing of expenses (*Politica*: 90).

Modern Interpretations of *Politica*

The second methodological issue focuses on the methodology of exploring and understanding any political text. In any such document, there are two foci: the author, or the society in which it was written. The first approach focusing on the author, and termed the Cambridge School by John Dunn, argues that 'the key to understanding every such text, is the fact that it was the product of a human author and focuses accordingly on the preoccupations and purposes that led the author to compose it at all and to do just as they did' (1996: 19).

The second, or Marxist approach emphasises the importance of societal influences in the fact that it: "...stresses aspects of the historical society in which the text was composed, of which the author may not have been perfectly aware, but which prompted him to think and express themselves as they did" (Ibid: 20).

There is a third approach that fuses the Cambridge and Marxist approachs, treating the text with indifference and as a repository of potential intellectual stimulation for a contemporary reader, and permitting themselves to respond accordingly, just as the fancy takes them (Ibid). In other words, the interpretation is dependent on the normative aspirations of the reader, who will borrow or use arguments out of context in order to support their original hypothesis, here Dunn identifies four key questions that need to be asked of the text:

1. What did the author mean by his text?

2. What does the text show about the author's own society?

3. What has the text meant to others reading it then or subsequently, and why has it meant that and not something else?

4. What do the great texts of the history of political theory mean today and mean for us? (Ibid.)

These questions are especially relevant to the study of Althusius. The first two questions, for example, presuppose a level of empathy. If *Politica* is approached from a present day stance, then it appears to be dated and thus offer little to a discussion on

sui generic constitutionalism; yet such a stance fails to take into account the theoretical and practical influences that were evident on Althusius during his life. Instead, it is essential to present *Politica* in the historical context of being written before the dominance of the state, in order to be able to understand its significance.

Questions three and four also raise interesting topics. Due the dominance of the *societas* state, alternative models of political association have either been forgotten or relegated to the league of Utopianism, and, thus Althusius has been largely forgotten by traditional political thought. Indeed, it was due to the work of Otto von Gierke and Carl Friedrich that Althusius' thought was revived and came to be discussed in relation to other political theorists, such as Bodin, Hobbes and Rousseau. This forgotten nature of Althusius is reflected in the fact that *Politica* has not been completely translated into any modern language. Portions have been translated for private work by individual authors, and the Johannes-Althusius-Gesellschaft e.V. have recently translated parts of *Politica* into German, but the most widely used version in Frederick Carney's abridged translation into English (1964 & 1995). It is possible to identify six major reasons as to why *Politica* has been forgotten: infancy, time, relevance, theoretical originality, language and methodology, but these will be explored in greater detail in next chapter.

The final question asked by Dunn will be addressed throughout the thesis, and has also been addressed by several authors. In discussing the federalism of Althusius, both Elazar and Hueglin argue that despite writing 400 years ago, *Politica* offers great potential to current understanding of political theory, by offering an alternative understanding of political association, due to its ability to acknowledge the individual, *but* in relation to the different groupings in a society, and also its ability to accommodate sub-state and non-geographical representation.

The Structure and Content of *Politica*

The third methodological issue that must be addressed is the structure and content of *Politica*. As Althusius did not leave behind a model of his constitutional thought, any subsequent representation of *Politica* is a normative interpretation and so open to

methodological criticisms. Although in the most recent abridged edition of *Politica* (1995) there is a diagram entitled 'Politica, A Schema by Johannes Althusius' (*Politica*: lviii-lvix), this differs considerably from a structural diagram. The purpose of the 'schema' is to simplify the structure of *Politica*, and its main headings concern the principal discussion points of the book including 'the subject matter of politics, types of associations, administration of symbiotic right and types of administration (Ibid.). Although this is a useful tool in understanding *Politica*, it cannot be taken to represent the organisational structure *Politica* proposes.

One possible explanation for the lack of a diagram, is that Althusius was far more concerned with the procedural aspect of the association, than with the specific composition of the different levels of association. Indeed, this fact is also reflected in *Politica* itself, where a significant proportion of the discussion is devoted to organisational issues, such as the efficient and legitimate running of the different associations, how the leaders of the associations are elected and the roles and responsibilities they exercise. The composition of each office or level of association will depend on individual circumstances.

Despite the logical nature of *Politica*, confusion arises when a general structure of the universal association is sought. For instance, in the discussion on the rural community, Althusius argues that a village is formed when several hamlets join together. Althusius then proceeds to the discussion of the town, which is a larger village that is fortified, *but*, if the town is large it is also called a city. From this interpretation, there appears to be no connection between a village and a town, and subsequently it is unclear as to the role or location of a village within the rural community, unless the village is an autonomous actor within the community that has no need of further association, but this is unclear from the text.

A second case in point is Althusius' discussion of the urban community, which is composed of those who practice industrial functions and pursuits while living an urban life (*Politica*: 42). According to Althusius, the urban community is a large number of hamlets and villages associated by a special legal order (*jus*) for the advancement of the citizens, and guarded and fortified against external violence by a common moat, fortress, and wall. Furthermore 'a community of citizens dwelling in the same urban area (*urbs*), and content with the same communication and

government (*jus imperii*) is called a city (*civitas*)' (*Politica*: 42). The confusion here is the relationship of the guild to the urban community. Althusius never explicitly mentions the guild in relation to the community, but by default they must play an active role due to fact that the community is composed of those who 'practice industrial functions and pursuits', which must refer to employment.

The conclusion that can be drawn from this is that while Althusius is clear what *a* is and how *a* relates to *b*, *b* to c etc., this methodical logic does not always led to a clarified structure, and subsequently this results in *Politica* being very much open to normative interpretation. One explanation for this lack of clarity is that while the initial edition of *Politica* was written when Althusius was in academia, the latter editions of *Politica* were influenced by his practical experiences Emden.[9] Subsequently, while Althusius was undoubtedly influenced to write *Politica* by political theory, later editions were influenced by Althusius' daily struggle to preserve Emden's autonomy, and so the marriage between political theory and Althusius' political practice may have resulted in the uncertainty that, in hindsight, can be identified in *Politica*.

Gender Bias in Political Vocabulary

Similarly to the first, the fourth methodological issue focuses on the vocabulary used in *Politica*. The term 'man' will be used in the thesis, and this is done to reflect the vocabulary of the political texts used, two points warrant further examination: First, the role of women in the 21st century; second, the 'de-genderisation' of the term 'man' in political theory.

It is apparent that the role of women in both the workplace and society has been transformed in comparison to the era in which Althusius was writing, and subsequently, it is self-evidently no longer the case that it is *only* the paternal head of the family who works, or who has civic rights. Despite Althusius' use of the term 'man', he actively promotes 'women's rights' in their relationship to men. In relation

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[9] As will be seen in Chapter One, Emden was the city in which Althusius was Syndic or legal representative from 1604 to 1638.

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to the family, Althusius sees that the man is the head of the family and so the wife has responsibilities to the husband (*Politica*: 29-30), but, in turn, the husband has responsibilities to the wife (*Politica*: 29). There is also a further discussion of the 'common advantages and responsibilities that are provided and communicated by both spouses' (*Politica*: 30).

The importance Althusius places on the family is dependent on his interpretation of Christian ethics[10] (Friedrich 1932: lxxii), rather than in any apparent desire to subjugate women, and this is exemplified in a section of *Politica* in which Althusius refers to the role of women. In discussing the 'constituting of the Supreme Magistrate' (Ch. XIX), Althusius discusses which type of person is preferable to become Supreme Magistrate. He dismisses 'atheists, impious or wicked men, strangers to true orthodox religion, men from ignoble or servile stations, or ones who are unappreciative toward a good predecessor, bastards or men inclined to drunkenness, vice or crime' (*Politica*: 129). Interestingly, Althusius also refers to women and states 'concerning the election of a woman, see my earlier comments' (Ibid.). Although in the abridged version of *Politica* these earlier comments do not appear, Frederick Carney does leave a brief outline of the discussion in a footnote, relating to Althusius' observation that 'the female sex does not bar one from office when the function is suitable to the sex' (*Politica*: 53, fn 6).

Without the full discussion it is only possible to speculate upon Althusius' motives behind this statement. For Althusius, the Jewish polity, which is the best of all (*Politica*: 131), allowed only male heirs until the 'fall of Jerusalem under Nebuchadnezzar.' (*Politica:* 131) The reasoning behind Althusius' preferences is hard to comprehend. Frederick Carney offers one possible explanation: 'Althusius apparently fears that the marriage of a female supreme magistrate, or of a female in the line of succession to the supreme magistracy, may introduce a foreign influence

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[10] In this discussion, Friedrich does note a criticism (which could be deemed feminist) of Althusius' emphasis on the family: "...the institutional aspects of marriage are super-imposed and have the purpose of regulating sexual life and the position of children, and such institutional order is founded upon a pre-existing social order, and that it does not spring from instinct...instinct only leads to the sexual act" (1932: lxxi). In response to this criticism, Friedrich notes that Althusius would argue this position is inadmissible 'because in addition to the natural individual and the super-imposed governmental regulation, he expounds the idea of the biological foundation of social relations' (Ibid). Also on a personal level, Friedrich notes that Althusius was married with several children and so is more inclined to value the institution, in comparison to someone like Hobbes, who never married (1932: lxxi).

and royal house into the realm' (*Politica*: 131, fn 31). From this one speculative conclusion can be made regarding Althusius' position on the role of women. Althusius, while not denying the importance of women within the universal association, appears to view them in adopting a maternal, caring role, while the man worked or engaged in political life. Althusius' view of class should also be borne in mind at this point. In the Province, Althusius identifies three secular estates: the nobility (*status nobilitatis*), the burghers (*status civitatum*), and the agrarians (*status agrariorum*) (*Politica*: 60), each of which has its specific task:

> The order of the nobility is constituted principally for defense, for repelling
> and driving force and violence away from the province. Whence in Germany
> it is called *der Wehrstand*...The order of burghers and agrarians is constituted
> principally for the adequate procurement of those things necessary and useful
> to civil life in the province...And their occupations are of three kinds. First are
> merchants and businessmen, then farmers and herders, and finally craftsmen
> and mechanics... (*Politica* : 61)

This passage highlights that Althusius does not look upon certain classes or gender as superior or others inferior; rather, he argues that as 'God distributed his gifts unevenly among men', this led to a situation where: "...some persons provided for others, and some received from others what they themselves lacked, all came together into a certain public body that we call the commonwealth, and by mutual aid devoted themselves to the general good and the wealth of this body" (*Politica*: 18).

The second methodological point that needs to be clarified is the different ways in which the term 'man' is used in the classical political texts. Indeed, while 'man' is used in the majority of political texts, it is done so to represent so many different meanings that it is possible to argue that it has undergone a process of 'de-genderisation'. In support of this idea, the use of 'man' will be briefly explored in John Locke's *Second Treatise of Government* (1690). While it is no exaggeration to claim that Locke is the precursor of modern liberalism, the use of the term individual and 'man' by Locke differs greatly from the modern understanding. Although Locke spends some time at the beginning of *The Second Treatise* discussing the difference between 'paternal' and 'parental' power, this is done so largely in reference to, the Patriarchal debate of the *First Treatise* and so will not be discussed here; rather, what

will be focused on is the individual in relation to the state. As it will be shown in Chapter Two, the role of the government for Locke was the preservation and protection of property[11] and accordingly the right to vote in the legislative elections was limited to those who had property; indeed Locke forwards the idea of the level of representation based on the level of taxation (*Treatise*: 82-83).

The result of this it can be interpreted that while Locke discusses 'man' he does not mean 'man' as a descriptive term of gender, rather he means a small group of land owning men. The de-genderisation of the term 'man' in this sense occurs because of the fact that while Locke does indeed refer to males as 'man', he only refers to a specific propertied elite, *rather than* man as biological category. In this sense, the gender specific aspect of the term is thus removed, as 'man' no longer equates with man as a biological entity.

It is possible at this stage to argue that 'man' in the context of political theory *no longer* refers to a biological category. Rather, it refers to either an elite group or a generic grouping of humanity, possibly derived from the term 'mankind'.

The Nature of *Sui Generic* Constitutionalism and Modern Political Vocabulary

In addition to the gender aspect, two further points need to be clarified in relation to the use of vocabulary in this thesis. The first point is centred on the use of the term 'constitution' throughout the work. While this may not seem problematic, it must be remembered that Althusius himself never used the term in *Politica*, and so to use the term could be seen as a misrepresentation or misinterpretation of Althusius. Rather, we use the term, albeit anachronistically, to represent the organising of the relationships that define the political structure of the *sui generic* association. The modern equivalent of this idea, or 'constitution', will be used in this work for convenience and clarity.

The second point that deserves clarification is what is meant by the different variants of 'constitution' that will be used in the thesis, namely constitution, constitutionalism

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[11] Or as C.B. MacPherson notes in this introduction to the Second Treatise: '...life, liberty *and estate*' (*Treatise*: xix. Emphasis in original).

and constitutionalisation. Despite being based on the word 'constitution', each variation has a subtly different meaning and as all three versions will be used in the thesis, it is essential to offer a definition of each. First, in the broadest sense, the term 'constitution' is used to denote the agreement or statute that organises the political relationships within any given association. As will be seen in Chapter Two, in the present interpretation of the word this organisation is carried out by a written legal agreement that distributes political responsibilities to various parties within the association. There are disagreements as to how specifically the constitution achieves these aims, and questions as to the content and application are continually discussed at both the theoretical and the practical level. Despite these ongoing discussions, the essential feature of the definition offered here is the emphasis on organisation. The constitution offers the association the basic framework in which to conduct political activity.

In contrast, the term 'constitutionalism' is used to denote actions, or a concept, in this case the practices, whether theoretical or practical, that occur as a result of the constitution of an association. An example of this could be the 'constitutionalism of the United States centres on the separation of powers and the protection of individual rights'.

Finally, 'constitutionalisation' is used to refer to the fixed process, or set of sporadic actions, that leads to the association adopting an agreement, or a constitution, to organise their political relationships. The difference between constitutionalisation as a 'fixed process' and as 'sporadic actions' is dependent on the purpose and aims of the members of the association in question. For the former, a good example can be offered in the American Constitutional Convention of 1787 and the European Constitutional Convention (2002-2004). In both instances, delegates were purposefully sent to the convention to draw up a constitution, and so the entire Convention processes can be seen as reflecting both America's and the EU's 'constitutionalisation'. The process as 'sporadic actions' can be exemplified in the 'constitutional' process of the European Union, largely from the mid 1960s with the 1963 "Van Gend en Loos" and the 1964 "Costa v. Enel" decisions. The key feature of this variant of constitutionalisation, is its unintentional nature. Rather, several

actions by different actors led to a position in which the adoption of a constitution for Europe was openly discussed in the Constitutional Convention (2002-2004).

Having identified 'the constitution' as a means of organisation, it is possible to identify its constituent parts. In this sense, the social contract, sovereignty and federalism, can all be viewed as denoting integral parts of the constitution. First, the social contract, especially that espoused by John Locke, represents a rudimentary form of constitution in which individuals agreed to form a political structure that would allow them to organise their political relationships in a more amenable manner. Second, the constitution is concerned with the allocation of power and the power relationships of the structure, with the power or sovereignty, in current constitutional theory, emanating from the people.[12] Third, as mentioned previously, the constitution is concerned with the allocation of power and responsibilities of the structure, and the principal manner in which this allocation is achieved in a structure in which several power centres exist is through federalism. In this manner, while Chapter Two focuses on the definitional problems inherent in constitutional theory, Chapters Three, Four and Five are concerned with the fundamental organisational aspects of constitutionalism, as a means of better understanding *sui generic* constitutionalism.

The Fall and Rise(?) of *Sui Generic* Associations

While the term *sui generic* become increasingly popular with the emergence of the EU, it has also been used to describe the Holy Roman Empire, The Hapsburg Empire and the Socialist Federal Republic of Yugoslavia. The point that needs to be clarified is that in this thesis, the term '*sui generic*' is taken to mean an association that is without comparison; *sui* meaning of its own or itself and *generic* meaning group or class. As a result of this, there cannot be a single model of *sui generic* constitutionalism that fits all *sui generic* associations, as this is both contradictory, and more importantly, is not the aim here. Rather, Althusius' *Politica* is presented as a constitutional example that is more apt at *describing* or *explaining sui generic* associations, than the traditional constitutional models of the *societas* canon. This

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[12] There are of course exceptions to the constitutional theory explicated above; in the example of sovereignty being vested in the people, the United Kingdom is an exception with sovereignty being vested in the people's representatives, or Parliament.

does not mean that *Politica* will be able to describe every *sui generic* association, but this is not the claim of the work.

There appears to be an inverse relationship between the existence of the state in its current form and *sui generic* associations. The relationship appears to be very simple: in the example of Europe, the rise of the state meant the end of the *sui generic* association, such as the Austro-Hungarian Empire and the Holy Roman Empire.[13] Eulau (1941: 647) argued that the Treaty of Westphalia spelt the end of the constitutional development of the Empire, as a *sui generic* association. The dominance of the state is further reflected in political thought: starting with Niccolo Machiavelli's[14] *The Prince* (1516), closely followed by Jean Bodin's *Six Books of the Commonwealth* (1576), political theory began to advocate centralised forms of political association as a means to secure peace. Thomas Hobbes' *Leviathan* (1651), most famously put forward this argument and, as was discussed above, the influence of this work was to be seen on the remaining *societas* authors. The idea of the centralised state and sovereignty became so potent and compelling that, as will be seen in Chapter Five, even those political theorists attempting to characterise the Holy Roman Empire, such as Samuel von Pufendorf and Immanuel Kant, invented new *societas*-inspired terms, such as 'a league of states', to describe the once *sui generic* Empire.

Despite the 'Euro-centric' nature of the discussion to date, this does not mean that examples of historic *sui generic* associations are limited to the European continent. A prominent example on the American continent was the Iroquois League, formed in the 16th century by five (later six) Indian nations. While both the League, which was institutionalised by the Great Law of Peace (or the Great Binding Law) and the tribes acted as democracies, (Crawford 1994: 357) the League could not be equated with a federation, or even confederation in the present day understanding of the term, and

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[13] Today, only the *confederatio Helvetica* remains, but despite this the Swiss structure, as will be seen in the Chapter Five, has adopted increasingly 'state-like' characteristics.

[14] Niccolo Machiavelli (1469-1527), Florentine statesman whose works include the Prince (1513) and the Discourses on the First Ten Books of Titus Livius (1513-21). The former presented a practical handbook for how a ruler may take and keep power in a Republic and is often cited as the beginning of 'Real Politik', while the latter was concerned with 'Republics' controlled by an active citizenry. Due to the ruthless nature of the Prince, Machiavelli's name has become synonymous with ruthless and underhanded politics.

one of the main reasons behind this was the society in which the Iroquois lived; as Samuel Payne reasoned, 'the Iroquois lived in a nonstate society'. (1996: 614)

The problem with this example discussed is that it does not serve the purpose we ask of it: if the aim of the thesis is to further our understanding of current *sui generic* constitutionalism, then we could argue that the use of such historical examples is irrelevant. In the current political climate there are two examples of *sui generic* associations: the European Union; and the relationship between the native population and the federal government in Canada and Australia. With regards to the latter examples, in the decision of *R v. Sparrow* [1 S.C.R 1075] on the fishing rights of aboriginal people and its applicability to the Canadian constitutional act (1982), the Canadian Supreme Court found that:

> Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the "sui generis" nature of Aboriginal rights. While it is impossible to give an easy definition of these fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. [1 S.C.R 1075] 1990 http://www.scc-csc.gc.ca/

A second example of this *sui generic* relationship can be found in the Canadian Court's finding in *Delgamuukw v. British Columbia* in which, with reference to property rights, the Court found that:

> "Aboriginal title" is based on the continued occupation and use of the land as part of the aboriginal peoples' traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. [3 S.C.R. 1010] 1997 http://www.scc-csc.gc.ca/

Similarly, focusing on the relationship between art, culture, identity and the applicability of the law of copyright, Burns Coleman asks whether or not Australian aboriginal art should be protected under *sui generis* legislation (2004: 22).

What is suggested by the three examples above is an underlying theme of how to reconcile the differences between two different legal, cultural and political cultures. In this sense, *sui generis* is used to describe the unique and somewhat confusing relationship between Australian and Canadian federal law on the one hand and the rights of the aboriginal people who reside in these countries, on the other.

Clearly while the relationship between indigenous peoples and the state is not the concern of this thesis, the underlying theme evident in the above examples may still play a role in furthering our understanding of *sui generic* constitutionalism.

Structure of Work

In addition to the tackling the issues identified above, the thesis will also address the underlying question, namely:

1. How specifically does an Althusian perspective aid our understanding of *sui generic* constitutionalism?

In order to be in a position to do this, the thesis will be divided into three main parts: biographical, definitional and theoretical. The first, or biographical part of the work, Chapter One, will present a biographical account of the life, works and influences of Johannes Althusius. We saw above that because Althusius wrote in pre-Hobbesian times (1603), his political work has largely been overlooked, and this chapter is designed to redress this. In addition, in this part we emphasise the political period in which Althusius wrote, which is one in which the *societas* mode of state had yet to become dominant, and so where examples of both *societas* and *universitas* existed side-by-side.

Althusius presents the most coherent and dominant constitutional theory in his Magnum Opus *Politica*. In this text, Althusius not only deals with issues of federalism, but also of the social contract *as well* as offering a critical response to Jean Bodin's discussion on sovereignty. In regards to federalism, Thomas Hueglin notes that: "Althusius certainly will not be the ultimate measure but it should be hoped that his political theory, based as it is in coordination, rather than confrontation, might

provide us with at least some elements for a truly federal theory of politics. In this sense we may call him a modern federalist" (1979: 41).

The second, or definitional part of the thesis, Chapter Two, will offer a definitional discussion of the term 'constitution' and 'treaty'. The historical evolution of constitutionalism has not been uniform, yet the term 'constitution' is used in political discussions in a manner that suggests that there is a concrete definition. It is possible, however, to gather characteristics that most constitutions share and this is the closest that we can get to a concrete definition of a constitution; this is needed if an exploration of Althusian constitutionalism is to be undertaken. In addition to this, the discussion will also offer the Althusian definition of both terms, as it is possible to locate systems of agreements akin to both 'constitution' and 'treaty' within *Politica*.

The third, and theoretical aspect of the discussion will focus on the three main aspects of constitutionalisation as identified by Althusius and the *societas* canon: the social contract, sovereignty and federalism. Chapters Three, Four and Five will explore respectively the *societas* discussion on each topic, before contrasting this with the Althusian alternative, in order to develop in more depth Althusius' position on the key issues of constitutionalism. The observation of each chapter in this section is that while there is both a *societas* and Althusian variant of the social contract, sovereignty and federalism in political theory, due to its dominance it is the *societas* variant that is used as a tool to understand the constitutionalism of *sui generic* associations, such as the EU. The main contention here, is that it is the application of the *societas* variant that has lead to the present confusion, and that many of the present constitutional 'problems' of the EU would be solved if they were approached from the Althusian perspective.

Chapter 1. Johannes Althusius: Life, Work and Times

Althusius is...one of those thinkers who anticipate the future to such an extent that they appeal only to a small group of contemporaries.

Friedrich 1932: xviii

In effect, since the publication of Carl Friedrich's 1932 edition of *Politica*, there has been a steadily growing interest in Althusius' work, of which Friedrich, Frederick Carney and Thomas Hueglin have been at the forefront. Yet, Althusius' work remains unknown to most; as noted by Elazar, 'Althusian ideas remain peripheral, even to students of modern federalism' (1995b: 445). Nevertheless, Althusius' influence can be found in the works of Martin Buber (1949), and as will be explored later in the chapter, also in the recent works of consociational theorists, Arendt Lijphart (1969) and Dimitris Chryssochoou (1994).

As was noted in the Introduction, a central aim of this thesis is to add to this revival of Althusius' work, in this instance in relation to furthering our understanding of *sui generic* constitutionalism. In order to be in a position to attempt this aim, the purpose of this chapter is to 'introduce' Althusius by firstly outlining Althusius' academic and political life, in order to be able to locate Althusius' life within the broader European historical context. This is necessary as *Politica* was a product of the period in which it was written. Second, the chapter will summarise the structure of the Althusian 'state', as it will become clear that the contemporary sovereign state has little or no resemblance to the Althusian Universal Public Association. This outline is necessary at this stage as throughout this thesis, our discussion will refer to different aspects of the Althusian 'state' or Universal Association, and so for the clarity of the argument it is paramount to offer a definition and description of the Althusian 'state'.

Third, the chapter will discuss the different influences that evidently played a part in shaping Althusius' thought in order to aid our understanding of why Althusius proposed the political theory that he did. Fourth, to compare the ideas of Althusius with those of other political writers writing at the same time, since it is evident that Althusius wrote in response to his contemporaries, and that subsequent authors have written in response to Althusius. Fifth, this chapter explores the influence that

Althusius had posthumously on constitutional theory: characteristics of *Politica* can be identified in writers such as Leibniz and Proudhon who wrote *after* the *societas* canon theoretically became dominant. Sixth, the chapter will also explore the influences of *Politica* on the constitutionalism of the Socialist Federal Republic of Yugoslavia or Titoism, as there is direct evidence that Yugoslav constitutional writers and ideologues used Althusius as a counterbalance to Marxism (Elazar 1990). Seventh, and finally, the chapter will explore the occasions on which Althusius has been invoked.

Pre-*Politica* Althusius

Little is known of Johannes Althusius' early life. The basic outline of his formative years can gathered mainly from a few books written predominantly by German historians or constitutional theorists. Arguably the most informative biography written in English is Carl Friedrich's 99-page introduction to his 1932 edition of *Politica*, which appears to have been written after extensive research in German Church and Council archives (Friedrich 1932: xv-xcix).

From this study, it is possible to hypothesise that Althusius was born in 'Dieden(s)hausen in the County of Wittgenstein-Berleburg in 1557. The County of Wittgenstein was part of the Westphalian Circle, bordering on the County of Nassau-Dillenburg'. (Friedrich *Politica*: xxiii) As is demonstrated in figure 3, Althusius is recorded as commencing his Doctorate studies in Cologne in 1581, before moving to Basel in 1586 to complete his studies in civil and ecclesiastical law

Figure 3: Key Places, Dates and Influences in Althusius' early academic life
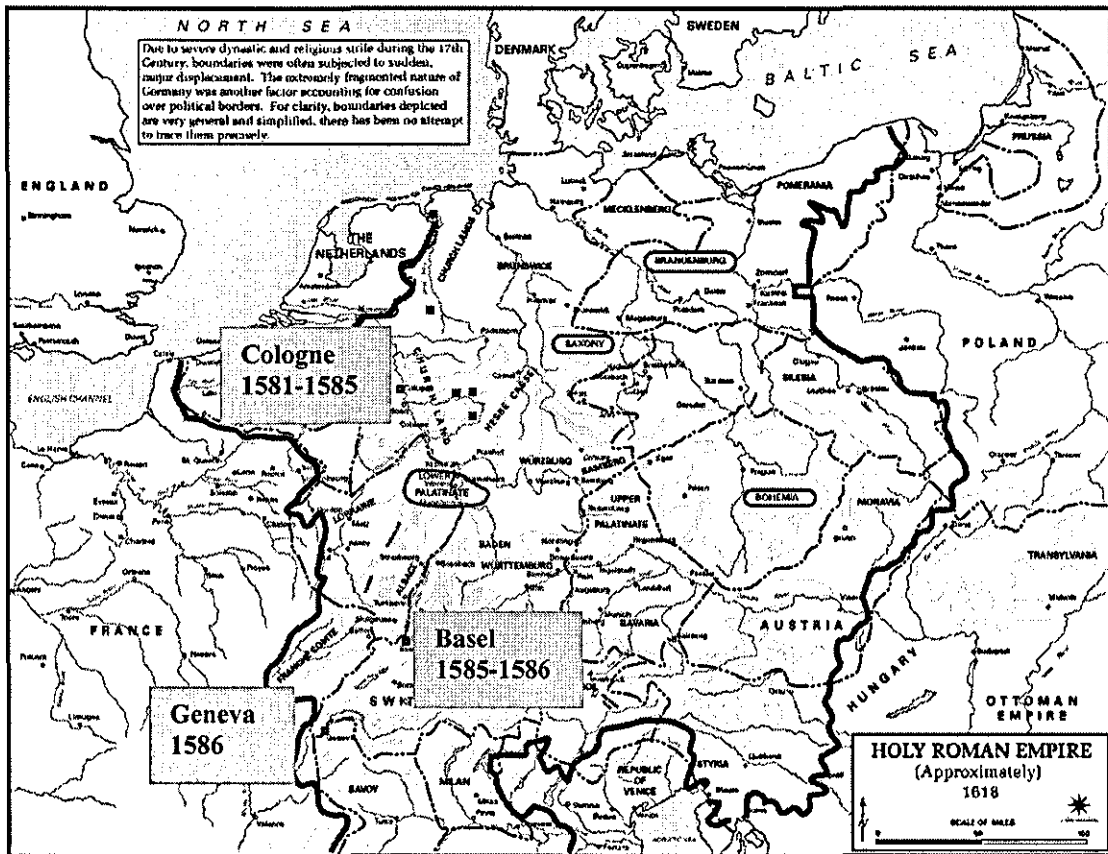
Key:

1581 Studies Aristotle and commences Doctoral studies in Cologne

1586 Obtains Doctorate in both civil and ecclesiastical law (UJD) in Basel

1586 Visits Geneva and possibly taught by Denis Godefroy (Dionysius Gothofredus 1549-1622), a Hugenot Professor of law at Geneva, Strasbourg, Heidelberg. One of the leading 'Reformed' (i.e. Calvinist) scholars of the day, who narrowly escaped the St. Bartholomew's Day massacre (1572).

Source:
http://www.dean.usma.edu/history/atlases/dawn_modern_warfare/holy_roman_empire_1618.html
(accessed 7/7/5)

Figure 4: Key Places and Dates in Althusius' Academic and Professional Life

Due to severe dynastic and religious strife during the 17th Century, boundaries were often subjected to sudden, major displacement. The extremely fragmented nature of Germany was another factor accounting for confusion over political borders. For clarity, boundaries depicted are very general and simplified, there has been no attempt to trace them precisely.

Key:
1557? Althusius born in Diedenshausen in the County of Bad Berleburg
1581 Cologne studying Aristotle and commences Doctoral studies
1585 Basel continuing Doctoral studies
1586 Awarded Doctorate in civil and ecclesiastical studies (UJD) at Basel
1586 Invited to join Academy in Herborn
1592 Teaches in Gymnasium in Steinfurt
1594 Spring: Returns to Herborn
1594 Autumn: College moves to Siegen
1599 Academy moves back to Herborn, Althusius stays in Siegen
1601 Althusius returns to Herborn
1603 Writes *Politica*
1604 - 1638 Syndic of Emden
Source:

Upon completion of his doctorate in 1586, and as displayed in figure 4, Althusius was invited to join the Academy in Herborn to lecture in *Institutiones Juris* and philosophy (Ibid: xxvi). After a brief spell teaching at the gymnasium at Steinfurt in 1592, Althusius returned to teach at Herborn, the college was subsequently moved to Siegen by Count Johann the Elder in late 1594. In 1597, Althusius became rector of the college at Siegen, and when the Count moved the College back to Herborn in 1599, Althusius remained at Siegen, until he to returned Herborn in 1601.

While a Professor at Herborn, Althusius became a leading scholar in what was termed "the school of federal theology", which was the world view and the intellectual foundation (Elazar 1991a: 119, 139) of the Calvinists or Reformed wing of Protestantism:

> First, it is based on a network of covenants beginning with those between God and man, which weave the web of human, especially political, relationships in a federal way – that is, through compact, association, and consent (Elazar 1991a: 119)...the writings of Calvin and Bullinger not only contributed directly to the "new federalism" of Althusius but inspired an entire political thought that strongly influenced modern republicanism and shaped the two federal polities of the time, Switzerland and the Netherlands, both of which were dominated by Reform Protestants (Ibid: 139).

It was during this period that Althusius wrote the first edition of *Politica*, in which he attacked the doctrine of undivided territorial sovereignty that had found favour through the writings of Jean Bodin. As we shall see in Chapter Five, Althusius' attack centred on attributing the rightful ownership of sovereignty to the federally-organised body of the people (Hueglin 1994a: 3) rather than to the Prince, as was argued by Bodin. Althusius' view was largely influenced by his desire 'to rescue the autonomy' of religious and municipal self-determination from the new centralised territories (Hueglin 1994b: 82) that were beginning to emerge at that time.

Shortly after publishing *Politica* in 1603, a student of Althusius', Johann Alting sent a copy of *Politica* to his father, Menso who was one of Emden's distinguished clergyman (Carney 1995: xii & Friedrich 1932: xxix-xxx). The Council of Emden subsequently took a favourable view of *Politica*, as it served the Council's cause in its

battle to protect Reformed Church liberties from encroachment by the counts of East Friesland (Murdock 2004: 73). Consequently, Althusius was offered the position of Syndic or legal advisor of Emden, with *Politica* representing a theoretical 'blueprint' and 'justification' for this position. As Syndic, Althusius' roles were defined as advising the Council, representing the city at the county courts as well as at the Imperial Diet and elsewhere, and assisting the Mayor and Council in legislation (Ibid: xxxiv).

Character of Althusius

To supplement this brief biographical note, a further point regarding Althusius' personality seems appropriate. There were reported incidents in Althusius' political and academic life, which due to his loyalty to the institution he served, whether the College or Council, led to him being confrontational to people who he perceived as posing a threat either to him, or to the institution. There are four prominent examples given in the literature and the purpose of these examples is to highlight two points about Althusius and his approach to politics. Firstly, Althusius was not afraid to adopt a confrontational approach if the circumstances needed one. Secondly, and more importantly for our discussion, Althusius was in a rare position to 'practise what he preached'. The theoretical underpinnings of *Politica* got him the job of Syndic of Emden and while in this position he was able to 'update' *Politica* to reflect his practical experience of city life in Emden.

Firstly in 1601, Althusius became involved in a theological controversy that 'caused quite a stir among the worthies of the county of Nassau' (Friedrich 1932: xxxviii). The argument centred on to what extent the government had the authority to determine the extent to which the will of God was revealed in the scripture. The exact sides taken by Althusius and the Theologians on the matter is less important than the fact that the Council had to become involved as a mediator between the two opposing sides[15] (Ibid.). The second incident involved Althusius' work as a Professor at Herborn. The job of one important local dignitaries Johannes a Münster in Vortlage,

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[15] During the incident an exchange of letters occurred of one specific letter written by Althusius to the Council, Friedrich notes that Althusius was 'peeved' and that the trouble with theologians is that they never make sure first what the question is about, but immediately fly up in the air (Friedrich 1932: xxviii).

was to intervene on the behalf of students, who were deemed to have been treated too severely. On one occasion, Althusius' treatment of a student who had 'hit a man in the street after dark with a sword and wounded him badly' was called into question (Ibid: xxix). As Friedrich notes: "Althusius showed himself once more as a very forceful and intrepid defender of the rights of the institution which he served, not swerving from the path of duty, nor hesitating to provoke an open clash with a cagy opponent, when it seemed desirable to do so" (1932: xxix).

This loyalty was also evident in Althusius' actions while Syndic of Emden. Due to its position as the only Protestant port on the Northern European coast and as a result of the Spanish blockade of the other ports, the Council of Emden aspired, due to the increase in trade, to rise to the status of a free Imperial city. At the same time, the territorial lord of East Friesland, in which Emden was situated, wanted to increase taxes in order to establish himself as the absolute ruler over a modernised territorial state (Hueglin 1994b: 78).

This conflict between the two factions resulted in the Count's army invading the city. The response by the Emden war council, led by Althusius, was to lock the city gates, which are apparent in Figure 5, and arrest the Count in his own residence (Hueglin 1979: 17). After a brief period and a strenuous series of negotiations, which included the King of England, (Hueglin 1999: 15) the Count was released.

The final incident occurred in 1625, and again involved the relationship between the Count and the City. When the newly enthroned Count of Eastern Friesia arrived at the city walls expecting to be greeted by the Emden Council, no-one did. Eventually, a delegate from the Council went to the Count's residence and explained no-one had been there to greet him as they were unsure of which Gate the Count would use (Hueglin 1979: 9). As Thomas Hueglin notes, the feeble excuse given by the City was meant to readdress the power relationship between the Count and the City. No longer would the City alone swear allegiance to the Count, but the contract would entail mutual obligations for both parties.

Figure 5: Map of Emden circa 1575
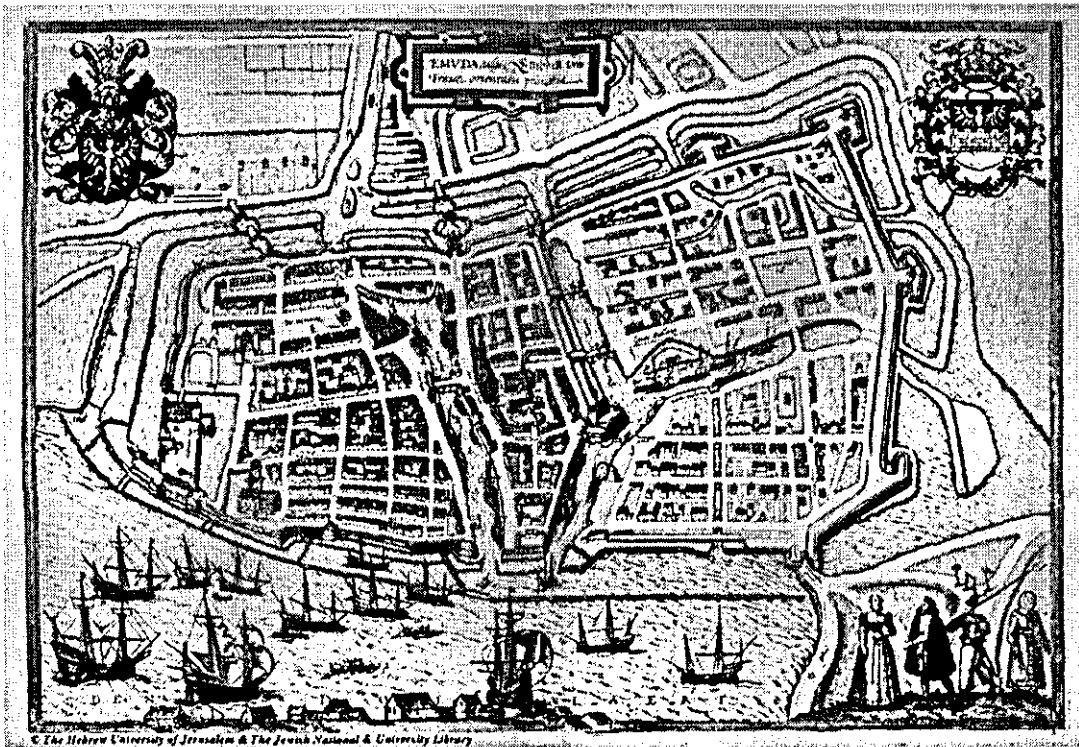
source: http://historic-cities.huji.ac.il/germany/emden/maps/braun_hogenberg_II_32_m.jpg accessed 27/7/2005

The Importance of this exploration into Althusius' character is that it demonstrates that in addition to the theoretical writings of *Politica*, Althusius was able to apply and elaborate on these ideas, during his long and distinguished political career:

> The first edition of 1603 had been written by a professor...who had not been involved yet in political affairs. The second edition, however, contained much new material that was inspired by Althusius' actual involvement in the affairs of Emden, including its relations with its neighbour, The Netherlands, and its disputed with the Counts of East Friesland. In essence, he could see his theory in action in the struggle for rights of the burghers against the count and the nobility (Baker 1993: 34).

While it is not the aim of the thesis to attempt to practically apply Althusius to the EU, the theoretical and practical experiences of Althusius gives his argument a rounded and thought-through nature, which augers well for being used as the basis of a theoretical investigation.

The 'State' of Althusius

Our hypothesis, that using Althusius' work furthers our understanding of the constitutionalisation of *sui generic* associations, is based on the nature of the Althusian 'state'. As we shall see in the discussion on constitutionalism in Chapter Two, rather than adopting a *societas* contractual vision of the state comprising of an agreement between individuals, Althusius viewed the 'state' or Universal Association as comprising of different levels of *consociatios*, such as villages, cities, provinces and guilds.

Althusius attempted to conceptualise the complex real world of the whole and of the part and the universal and particular order, as a many-layered problem requiring a multilevel constitutional solution (Hueglin 1999: 114). In these constituent parts, there are two differing types of *consociatios*; simple and private, and mixed and public (*Politica*: 27). The family and the Collegium are the former; the city, the province and the realm/commonwealth the latter. The important fact to remember at this juncture is that unlike the *Societas* canon, *all* the *consociatios* are political – even the family. In this manner each, of the individual *consociatios* has its own compact (or constitution) on which it is agreed.

> The simple and private association is a society and symbiosis initiated by a special covenant (*pactum*) among the members for the purpose of bringing together and holding in common a particular interest (*quid peculiare*). This is done according to their agreement and way of life, that is, according to what is necessary and useful for organised symbiotic life. Such an association can rightly be called primary, and all others derivative from it (Ibid: 27).

In this way, the covenant of the family is not a grandiose single document designed to serve the purposes of the entire realm, it is a purpose-designed document[16] that serves only the needs of the initial *Consociatio*. This step-by-step approach to constitutionalising the Commonwealth carries on when several families, hamlets or villages[17] join together to form the Collegium.[18] For Althusius, this is the first

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[16] Although this does not have to be necessarily written: Althusius does not mention if this has to be the case or not.
[17] Each of which will have been based upon a mutual covenant.

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example of a civil association as the common bonds that unite the differing *consociatios* are no longer reliant on blood. In this respect it is also a spontaneous and voluntary association, as it can be discontinued by mutual agreement (Ibid: 33).

Each of these Collegiums is governed by a set of covenants and laws that are described in the corporate book (*Zunftbücher*). This corporate book highlights the communication that should occur between members, and helps uphold the plan of social life set forth in the agreements; this communication pertains to things, services, right and mutual benevolence (Ibid: 35).

The communication of *things* refers to the contribution of the Colleagues or the legal acquisition of resources to fund the necessary running of the collegium. Quite simply, communication is the medium through which symbiotic life is practiced (Hueglin 1979: 25). The communication of *service* revolves around what each member of the *Consociatio* can bring to the collective. The services provided are again part of the constitutionalisation process as they are 'determined by mutual agreement among the Colleagues' (*Politica*: 30). While *mutual benevolence* is that affection and love of individuals toward their colleagues because of which they harmoniously will and "nill" on behalf of the common utility (*Politica*: 37).

Rather predictably, this process of layered constitutionalism applies to the city. For Althusius the community [city] is an association formed by the fixed laws and composed of many families and Collegia living in the same place (Ibid: 40). An important transformation occurs here, however. As persons coming together, they now become not spouses, kinsman, and colleagues, but citizens of the same community. The *consociatios* have now become mixed and public (Ibid: 40).

The Province 'contains within its territory many villages, towns, outposts, and cities united under the communion and administration of one right (*Jus*)' (Ibid: 51). Again the main concerns of this legal order are the communion of provincial right in which the goods needed for the province are attained and the administration of this right (Ibid.)

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[18] Althusius also uses the terms 'guild' and 'voluntary association' interchangeably with the term 'Collegium'. The thing they share in common is that they are a *Consociatio* of at least three members (because among two people there is no third party to settle disputes) how are united for the purpose of holding in common such things they jointly profess as duty, way of life, or craft (Ibid: 29).

The final level of the Althusian realm[19] is the Universal Realm or Commonwealth:

> In this association many cities and provinces obligate themselves to hold, organise use, and defend, through their common energies and expenditures, the right of the realm (*Jus Regni*) in the mutual communication of things and services. For without these supports, and the right of communication, a pious and just life cannot be established, fostered, and preserved in the universal social life (Ibid: 66).

The bond of this Commonwealth is a *tacit* or *expressed* promise to communicate things, mutual services, aid, and counsel, and the same common laws (*jura*) to the extent that the utility and necessity of universal life of the realm shall require. (Ibid. Emphasis mine.) In other words the Commonwealth is a larger version of a Province, a province is a larger version of a City etc,. down to the building block of the Commonwealth – the family.

Influences on Althusius

It is possible to identify many factors that influenced Althusius: Aristotle; the Calvin religion; both classical and modern literature; the Dutch provinces; the German Empire, and his own personal experience and character, as we saw above. The importance of Calvinism is evident, not only for Althusius, but also in Emden; many of the French Huguenots who survived the St. Bartholomew's Day Massacre of 1572 moved to Emden, as it had become the source of the mother church for northern European Calvinism – at times called the 'Geneva of the North' (Elazar 1995: xi & Hueglin 1979: 17).

Moreover, Emden played a key role in the Reformation, as it was one of the first cities in the Empire to adopt the Reformed faith (1526) and its position was strengthened when in 1542, Countess Anna of East Friesland invited the Polish Calvin, John à Lasco (John Laski 1499-1560) to 'reorganise' the city's life (Carney 1995: xi). This

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[19] Not taking into the possibility of a confederation being entered into, but the possibility of entering into a confederation will be discussed in Chapter Two, when we explore Althusius relationship to a 'treaty'.

predominant role played by Emden in the reformation was recognised by Calvin himself, who dedicated the Latin Catechism (1545) to 'the faithful ministers of Christ throughout East Friesland' (McNeil 1962: 259). Moreover, during the 1550s and 1560s, Emden, along with the Church of Antwerp and the Calvinist Church in London, were the centres of the Dutch Revolt and the Reformation in northern Europe. For a short time, when Queen Mary closed the London Church in 1553 (Pettegree 1992: 24), and the Church in Antwerp was unable to function due to Spanish occupation, Emden became the focal point of both the Reformation and Dutch revolt sending ministers to preach in the Netherlands and advising Dutch congregations in ecclesiastical matters (Pettegree 1992).

Calvinist Influences on Althusius

While the religious teachings of Calvinism played a significant part in Althusius' life, he did go to great lengths to develop a covenantal theory of human society that was not based on theology (Elazar 1995b: 443). Hence, *Profanis* in the full title of *Politica*. Whilst it is possible to perceive Althusius' work in a secular manner[20] (Baker 1993: 19), it must not be forgotten that Althusius' study on sovereignty and the administration of the commonwealth has both a secular and an ecclesiastical aspect. Indeed, Althusius argued in *Politica* in the discussion on ecclesiastical administration that: "For a sound worship and fear of God in the commonwealth is the cause, origin, and fountain of private and public happiness. On the other hand, the contempt of God, and the neglect of divine worship, are the causes of all evil and misfortune" (*Politica*: 161). Despite this, Friedrich offers the suggestion that Althusius tends to interpret religion politically, and to subordinate ecclesiastical to governmental considerations (1932: lxxxi) and this does reflect the practical nature of Althusius' thought. Three main instances of Calvinist practical influence are apparent on *Politica*.

Firstly, Calvin emphasised the importance of the family unit as a patriarchal unit in which the father set the moral tone (Green 1952: 181). In *Politica*, Althusius argues that the family was paramount to the understanding of any political association,

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[20] That is, devoid of the influence of God

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writing that: "The knowledge of other associations is therefore incomplete and defective without this doctrine of conjugal and kinship associations, and cannot be rightly understood without it" (*Politica*: 31). In addition to this emphasis on the family, Calvin emphasised the role of the mutual agreement between the husband, wife and children, which became Althusius' "*conjugal association*". For Calvin: "Husbands are bound by mutual duties to their wives, and parents to children" (*Institutes*: 673).

Secondly, Calvinism offers a key to Althusius' view of man within the *consociatio*. The *consociatio* was fundamental to Althusius work, indeed he called it the 'subject matter of politics', as it was within these groups that the individual 'symbiotes pledge themselves to each other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life' (*Politica*: 17). For Calvin:

> Government makes possible the right ordering of life which is necessary to all communal living, and is equally as necessary to mankind as bread and water, light and air, and far more excellent. For it enables men to secure the accommodation arising from all these things and enables them to live together (Hudson 1946: 180).

From this description, it is evident that for Althusius, man was to find himself within some form of social organisation:

> Therefore, as long as he remains isolated and does not mingle in the society of men, he cannot live at all comfortably and well while lacking so many necessary and useful things... and almost impelled, to embrace it if he wants to live comfortably and well, even if he merely wants to live (*Politica*: 18).

Finally, as the right of resistance was a central component of Calvinism,[21] according to Calvin, and despite not defining how this was to be done (Hudson 1946: 188), it

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[21] The main points of this right of resistance were recorded in the *Vindiciae Contra Tyrannos* (1579), written by Philippe Duplessis-Mornay (1549-1623) and Hubert Languet (1518-1581). The basic argument of *Tyrannos* was that there had been an original contract between God *and* the King and his people. In the earthly relationship, the people are the superior partner as the King, who holds his power from God, is bound by his obligations to them. If the King breaks either of the contracts, either between himself, the people and God or between himself and the people, 'he stands condemned as a tyrant and the people are released from their allegiance to him' (Green 1952: 179).

was the right and duty of the inferior magistrates to resist tyranny in a King *and* to protect the people against him (Hoetjeś 1993: 124). As Calvin argued: "Private persons ought not meddle with the affairs of state, or rashly intrude themselves into the office of magistrates, or undertake anything of a public nature" (Hudson 1946: 186). Rather, than taking action against the tyrannical magistrate, the individual must "implore the help of the Lord, in whose hands are the hearts of kings, and inclinations of kingdoms" (*Institutes*: 674). This is mirrored verbatim in Althusius' discussion on the role and duties of the Ephors, as Althusius argued that individual *consociatios could not* resist a tyrannical Supreme Magistrate, as this was the duty of the Ephors, who:

> ...are the representatives of the commonwealth or universal association to whom, by the consent of the people associated in a political body, the supreme responsibility has been entrusted for employing its power and right in constituting the supreme magistrate and in assisting him with aid and counsel in the activities of the associated body' (*Politica*: 99).

In the case of a usurper, however, Althusius argues that 'each and every optimate and private person who loves his fatherland can and should resist, even by his private authority without awaiting the command of another' (*Politica*: 196-197). This feature is also found in the *Vindiciae Contra Tyrannos*, which noted that the actual right to resist lies with individuals only in exceptional circumstances; namely, when a ruler has usurped power and does not have any rightful claim to Kingship (Hoetjeś 1993: 125). In many respects, *Politica's* argument on Tyranny can be seen simply as a more sophisticated version of Mornay's *Vindiciae* (Baker 1993: 38).

Despite Althusius' best attempt at keeping *Politica* secular, the very climate in which he was both educated and was politically active, did inevitably influence his political writings. As Henry Cohn notes:

> Althusius had spent nearly twenty years at Herborn before he assembled in his *Politics*...ideas which he had absorbed at the Academy, notably federalist theories which dovetailed with abortive Nassau plans for a Calvinist political union in the Empire and Europe. From 1604 Althusius was able as syndic in the City of Emden to put into practice against the Counts of East Friesland the

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resistance theories that had been nurtured by princes of William of Orange's family and their predecessors (1985: 158).

Despite the religious undertones, for much of his academic life, Althusius was exposed to the theoretical arguments for a Calvinist political union; these included the 'bottom-up' nature of power, and subsidiarity[22] as a tool of organisation, and these religious aspects were politicised by Althusius and used as the basis of *Politica*.

The Influence of Classical and Contemporary Literature

In his introduction to *Politica*, Carney goes to great lengths to discuss 'his [Althusius'] major literary sources' (1995: xxiv-xxix). In this, Carney identifies eight categories of authors who in some way influenced *Politica*, due to limitations of space, these will only briefly mentioned here. Carney notes such diverse groups as those who are 'characterised by a common interest in political prudence' such as Giovanni Botero and Justus Lipsius; Calvinist and Catholic constitutional authors such as Fernando Vásquez and George Buchanan, through to the legal writers and historians such as Andreas Gail and Theodore Zwinger. The purpose of this brief list is to emphasise that although Althusius appears to have definite Calvinist influences, he was a well-read and educated scholar, who was capable of adapting other's work to serve his own purposes, when the need arose, in doing so avoiding dogmatic beliefs.

The Influence of 'Practical' Politics

The geographical position of Emden on the border between the United Provinces and the Holy Roman Empire ensured that United Provinces' resistance against the Spanish monarchy (1555-1618) influenced Althusius' struggle against the Count of Friesland. This spirit of resistance shown by the Calvinist Dutch against a larger enemy influenced Althusius, and the support Althusius showed the Dutch Province in their

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[22] As will be seen in Chapter Four, subsidiarity as a political term was never explicitly used by Althusius; rather, the correlation between Althusius and subsidiarity is the result of retrospective observation made by current political theorists, namely, *Politica* displays the features of the political term 'subsidiarity' as understood in a modern sense of the word.

struggle against Phillip of Spain, resulted in the Dutch posting a garrison of Troops in Emden (Hueglin 1979: 17), which Althusius described as the 'fundamentum et conservatio' of the city's 'freedom' (Israel 1995: 252).

The influence of the structure of the Empire is also evident in *Politica*. The role of the Ephors in the Althusian commonwealth is crucial, and it is apparent that: "The model that Althusius employs most frequently in his advocacy of Ephors is the seven electors of Germany. He also manages to find somewhat comparable officials in other nations. They are usually distinguished rulers of provinces who possess at the same time this general function in the commonwealth" (Carney 1995: xxi).

In addition, the influence of the Empire is evident in the vocabulary of *Politica*. Althusius refers to different kinds of 'imperial cities' (*Politica*: 45) and refers to the peasant class as the 'Commons' (*Politica*: 60-61), both of which were common terms used in the Empire. Althusius' own political experience as Syndic of Emden must also be taken into account, for the subsequent editions of *Politica* (1610, 1614) contained a more elaborate structure than that found in the original version, including the role of the city.

Althusius' Place in Political 'Canons'

Burgess differentiates between an Anglo-American and a Continental variant of federalism, and argues that the latter originates with Althusius,[23] and was developed by Proudhon, the Protestant Reformed tradition and the Roman Catholic papal encyclicals (2000: 11). Similarly, Elazar argues that after Althusius, 'all subsequent federalist grand designs until Pierre-Joseph Proudhon's in the mid-nineteenth century' were 'derived from or somehow related to [the] scriptural precedent', which was so influential to Althusius (1995a: xxxviii).

Eulau (1941) argues that Althusius is part of a larger contingent of authors including Hippolithus a Lapide, Hoenonius, Besold, Ludolph Hugo, Leibniz and Pufendorf, all of whom attempted constitutionally to define the Empire, while Riley explores the

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[23] Burgess calls Althusius 'the first great European theorist of modern federalism' (2000: 8), while J. Wayne Baker argues 'Althusius' *Politica* contained the first federal political philosophy' (1993: 34).

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relationship between sovereignty and federalism in the Empire, by exploring Althusius, Hugo and Leibniz (1976: 19-38).

In his literary discussion in the introduction to *Politica*, Frederick Carney identifies Althusius as belonging to the category of 'both Catholic and Calvinist who had an interest in constitutional government' such as the Catholics Fernando Vásquez, Diego Covarruvias and Juan de Mariana and the Calvinists Junius Brutus, George Buchanan and Lambert Daneau (Carney 1995: xxv). Carney argues that:

> Althusius may be considered the culminating theorist of this group, for he provided their ideas on limiting the power of a ruler with a politically systematic basis they had previously lacked. He did this, of course, by making symbiotic association and its needs the foundation of political doctrine, and by showing what kind of constitutional considerations can be understood to arise therefrom (Ibid).

While a central point of the thesis is that the Althusian variant of the 'state' subsequently lost out to that of the *societas* canon, we note here that there are Althusian characteristics to be found in the writing of those authors who wrote in the *societas* era. Unsurprisingly, these authors reflect Althusius' own political and geographical background: the Dutchman Hugo Grotius, the German Leibniz, the popular sovereigntist Rousseau and the anarchist Proudhon.[24] Furthermore, Rousseau's relationship to Althusius will be explored in Chapter Four, when we explore the possible influence *Politica* had on Rousseau's theory of sovereignty. Finally, we note that Marx displays a significant degree of Althusian characteristics, yet the connection between the two authors has only been made in passing references within a wider discussion between Daniel Elazar and Jovan Đorđević (Elazar 1990).

Returning to the influence Althusius had on Grotius, Leibniz and Proudhon, Friedrich sees Hugo Grotius as being opposed to Althusius' idea of popular sovereignty, but for Friedrich, Grotius: "...did share his concept of federal union. Writing specifically against the background of the Netherlands, Grotius too sees the political

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[24] Although Althusius was not an anarchist in the modern sense of the word, if we view his work from a modern viewpoint i.e. from a centralised sovereign state, *Politica* can be deemed to displays anarchic tendencies, such as the lack of a centralised state and the corporate nature of the political structure.

commonwealth as a perpetual union of lesser communities, united through *consociatio*, or union"[25] (Friedrich 1968: 13).

Ward argues that Leibniz was undoubtedly taken by Althusius' quasi-federal model for a united Europe (2001: 33), and there are Althusian characteristics to be found in Leibniz's work including humanism, and the maintenance of the medieval thread of jurisprudence against that of Hobbes (Ibid: 34). For Friedrich, not only did Leibniz display many of the Germanic structural similarities espoused by Althusius, but he also wrote in opposition to the Anglo-French authors. First, not only did Leibniz accept the doctrine of the Ephors or estates as Calvin had first enunciated it (Friedrich 1972: 64), but he also favoured German liberty in opposition to the absolutism of France and England. Within the Imperial system, Leibniz praises the large number of princely courts: "Is not the large number of princely courts a wonderful means by which many people can distinguish themselves who otherwise would have to lie in the dust" (quoted in Friedrich 1972: 58).

Second, Leibniz disagreed with Bodin, Hobbes and Pufendorf on the subject of sovereignty. Rather than being 'indivisible' as was claimed by these authors, Leibniz argued for a concept of 'relative' sovereignty, which enabled Leibniz to speak of a 'multitude of sovereignty' within a state (Friedrich 1972: 62). Indeed, the concept of 'Majesty' replaces Leibniz's sovereignty – that is the highest political quality – and in assigning it to the Empire, Leibniz is attempting to realise one of his main political ambitions: the revival of the universal authorities, both secular and ecclesiastical (Riley 1976: 26).

Proudhon's conception of the state-society relationship, in his *Du Principe fédératif* (1863) was like that of Althusius, very much an organic view based on corporatism and subsidiarity. For Burgess, Proudhon's similarities with Althusius were quite

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[25] "Again it happens that many states, forming each an independent body, may have one head. For political are not like natural bodies, to only one of which the same head can belong. Whereas in the former, one persons can exercise the function of the head to many distinct bodies. As a certain proof of which, when the reigning house has become extinct, the sovereign power returns to the hands of the nation. So it may happen, that many states may be connected together by the closest federal union, which Strabo, in more places than one calls a system, and yet each retain the condition of a perfect, individual state, which has been observed by Aristotle and others in different parts of their writings. Therefore the common subject of sovereign power is the state, taken in the sense already explained. The proper subject is one or more persons according to the laws and customs of each nation. This is called by Galen in the sixth book DE PLACITIS HIPPOCRAT ET, PLATONIS, the first power of the state" (*Law of War and Peace*: 49).

striking. Not only did Proudhon emphasise corporatism, subsidiarity and society as a multi-layered association consisting of families, groups, economic units and local communities, but, as with the *zoon politikon* of Aristotle, Proudhon viewed individuals as becoming 'whole' persons through interactions with and responsibility to other humans (2000: 10-11).

> Some of [Proudhon's] formulations sound like Althusius, more especially his emphasis on contract. Proudhon claimed that under a federal contract the contractants – the heads of families, the communes, the cantons, the provinces, and eventually the states – "not only oblige themselves bilaterally and mutually toward each other, but in concluding such a pact they also reserve to themselves more rights, more freedom, more authority, and more prosperity than they give up (Friedrich 1968: 26).

The purpose of this discussion is to recognise both that Althusius can be viewed in relation to several different 'canons' and yet that his work is in no way unique or original. What makes *Politica* useful to the understanding of *sui generic* constitutionalism is the manner in which Althusius combined these different influences and applied them to his contemporary surroundings.

Althusius' Influence on Titoism

In addition to Althusius' influence on certain political canons, it has also been claimed that *Politica* played both a theoretical and practical role in the constitutional project of the Socialist Federal Republic of Yugoslavia (SFRY), especially from 1963 to the country's dissolution in 1991. This claim was made by Jovan Đorđević, who in discussion with Daniel Elazar in 1973, noted the influence Althusius had on the constitutional writers in Yugoslavia, especially as a counter-balance to Marxism. (Elazar 1990). While, the culmination of the influence of Althusius on Titoism can be found in the 1974 constitution; as early as the mid-1960s, Jovan Đorđević argued that the 1963 constitution instigated a process for Yugoslavia that was *sui generis* (1967: 211). What this meant by this was that under Titoism, Yugoslavia was increasingly becoming a self-managing community of working people, nations and nationalities

(Kardelj 1953: 94 & Jović 2003: 176), as opposed to a "state" in the contemporary understanding of the word. It is possible to identify Althusian characteristics in three main areas of Titoist constitutionalism: The structures and practices that the constitution established; the theoretical underpinnings of Titoism; and the electoral system.

There are four main Althusian characteristics in the structures and practices established by the 1974 constitution:

Simple Consociations and Residual Nature of Power

The first is a replica of the Althusian emphasis on the simple *consociatios* as decision-making entities, and the residual nature of power at each successive level of government as found in *Politica*. Under the 1974 constitution, the idea of social self-management reached into *all* areas of Yugoslav life, and this meant that the traditionally economic principle of self-management became the 'cornerstone of the social system' (Kardelj 1953: 91). Social self-management resulted in a system in which decisions and actions are formed and start out from 'the bottom' (Matić 1977: 28). This in itself led to the position where executive functions remained the prerogative of the lowest possible level; People's Committees and Social Self-Management Organs, while the Republican and Federal government only retained the executive functions, which 'by their nature can only be carried out at the federal or republic level' (Kardelj 1953: 92).

This in itself demonstrates both the Althusian emphasis on the simple *consociatios*, and the Althusian principle of subsidiarity: the division of powers between the Yugoslav federation, republics and communes follows 'the principle that specific powers are given to the higher bodies and that all residual powers belong to those lower down' (Lydall 1984: 105) and an 'increasing stress on the prerogatives of the communes', which are 'the smallest units of political aggregation of power' (Denitch 1977: 115) and the basis of the whole system (Rusinow 1977: 328).

Complex Nature of Checks and Balances

The second Althusian feature is found within the complex system that Althusius introduced between the Supreme Magistrate and the Ephors; each was vested with certain powers and each was designed to be the 'counterbalancing' force for the other. The 1974 constitution similarly established a complicated power relationship between the executive body of the assembly, which is formed out of the executive council, and the council, which is the collegiate executive organ of the assembly of the commune. (Article 149) Dennison Rusinow echoes this sentiment when he highlights: "The system thus described [that of the 1974 Constitution] therefore included a far more complicated and multidimensional version of the American Constitution's 'checks and balances' (1977: 328).

The Politicisation of Society

A third Althusian feature is the fact that both Althusius and Titoism 'politicised' the whole of society. In social contractarian theory there is an area of society that remains outside of the political world. For Althusius, largely under Aristotelian influence, although there are private and public associations, *all* are politicised. Similarly, as the project of 'constructing socialism' was the cornerstone of Yugoslav society, this had the direct influence of affecting 'grass roots' self-management, thus turning all of Yugoslav society into a political society (Golubović 1986: 6).

Shift of Power from Centre

The fourth Althusian feature is that the shift of power, both political and economic, from Belgrade to the Republics was so thorough, that in many respects the federal organisations resembled the position of the European Commission in the EU; namely the real power and decision-making was undertaken by the Presidents of the Yugoslav Republics, while the Federal Yugoslav level dealt with specially designated competences, a situation not dissimilar to that between the European Commission on

the one hand, and the European Council and Council of Ministers, on the other. As Kardelj noted in 1974, 'the Federation itself became more the initiator, executor and agent of adjustment than an autonomous decision-maker'. In this, a basic Althusian influence was evident, as the federal bodies were not independent of the Republics, but formed directly by them (Jović 2003: 177).

Althusius and the Theoretical Basis of Titoism

As will be explored in greater detail in Chapter Two when we explore the individual in both *Politica* and the *societas* canon, Althusius saw the individual in his 'real' state, rather than the 'abstract' individual of the *societas* canon. Similarly, Edvard Kardelj[26] argued that the Yugoslav political system should not be based on the liberal notion of 'abstract citizens', because an 'abstract man' is 'non-existent': "Such an abstract and isolated individual can be represented only by an alienated, general deputy who pursues some sort of fictive general interest" (Todorović 1974: 3). This abstract individual existed only in liberal models, which 'try to transform man into a God' (Jović 2003: 178), instead of accepting the fact that man's life was dependent on both society and nature. For Kardelj, subsequent liberal criticisms of man were not based on man as he was, they *criticised him from the position of man 'such as he ought to be'* (Ibid. Emphasis mine). As a result, for Kardelj the aim of socialist self-management was to identify and solve the actual problems of individuals, rather than solving abstract problems:

> This goal, however, cannot be achieved if man is viewed as an "abstract political citizen", or if the working class is viewed as an abstract ideological concept; rather we must champion on the one hand the *real person*...on the other the *actual working class*, which is not simply an agglomeration of people but rather a complex system of relationships among these people...
> (Kardelj 1980: 134).

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[26] Edvard Kardelj (1910-1979) was the leading ideologue of League of Communists of Yugoslavia (SKJ), and increasingly from the 1960s the most dominant theoretical force in Yugoslav politics, to such an extent that Slobodan Stankovic described him as 'Tito's right hand; he was also his left hand, and, occasionally, even "Tito's head" – producing theories and ideas that the aging leader then propagated in simpler terms, understandable to everyone' (1981: 68).

Althusius and the Titoist Electoral System

Kardelj saw that the best way to achieve this realisation of the individual, was through the system of socialist self-management, as opposed to parliamentary representation:

> In the first place, in the multiparty system the citizen can rarely voice his preference as regards to the taking of a decision or as regards the decision itself, but can only participate in electing a candidate who is supposed to represent him. This candidate is actually not even nominated by the ordinary citizen but by the party caucus or at least under the decisive influence of the party leadership. The election of a party candidate, therefore, is in fact simply giving an endorsement to *someone else's* choice, so that in the end the right to vote in the parliamentary system can be said to be a form of the political alienation of the citizen (Kardelj 1980: 189).

The 1974 constitution introduced an 'indirect' electoral system that was meant to introduce 'direct' democracy, by ensuring that 'delegates' who were given mandates by 'delegations', who in turn were mandated by the voters, now officially ruled Yugoslavia. Delegates to communes elected delegates to Republican and Federal assemblies, so that Republican and Federal legislators were three stages away from their basic electorates (Lydall 1984: 103). As Sharon Zukin notes:

> Officially, the Yugoslavs call this delegate system the 'most direct' form of democracy, but the election of each higher territorial assembly by delegations in a lower organ really excludes mass participation at all but the neighbourhood level (1984: 262).

This electoral system can be found in the Althusian structure, as only those levels below that of the city provided 'the opportunity for direct participation of individuals as such in the process of rule' (Carney 1995: xix). The introduction of this 'Althusianesque' system allowed Kardelj to search pre-*societas* theories to solve the perceived constitutional weaknesses of the *societas* canon, as he argued that neither the one-party system or the bourgeois parliamentary system could sufficiently represent individuals 'real' needs (Kardelj 1980).

The aim of this electoral system in its Titoist guise was to avoid replicating the weaknesses of the liberal, or *societas* model, by introducing 'new and more advanced forms of democratic life' (Stanković 1981: 32); an assembly system based on mandated representation. The objective of this system was to force the delegates to protect their primary interests first, then to look at the broader picture (Vucković 1997: 113), thus introducing a variant of subsidiarity. This was an important fact as it broke with ideas of parliamentary representation, which by this period had become the standard form of representation. As Kardelj explained:

> ...in the system of political pluralism of bourgeois society, the citizen, in elections, gives his deputy *general powers* to decide on all matters concerning his own and the public interests falling within the competence of parliament, whereas the worker-manager and citizen in the system of self-management pluralism gives *specific powers* to his delegations, or delegates, to negotiate the adoption of specific decisions in the realm of his personal and common public interests (1980: 191).

Kardelj argued that the different interests that an individual may have are too varied and fluid to be 'represented by political parties and reduced to generalised political formulas'. Indeed, parliamentary politics does just this and 'denies the genuine expression of this diversity in the administration of society' (Ibid: 170). Furthermore, within the system of socialist self-management the 'genuine political interest of the working class is unanimous' (ibid: 174) and so does not require being split into artificial 'parties' of representation.

The long-term aim of the League of Communists of Yugoslavia (SKJ) and Socialist Alliance of Working People of Yugoslavia[27] (SAWPY) was to provide a superstructure, or a specialised public service (Stanković 1981: 30), in which socialist self-management:

> ...will not cause a political differentiation of the working class and working masses in the form of political parties, but which will secure their direct participation in the political decision-making on the basis of free airing of

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[27] The SAWPY, or Popular Front as it was known until February 1953, represented the different groups, some non-communist, that opposed the Nazis in the Second World War.

opinions on specific problems. In this way, in the system of pluralism of self-management interests, the majority and minority are not represented in the from of monopolistic political parties but are formed and re-formed for every specific decision (Ibid: 180).

For Tito the introduction of this system was '...a determined break...with all the remnants of so-called representative democracy which suits the bourgeois class' (Singleton 1976: 274) and offers no more than the possibility of a popularity contest (Lydall 1984: 102).

A second Althusian characteristic of the Titoist electoral system was the emphasis on the delegate system, which differed from a 'representative system' by the fact that the 'direct and virtually day-to-day responsibility of the delegates to their delegations and of the latter to the neighbourhood or 'working community' that had elected them (Singleton 1976: 332-333):

> Instead of the classical political deputy as the representative of a given political party, our delegate assembly has a collective delegation from the community of self-management interests, which acts as the spokesman for the real individual, who has specific personal and social interests (Kardelj 1980: 232).

Not only did this provide continuity and a direct linkage between the different political levels, but also, as the Constitution specified that all questions on the agenda had to be discussed within the delegations first, this enabled the delegate, who was a member of both assemblies, to be in a position to bargain for the lower level preferences at the higher-level meeting. This does not mean, however, that Delegates were merely 'transmission belts' (Ramet 1984: 73) or are simply there to be a 'rubber stamp' spokesman (Kardelj 1975: 44) for their respective Assemblies.

Each delegate was not restrained by an 'imperative mandate' (Ibid: 44); instead they were given a general set of instructions by their delegations, but not told how to vote on the decisive issues. Instead, each delegate consulted the other delegates within the assembly, and with his own delegations instructions in mind, sought to arrive at solutions that were acceptable to everyone and in the general public interest. In doing

so they represented the needs and interests of their self-managing community (Ibid: 45).

As the basis of the political system was residual, elections became practical experiments in managing the welfare of the association, rather than political contests as to who was going to exercise political power for the next *n* years. The Yugoslav delegates when acting within assemblies, consciously sought to reconcile their position to that of other delegates in order to find a consensus in which all benefited; we shall see in Chapter Three that this procedure is replicated in the Althusian decision-making procedure in the town and city.

Although there was a degree of flexibility and autonomy within the system it did not, however, give the delegates a position akin to a Western representative politician. If a delegation felt that a delegate has ceased to represent the interests of the self-managing community, the delegation is in a position to recall them. Likewise, the delegate could resign if they were not in agreement with the instructions forwarded to them by the delegation (Kardelj 1975: 45).

Although the Titoist system consciously dispensed with any recognisable notion of the 'direct' elections, it did have the potential to increase both accountability and ensure widespread participation. As Tito told the Tenth Congress of the SKJ in May 1974, over 7000,000 citizens or 1 in 20 of the eligible voters were serving on some kind of delegation, and this meant that there was an increased emphasis on 'grass-roots' politics. By 1981 this figure had risen to 1,000,000 and writing in 1986, Seroka and Smiljković speculate that as 'rotation in office, circulation of functions, and short terms of office are the rule, the proportion of the population that has served, or will serve, as a delegate or a member of a delegation may eventually include everyone' (1986: 16).

The use of the mandate system representing a common collective view and forcing representatives to try to reconcile their communal and regional interest in decision-making is repeated in Althusius' discussion on the decision-making process in the guild and the city. Likewise, as will be seen in Chapter Two, making consensual decisions the optimal form of decision-making can also be found in *Politica*. Although often derided for producing weak decisions, a consensual decision is more

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likely to have been thoroughly discussed and have taken into account all points of view, than if all decisions are put to a majority vote. The use of consensus was also reflected in interrepublican discussions, Kardelj favouring the method of negotiations, as excessive state coercion could lead to an 'extremely serious political crisis' (Burg 1983: 201). Instead, Kardelj argued that:

> ...we turned primarily to the method of negotiation and agreement making among the republics. Because in such direct negotiations by the republics, on the occasion of the harmonisation of their interest, it will be easier to find appropriate forms of mutual compensation in situations when someone's legitimate interests are affected (Ibid.).

The aim of this system was to avoid the failings of both the conflictual system of multiparty democracy of bourgeois capitalism or the single party state system (Kardelj 1975: 41) and to create a 'new historical type of democracy' which is 'more progressive and more human' than parliamentary democracy (Kardelj 1975: 18).

> The dogmatists who champion the political pluralism of the bourgeois state seem to think that the history of democracy has reached its culmination in the bourgeois system of democracy, and that any other form of political system is contrary to democracy...fortunately, however, there are and will be many systems much more democratic than the bourgeois parliamentary state (Kardelj 1977: 394)...it is, therefore, pure political hypocrisy when a socialist society is accused of an absence of democracy and rule by dictatorship, while bourgeois society is said to be free of dictatorship, to have a rule of democracy (Kardelj 1980: 137).

Althusius and The Withering of Yugoslavia?

In addition to the influence Althusius had on Kardelj's work, this 'Kardeljianism' has recently been proposed as a reason for the dissolution of the country in 1991. In reviewing Dejan Jović's recent book *Yugoslavia, the State which Withered Away: The Rise, Crisis and Fall of Kardelj's Yugoslavia (1974–1990)*, Aleksander Pavković

argues that Jović identified the greatest tension in Yugoslavia in the 1980s and 1990s as between those who wished to defend the constitutional structure, such as the Slovenes, and those who wished to reform the structure to stop the 'erosion of the powers of the federal state' (2003: 301), such as the Serbs. Increasingly, in the late 1980s there was also a third party, 'the revolutionaries' such as Milošević, who relied on Serb national pride and communist rhetoric, and wished to act quickly to achieve their political goals, using revolutionary that is, 'non-institutional', means. The tension reached its peak at the 14th Congress of the SKJ in January 1990, when the Slovenian delegation, realising that stalemate had been reached, and "not being able to defend Kardelj's doctrine of Yugoslavia from the constitutional reformists and, later, 'revolutionaries'...decided to leave Yugoslavia" (2004: 303). Interestingly, Jović argues that this action was:

> ...quite close to the spirit if not the letter of Kardelj's doctrine...a return to a centralised Yugoslav state, from the viewpoint of this doctrine, would have been historically retrogressive and, in comparison, the dissolution of Yugoslavia appeared a preferable if not necessarily much more progressive development (2004: 303).

In support of this claim, Jović highlights the fact that in 1967 Kardelj warned that the 'unitarists' of the SKJ, not to provoke ethnic separatism, but to allow all nations to create their won states within Yugoslavia' (Jović 2002: 170).

Jović further supports this hypothesis in his earlier chapter "Yugoslavism and Yugoslav Communism: From Tito to Kardelj" in Dejan Đokić's "Yugoslavism. Histories of a Failed Idea 1918-1991"; where he argues that:

> Edvard Kardelj believed that the main danger to post-Tito's Yugoslavia would come from the renewal of a centralised state, either in its interwar (bourgeois) form or in a form of Soviet statist ('Stalinist' or – as Kardelj called it – 'Great Statist') socialism. If this happened, Kardelj argued, the results of the Yugoslav revolution would be annulled (2003: 168).

Althusius in Contemporary Political Writings

As a theorist, Althusius is rarely mentioned in discussions on political thought, let alone in the EU constitutional debate. One of the most prominent authors to realise the potential of Althusius' work was Daniel Elazar (1991a, 1991b), writing on Althusius' relation to federalism and covenantal constitutional structures. Indeed, Elazar's belief in federalism as a political system is reflected in his claim that *Politica* represents the basis of a 'post-modern' federalism, which in many respects, would bridge the divide between the liberal and communitarian canon. His reason for this is that this post-modern model would recognise the need for the individuals in civil society to be secure in their individual rights while simultaneously acknowledging group associations as also having real, legitimate collective rights in an appropriate constitutional or political status. Nevertheless, it is obvious that the political ideas of Althusius cannot be literally transposed into what Elazar calls the 'post-modern' epoch' at the end of the Twentieth century, because of the significant political, social and economic changes that Europe has undergone in the past 400 years. Nonetheless, Elazar claims that 'much of his [Althusius'] system, its ideas, and even its terminology, may be adaptable or at least from the basis of post-modern federalism' (Elazar 1995b: 447).

The potential Althusius offers to political theory has also reached the discussion on cosmopolitan democracy and other forms of globalisation. Keane argues that while traditional notions of cosmopolitan democracy favoured Kantian principles, 'cosmocracy' or a variant of global democracy, is a: "...much messier and far more complex type of polity...it is a conglomerate of interlocking and overlapping sub-state, state and supra-state institutions and multi-dimensional processes that interact, and have political and social effects, on a global scale" (2002: 8).

For Keane, the role Althusius plays is clear, for which *Politica* is 'deserving of a revival', as despite various weaknesses and anachronisms:

> Althusius has much to say to us about the need to think normatively and strategically, in more nuanced ways, about complex systems of power. Cosmocracy resembles a thoroughly modern version of the political world pondered by Althusius, a strangely 'medieval' mélange of overlapping legal

structures and political bodies that come in all shapes and sizes – a many-sided world of overlapping and potentially conflicting political structures, primordial groups, differently sized political associations, and federalist strivings for both particularism and universalism, ecumene and community (2002: 58-59).

While the aim of this thesis is to further understanding of *sui generic* constitutionalism, and not enter a discussion on either post-modernism or cosmocracy, the use of Althusius in both these discussions allows us to make two interrelated points. First, the increased attention paid to Althusius' work appears to be the result of the growing recognition of the limitations of 'traditional' constitutional theory; for example its inability to accommodate non-state or non-geographical actors in the constitutional process. Second, and this point will be elaborated below, a weakness of *Politica* is that there are specific methodological issues involved in the normative interpretation of the text.

Unsurprisingly, due to Althusius' limited 'existence' in the theoretical world, it is the same authors who discuss Althusius within both the realm of political theory and within the realm of EU constitutionalism. The two most prominent authors in this category are Thomas Hueglin 1994a, 1999) and Daniel Elazar (1991a, 1995a, 1995b). In fact, Hueglin's paper entitled *Federalism, Subsidiarity and the European Tradition* was one of the first attempts to take an aspect of Althusius' work, in this case subsidiarity, and explore its potential for the understanding of the EU (1994a). With regard to the theme of subsidiarity, Hueglin's idea of 'societal federalism' (1999: 109-135), which is understood as a 'general form of social organisation' rather than 'a specific type of government' (Ibid: 109), has been further explored by Markus Jachtenfuchs, who argues that within 'unitary and hierarchical states' the centre is usually far away from the individual's every day lives. In order to combat this, there needs to be a redistribution of 'rights to people on the local and the regional level and with regard to those areas which are of direct relevance to them' (1998: 55).

Largely due to the work of Elazar and Hueglin, subsequent discussions of Althusius in relation to the EU predominantly relate to either subsidiarity (Endo 1994, Friesen 2003), or to federalism (Elazar 2001: 34, Hueglin 1999: 2), or due to the fact that Althusius wrote at a time in which the sovereign state had yet to become the dominant

form of political association. As will be explored in more detail in Chapter Five, there are those authors who locate Althusius as being either a 'common wellspring of modern federalism and consociationalism' (Koslowski 1999: 567) or alternatively as the source of a continental, as opposed to an American federal canon (Burgess 2000: 8).

Probably the most productive and well-known fields of Althusian literature are not those theories that are direct interpretations of Althusius, but those theories that are influenced by him. The classic example of this is Arendt Lijphart's *Consociational Democracy* (1969) which attempted to explain why certain European countries were stable democracies, despite adopting neither Anglo-American nor Continental European styles of democracy. Although Consociational Democracy was not 'EU-specific', not only has it been subsequently applied to an understanding of the EU (Taylor 1990, 1993, 1996), but it was also the basis for Dimitris Chryssochoou's (1994) *Confederal Consociationalism*, which adopted Lijphart's original work in an EU context. In addition, there have been more recent 'consociational interpretations' and discussions of the European Union, most notably in the form of an EU consociational discussion between Matthijs Boogards, Markus Crepaz and André Kaiser (2002), but also Ann Peters (2003), who made a plea for a European 'semi-parliamentary and semi-consociational democracy'. Finally, it must not be forgotten that consociationalism as a political theory, is discussed in a significant number of EU textbooks (Hix 1999, Chryssochoou et al 1999, Rosamond 2000).

Another possible example of an Althusian influenced work is Phillipe Schmitter's *Condominio* (1996). Written in a chapter entitled *Imagining the Future of the Euro-Polity with the Help of New Concepts* and very much in the Lijphart vein of thinking[28], Schmitter argues that:

> Instead of one Europe with recognised and contiguous boundaries, there
> would be many Europes. Instead of Eurocracy accumulating organisationally
> distinct but politically co-ordinated tasks around a single centre, there would

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[28] Both consociational democracy and Condominio were one example taken from a matrix of possible scenarios. For Lijphart's consociational democracy, the other examples were Centripetal democracies, Centrifugal democracies and Depoliticised democracies; while for Schimtter's Condominio, the other possible outcomes were Consortio, Confederato, Stato/Federatio.

be multiple regional institutions acting autonomously to solve common problems and produce different public goods (1996a: 136).

The commonality that both Consociational democracy and Condominio enjoy is the promotion of a regionalisation of power and a shift in the decision-making away from a central authority to the peripheral powers. What Lijphart brings to the discussion, and something that Althusius discusses in *Politica*, is the possibility that representation and 'federalism can be analysed along non-territorial, functional lines as well as upon territorial lines' (Burgess 2000: 7).

Conclusions

There has yet to be a concerted effort to use Althusius' *Politica* as the basis for an alternative theory of constitutionalism. There are many possibilities as to why this is the case, but only six will be discussed here: infancy, time, relevance, theoretical originality, language and methodology.

The first two reasons, of infancy and time, are related. Althusius' work is relatively newly rediscovered and so *Politica*, unlike Hobbes' *Leviathan* and Locke's *Two Treatise*, will not have been explored in the numerous political scenarios in which it could be applied. In this way, *Politica's* potential as a source of theoretical constitutionalism has yet to be realised. Yet to undertake such a lengthy exploration of *Politica and* compare it to a *societas* canon requires a significant amount of time be spent, not only on research, but also on formulating the comparisons. In addition to the time taken, there is also the issue of author preference; namely, authors may not wish to undertake such an investigation, as the perceived benefits may be limited.

A third reason why Althusius has yet to be explored in depth could be due to the perception that Althusius has little or no relevance to the modern contemporary world, but this is unlikely. If this were the case, why would respected authors such Daniel Elazar, Thomas Hueglin and Michael Burgess attempt to further hypothetical solutions if no possible good were to come from it? It is the finding of this thesis that *Politica* does have relevance to the modern world, *but* only to certain aspects.

Reaffirming the aim of the thesis, namely to further the understanding of *sui generic* associations, the potential displayed by *Politica* enables it to be applied to a contemporary setting, but in relation to the understanding of *sui generic* associations, as opposed to the understanding of the sovereign state.

A fourth reason, partially stemming from the third, is the theoretical originality of Althusius' work. The authors, who have studied Althusius' *Politica* in detail, may have been discouraged by its limitations or by its confrontation with modern democratic ideas. Althusianism is a direct and holistic challenge to the liberal political ideals that have evolved over 300 hundred years.

The fifth reason is centred on the problem of language. Althusius wrote the original version of *Politica* in Latin. Although the Latin version is available, there is understandably, a reliance on the abridged English version of Frederick Carney. This problem is further compounded by Carney himself, who in the introduction to the 1995 edition of *Politica* discusses with a refreshing honesty the problems of translation from Latin to English (1995: xxix-xxxiii). Subsequent authors have also commented on these problems, and there have been attacks on Carney's work. The most malicious of these appeared in an article by Robert V. Friedeburg entitled *Self-Defence' and Sovereignty: The Reception and Application of German Political Thought in England and Scotland, 1628-69* (2002), in which in a footnote, the author attacks Carney's work thus:

> The abridged English translation *The Politics of Althusius*, ed. Frederick Carney (London 1964), is useful for a first glance at the text at best, but both the translation itself and the substantial omissions make this edition almost *useless for any more serious approach* (2002: fn81. Emphasis Mine).

In support of Carney, and a glaringly obvious point that Friedeburg appears to overlook is that in the modern age, there are limited scholars who read Latin competently enough to read *Politica* in its original Latin version. Whilst this fact does not remove the problems with Carney's translations, it does put it into some kind of perspective. If contemporary non-Latin readings scholars were not meant to read

Politica, then Althusius' work would remain largely unknown.[29] However, and despite the translation problems, if the aim of Carney's work was to re-introduce Althusius into political debate, by translating *Politica* he widens the scope of involvement. One of the authors who Carney has enabled to join the Althusian debate is the 'Doyen of Modern Federalism' Daniel Elazar, who in the introduction to the 1995 edition of *Politica*, openly admits he lacks a sufficient command of Latin (1995a: xliv). In this respect:

> We owe Professor Carney a great debt for providing the English-reading
> public with the opportunity to read Althusius' magnum opus in translation and
> not to have to rely upon assessments of the Latin text by others (Ibid: xlvi).

The final possible explanation for the lack of attention to Althusian thought is methodological. The problem here is two-faced: first there is a massive shift in the political and social world between 1603, when *Politica* was first written and the present time. Subsequently *Politica*, as a complete work, has yet to be explored in relation to modern constitutionalism, rather individual aspects, such as subsidiarity (Hueglin 1994a), hav e been adopted. Second, there is the issue of context and recognition of sources. While *Politica* was the source of the key aspects of Arendt Lijphart's *consociational democracy*, in much of the subsequent discussion on consociational democracy, Althusius' role is ignored. Rather than criticising the initial work of Althusius *and* consociational democracy, subsequent critics (such as Barry 1975 and Halpern 1986) have focused solely on Lijphart. The methodological problems here occurred as a result of the fact that Lijphart took one aspect of Althusius out of context. The result of this, and something that is evident in the subsequent EU literature is that the initial context in which Althusius wrote is forgotten, thus the full impact of the Althusius theory is either lost or misinterpreted with a completely different outcome.

This point is reiterated in the concluding chapter of Thomas Hueglin's (1999) *Early Modern Concepts for a Late Modern World. Althusius on Community and Federalism*. In a discussion on the 'lineage of Althusius', Hueglin argues that

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[29] The present author has had first-hand experience of Friedeburg's view. Upon submission of an article entitled *Back to Althusius: Pre-Westphalian Suggestions for a Post-Westphalian World* to the Journal of International Relations and Development, one of the reviewers opened their criticism by arguing that the author has made no attempt to refer to the original Latin version of *Politica*.

although both the term and the concept of consociationalism have been derived from Althusius (1999: 210), there are 'significant differences' (Ibid: 211) between the two versions. The most pressing of these is the fact that for Althusius, *consociatios* were a 'generic unit of political organisations'. Citizens who were organised in the *consociatios* were to be empowered to make autonomous decisions about what they would consider as useful and necessary in social life (Ibid.):

> Modern consociational practice, on the other hand, has been described as elite accommodation reducing rather than enhancing the complexity of social life. Consociational democracy in this understanding constitutes a descending form of elite control over the segments of society which are to be brought to peaceful coexistence, not an ascending form of organised popular control over the process of governance (1999: 211).

The problem here arises from the misrepresentation of the word 'consociation' as the term originates in a non-liberal model. For Althusius it represents an integral part of a system that allows individual groups to make decisions over their own lives at the lowest possible level, rather having an elite making them on their behalf, as is the case in consociational democracy. The point to be made here is that despite Althusius' increasing relevance, especially to the EU constitutional discussion, the fact is that much of *Politica* is taken out of context and so the original Althusian meaning is lost. In order to avoid this methodological problem, this thesis has consciously distinguished between the *societas* (i.e. Hobbesian) canon of constitutionalism and Althusius, and presents the latter as an independent constitutional theory in relation to the former.

Before the theoretical discussion can begin, it is important to define what is meant by the terms 'constitution' and 'treaty', since the fact that there is no single definition for either term is a serious flaw of their usage within constitutional debates. Both terms are used *ad infinitum* in the *societas* literature, but also increasingly in relation to *sui generic* associations, such as the EU, but there is no single agreed definition for either term. How can it be that two theorists or politicians can discuss the same text and yet have a different understanding of its meaning? What are the consequences of such a position? After establishing a working definition of 'constitution' and 'treaty', the chapter will then explore *Politica* in relation to these working definitions to gather the

differences between the *societas* and Althusian understanding of the terms. The aim of such a discussion is to demonstrate that *Politica* represents a fundamentally different version of constitutionalism to the *societas* canon, and that Althusian constitutionalism is better suited to explain the constitutionalisation of *sui generic* associations.

Chapter 2. What Constitutes a Constitution? The Need for a Definition

> It should be borne in mind that there is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through than initiating a change in a state's constitution. The innovator makes enemies of all those who prospered under the old order, and only lukewarm support is forthcoming from those who would prosper under the new.
>
> *Niccolo Machiavelli The Prince: 51*

One of the principal problems in constitutionalising a *sui generis* association is the lack of definition of the term 'constitution'. How can something be constitutionalised, if no one is completely sure what a constitution is? Although this may initially appear to be a matter of semantics and philology, it has the potential to lead to a position in which one person using one definition may legitimately argue that an association has become constitutionalised, while at the same time a different actor may present an equally valid case as to why it has not. This leads to a position of confusion and, relating to the importance of language in any form of law, this is not an agreeable position to be in. In saying this, this does not mean that if there were an agreed definition of the term all problems of political practice would be eradicated. Far from it. The issue of the 'constitution belonging to the state' is just one problem that can be cited from an ever-increasing list of difficulties, which would also need to be overcome.

The issue of the lack of a definition of a constitution, and the objective of the first part of this chapter, is to review constitutional theory and to attempt to define the common structural, political and legal characteristics that modern constitutions share. This in itself is not a major task, but the point of locating these 'consensual aspects' of the constitution is to produce a 'consensual definition' or a 'catalogue of characteristics' that can be used as a working definition for a comparison with Althusian constitutionalism. The purpose of this comparison between Althusian and *societas* constitutionalism is to locate the differences between the two approaches, and allow us to explore Althusian constitutional and its potential for furthering our understanding of *sui generic* constitutionalism.

The second part of the chapter will focus on the second form of political association of the *societas* canon: the treaty. It is a commonplace that whilst the constitution deals with the domestic governance of the state, the treaty deals with its international relations. Although this duopoly represents a legitimate legal distinction between the foundation of domestic and international relations, it has not only been surpassed by political practice, but also aspects of jurisprudence have long questioned its validity. In addition to the questions asked by jurisprudence over the legitimacy of the distinct division between the two terms, there is a more fundamental weakness that very much negates its usefulness for the contemporary EU discussion: this simplistic division between a 'treaty' and a 'constitution' fails to consider the possibility of a third, or even fourth, political relationship between different associations. In this manner, the failure of this dichotomy to adapt itself to the increasing emergence of *sui generis* associations can be seen as a serious weakness of the *societas* canon.

The Attempt to Identify a Definition or 'Catalogue of Characteristics' of the Constitution

From constitutional theory, a broad consensus can be reached regarding a constitution and its workings. Yet each constitution also has several distinguishing features linked to the very specific context in which it was written. In addition to this, there are many differing theoretical and ideological styles of constitutionalism.

For instance, amongst the current Member States of the European Union, there is a whole range of constitutional styles: ranging from federalist, presidential parliamentarism, parliamentarist, presidential and monarchical parliamentarist. Although it would be convenient to pigeon-hole each constitution in this way, is increasingly not possible to do so. For instance, Spain is a Monarchical Parliamentary regime, but is undergoing a process of federalisation due to the growing autonomy of the regions. Belgium, although remaining a monarchy, has adopted a federal structure. Nevertheless, four broad theoretical elements emerge: a written text, a separation of powers, a Bill of Rights, and the supremacy of the Constitution.

As these theoretical groupings have been deduced from constitutions in general, in *theory* they will all be similar if not the same, yet in *practice* there may be differences. The theory behind a separation of powers will be identical in all constitutions, but the actual form this takes will be different. A presidential separation of powers will differ, for example, from a parliamentary one. Likewise, a federal separation will differ from that found in a unitary system. In the same way, while the theory behind a Bill of Rights is to ensure the Rights of the citizen within the society, in practice not all Bills of Rights will contain the same rights. Finally, although the majority of the documents are written some are written, but contain parts of previous constitutions or treaties as annexes. A good example of this is the Austrian constitution that has, under article 149 [Old Laws], given constitutional status to previously enacted laws.

A point that is evident from the discussion, even at this stage, is the influence of the *Societas* canon on these common characteristics. The topic of the separation of powers originated in the work of James Harrington, John Locke, Baron de Montesquieu and the *Publius* authors. Likewise, the issue of natural law and the bill of right is an archetypal *Societas* discussion originating in the Hugo Grotius and Thomas Hobbes, before being famously discussed by Thomas Paine and Edmund Burke.

Unwritten *v.* Written

The issue of the written text in constitutional theory has long been a point of contention amongst scholars. One the one hand, there is a simplistic differentiation between 'written' and 'unwritten' texts, but in reality this distinction is misleading; as C.F. Strong points out: "...this is a false distinction, because there is no constitution which is entirely unwritten and no constitution that is entirely written" (1963: 66).

Moreover, K.C. Wheare argues that the distinction between written and unwritten constitutions should be discarded. 'The better distinction is that between those countries that have a written constitution and those that have no written constitution' (1963: 20-1). The difference between an unwritten and a no(n)-written constitution, as identified by Wheare, is a subtle one and focuses on the nature or existence of 'constitutional laws'. The former example, despite being called 'unwritten', will

contain written laws that are of constitutional importance, but these laws will not be consolidated in a central document called the 'constitution'. Rather these laws exist on the statute books of the country alongside 'ordinary' legislation. The possible confusion that may arise from this situation, is that even where there exists a central constitution, there are laws that are constitutional that may not be included in the single document. On the contrary, in an example of a 'no(n) –written constitution', no constitutional laws will exist.

Adopting a broader point, but in many ways supporting Wheare's position, Vernon Bogdanor notes that; "In addition to the basic meaning of 'constitution' – a document containing, at the very least, a code of rules setting out the allocation of functions, powers and duties among the various agencies and officers of government – there is a wider meaning of constitution, according to which every democratic state has a constitution" (1988a: 4).

Despite this, there is a common practice in the constitutional literature to explore the written constitution, with the United Kingdom, New Zealand and Israel cited as examples. Does this mean that constitutionalism is possible even in the absence of a written constitution? Unfortunately, the answer to the question depends very much on the definition of constitution used. If we use the example given by Strong, then the United Kingdom, New Zealand and Israel *do have* constitutions, despite their lack of a single document, and in this instance constitutionalism can occur within the confines of an unwritten text. Thus, constitutionalism can occur despite the absence of a written constitution, which very much negates the need for a written text. What this fails to explain, though, is why the vast majority of constitutions are written? Several possible reasons can be suggested for this.

In the first instance, the constitution needs to be a written text in order for all political actors to be aware of the 'rules of the game', namely, the single document lays out the political structure and rules, and the constitution may also limit the term of office of officials. In addition, the bill of rights will also inform the citizens of their rights. Secondly, the written document has a symbolic nature. As well as serving as the fundamental law of the state, the text can also be used as a form of 'social adhesion' to bind a citizenry or provide a focus of loyalty. Thirdly, a written text is often viewed as more democratic, than an unwritten constitution, due to its openness; that is

no single party can 'hide' rules from another within the political process, and this is evident when the unwritten constitution is explored. In the scenario of an absence of a written text, in many ways the government *becomes* the constitution, leaving it in an irrefutable position in terms of power and legitimacy within the state. As the constitution is seen as a legitimate tool to control the power of government, if the government *is* the constitution then this perverts the whole idea of constitutionalism. Also, a written text can act as a safeguard to individual's rights, and so if the assurances and protection contained within the text are missing, this leaves the citizenry open to potential exploitation and oppression by those in power.

Equally, however, even when the constitution is written, it remains a piece of paper with no power. The power it enjoys emanates from the citizens' perception of it. It will only enjoy the prestige and power it deserves as long as the citizenry perceives the constitution's importance. If the text is seen to effectively control the powers and actions of the ruling parties, this will add to its precedence, as it will be seen as having a legitimate role. As Samuel Finer notes; "Constitutions are otiose: if the power-holders exercise self restraint, the written constitution is unnecessary, and if they do not then it is useless" (1995: 1-2).

If this claim is true then there is no real point in continuing this discussion about constitutions; under this premise money would also be useless. A €5 note is only worth €5 because we perceive it to be and we respect the authority of the 'piece of paper'. The actual value of the paper the note is printed on would be a few Cents, but it can buy €5 worth of goods.

So here we have an interesting paradox. The written text is only relevant when it is respected, but a written text is essential as not only does it lay out the political rules, but it will also remove much of the fear that is naturally generated by different factions within the state. In this respect the written text is largely symbolic, as it psychologically reassures the citizenry that the government can be held in check, and so represents the resolution of the paradox.

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The Separation of Powers

The aim of the separation of powers, when the American constitutional writers first significantly discussed it in the 1770s, was to ensure individual liberty. The separating of powers between the differing branches of government was essential for Montesquieu (1748) and the *Publius* authors (1788) in order to ensure that liberty was not encroached upon. For such authors, the very notion of all powers of the legislative, executive and judiciary, in the same hands, whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny (Madison *Publius*: 245).

However, in this context the definition of liberty is unclear. Indeed, Montesquieu argues that for some people liberty meant the ability to wear a long beard, (*Spirit of Laws*: 149); but despite this lack of clarity for Montesquieu, the term *liberty* from James Madison onwards is synonymous with *freedom*. Undeniably, the Lockean-influenced idea of individual liberty was so important to the American Founding Fathers that not only was each branch of government given a distinct and separate, but inter-dependent role, but if the differing branches did collaborate and pass a liberty-encroaching Act, individual liberty could be maintained by the Supreme Court.

The first effective separation of powers was enacted in the American Constitution in 1787. In this the three main branches of government were allotted with powers, but more importantly were *independent of each other*, but not autonomous, because they cannot operate on their own (Sajó 1999: 74). It was Madison's ideal that, unlike in the British system where Parliament is supreme, no one branch could become stronger without making another weaker, so each would guard against the other's activities (Ibid: 72). So a form of 'Pareto Optimality'[30] was created amongst the differing branches of government. Apart from its relative simplicity, another original aspect of the Madison's theory was that it also contained a system of checks and balances. In terms of the separation, this adoption of a system of checks and balances is neither a positive addition nor a negation (Lane 1996: 95). For Montesquieu the two could not mix, as checks and balances would negate the initial separation, but for Madison the

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[30] Devise by the Italian economist and sociologist, Viflredo Pareto, (1848-1932), Pareto Optimality is an economic term to describe an economic situation, where the riches of one person cannot be increased without decreasing another's.

process of 'intra-regulation' of government would ensure that liberty was continued.

The American system of checks and balances resulted from Madison's fear of human weakness when partaking in the political process (Sajó 1999: 3), and because of this was not meant to be efficient. It was meant to ensure that individual liberty could never be curtailed:

> The doctrine of separation of powers was adopted by the Convention of 1787, *not to promote efficiency, but to preclude the exercise of arbitrary power.* The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to *save the people from autocracy"* (www.supremecourtus.gov 272 U.S. 293. Emphasis mine).

The style of separation discussed above is specific to a presidential system, where the President is elected independently of the legislature and exercises the executive powers. Clearly this separation cannot function in a parliamentary monarchy or a republic in which the symbolic president has limited executive powers, so how does a parliamentary separation work?

This style of government, often found in continental Europe, but not in all countries as France is an exception, revolves around the position of the executive *vis-à-vis* the legislative. In this scenario, the members of the Cabinet are responsible for filling the executive role and usually must also be members of the parliament (Wheare 1951: 37). This system relies more on party politics than the personality politics of the Presidential system, as the voters will vote for a particular party and its leader, if elected, will form the cabinet. Due to the symbiotic nature of the relationship between the executive and the legislative, it is unlikely that the Cabinet could be impeached or removed in the same way as a President can; furthermore, the changing of the Cabinet is often a decision of the Prime Minister, not of the electorate. So what of a separation of powers where the executive and legislative are combined? For this parliamentary system, the separation of powers is applied with regard to the judiciary. As long as the constitution establishes the judiciary as separate from the executive/legislative, then parliamentary separation is in existence.

As well as the styles of separation between the different branches of the state, there is another style of separation, which can supplement those discussed above. The government may be restricted both at the "centre" and the "periphery" (Sajó 1999: 95). Within a federal constitution a natural separation of powers already exists within the system between the federal and state level, but for those who advocate that "power is in unity", separation does not come naturally (Ibid: 69). Can there be a separation of powers within a unitary state?

The simple answer is yes, but it will depend on the form of political system the constitution entails. For instance, France is a unitary state, and yet it has a presidential separation of powers, whereas Germany is a federal state, with a parliamentary separation. In this manner there is a spectrum of the separation of powers, not only between the differing branches of government, but also between federal and state level.

Figure 6 shows only the two extreme positions in the relationship between the separation of powers and the state type, and just from the examples of France and Germany above, there are many differing examples to be found within the two extremes.

Figure 6: Location of power in relation to the separation of power and nature of state

Power Most Dispersed (State type/Separation of powers)	Power Most concentrated (State type/Separation of powers)
Federal/Presidential e.g. The United States of America	Unitary/Parliamentary e.g. The United Kingdom

Source: The author

In summary, a separation of powers of some form, whether presidential or parliamentary, is needed if individual liberty is not to be encroached upon. Although the classic authors on the subject have influenced this, it is clear that the main fear of both Montesquieu and Madison, that is the preservation of liberty, is *still* the main preoccupation of a *societas*-influenced constitutional separation.

Unlike many areas of constitutionalism, the separation of powers does lose its otiose nature once it is put into practice. As András Sajó notes; "Wandering cattle are not restricted by a clear boundary, only a barking dog on the neighbouring property" (1999: 70-71).

The Bill of Rights

The bill of rights is an essential feature of the *Societas* canon for two main reasons. Firstly, as will be discussed in more detail in Chapter Three when we discuss the role of the individual in the *societas* canon and Althusius, the constitution can be seen as a social contract which individuals enter into; and in order for the rights surrendered to the state not to be lost, they need to be written in a single text. Secondly, a written Bill of Rights is needed in order to stop governments, or a minority from curtailing the rights of the majority.

The idea of natural rights arguably originated from The Ten Commandments, but it was Hugo Grotius' *The Law of War and Peace* (1625) that introduced the notion of natural law (*jus naturae*), and Thomas Hobbes' *Leviathan* that introduced the idea of natural rights into political theory. Indeed, it was Hobbes who distinguished between the *jus* (law) and *lex* (rights), as before this time, in the Latin language, *jus* had been required to mean both law *and* rights (d'Entrèves 1970: 61). This was not a solely linguistic matter though.[31] What was clear was that in the American Declaration the theory of natural law *had been turned into* a theory of natural rights, and in this respect the theory of natural rights was acquainted with the idea of a fundamental law, which was the American version of the European law of nature (d'Entrèves 1970: 61-62).

The purpose of this discussion is not however, to trace the idea of natural rights from Grotius, Hobbes, to Pufendorf, Locke and Rousseau, but to look at one particular aspect of the discussion of natural rights, namely the 'golden era' of both constitutional theory *and* practice that was the thirty years between 1762 and 1792. In this period, starting with Jean-Jacques Rousseau's *The Social Contract*, there were

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[31] Another distinction between natural law and natural rights can be found in the definition of *passive rights* and *active rights*. Passive rights are ones given by somebody else, active rights are rights that are inherited at birth.

two defining revolutions of the time, in America and France, which both influenced and were influenced by the idea of 'Liberty'. Indeed:

> We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed... (*The Declaration of Independence* 1776).

It is not so much this practical aspect of 'liberty' that interests us in this part of the discussion however. What is of interest, and what arguably highlighted two opposing ideals of natural rights, was 'the most crucial ideological debate ever carried out in English' (Dishman 1971: 67) between Edmund Burke[32] and Thomas Paine, conducted between 1790 and 1792.

Until the French Revolution, both Burke and Paine shared both mutual respect and friendship, with Paine spending some time with Burke at his estate in Beaconsfield. The disagreement between the two originated in Paine's letters to Burke describing the events in Paris of the French Revolution, and it was these descriptions that gradually turned Burke away from the revolution (Dishman 1978: 59-68).

Burke's opposition to the Revolution stemmed from the fact that his view of radical democracy of the French Revolution as negative for the French people. Rather, Burke preferred a moderate democracy in which the will of the people was tempered by other constitutionally entrenched institutions such as the Monarchy, Lords and Church (Muschamp 1986: 142-3). Although believing in rights *per se*, having fought for the rights of the American colonists against unfair taxation, Burke believed these had to be within a frame of continual, hereditary government, rather than the base of a government – that is the government, aristocracy and monarch ensures the rights of the people and the stability of the nation. Indeed, Burke offered the Bill of Rights Act (1688), as a more suitable manner in which to assure rights. Of the cementing nature of the 1688 Act, Burke wrote: "They [the Lords] knew that a doubtful title of

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[32] *Reflections* is without doubt one of the major writings of English constitutional history and was partially written as an attack on the National Assembly and partially as an attack on Dr. Richard Price's speech to the Revolution Society on the 4th November 1789 entitled *"On the Love of Our Country"*. See http://oll.libertyfund.org/Texts/LFBooks/Sandoz0385/HTMLs/LoveOfCountry.html

succession would but too much resemble an election; and that an election would be utterly destructive of the "unity, peace, and tranquillity" of this nation' (*Reflections*: 86).

In addition, those rights of the people, which were not forsaken in Acts of Parliament, were to be found in the history of the country. That is, each country found its unique rights in its own unique history (Stirk & Weigall 1995: 107). Indeed for Burke, the French universal *Declaration of the Rights of Man and of Citizen* was not only 'so "pedantic" in its "abuse of elementary principles as would have disgraced boys at school", but more importantly it was "a sort of *institute* and *digest* of anarchy" (Dishman 1978: 65).

Whereas Burke despised the *Declaration*, it was very dear to Paine. Indeed, in much of his writings he argued for the notion of natural rights. David Powell in his book *Tom Paine, the Greatest Exile* and recalling the claim of William Cobbett, claimed that it was Paine, and not Thomas Jefferson, who wrote the American Declaration of Independence (1985:76). In the *Rights of Man* (1791-2), Paine acknowledged the existence of natural rights and argued that man's 'natural rights are the foundation of his civil rights' (*The Rights of Man*: 275). In this respect, when man enters civil society from the 'state of nature', he has to relinquish some of his natural rights to the state:

> The natural rights that he retains are all those in which the *power* to execute it is as perfect in the individual as the right itself. Among this class...are all the intellectual rights, or rights of the mind; consequently religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. They answer not his purpose... (*The Rights of Man*: 276. Emphasis in original).

For Paine, as was demonstrated in both America and France, and in complete opposition to Burke's idea, the Rights of Man are the basis of a 'modern' state and it is this emphasis on the past that is probably the key difference between the two authors. In *Reflections*, Burke accepts the constitutional history of Britain as being the best example and possibly hopes for the Revolution in France to falter, thus

enabling a British system to be installed. In this sense, *Reflections* is merely a continuation of a constitutional order and reflects the fact that Burke was not a philosopher, but a realist and a man of affairs. Politics for him was not about speculation or theory, but about practicality and prudence (Germino 1972: 217). Conversely, *The Rights of Man* rejects this 'old world'. Tradition was often not only simply a means of masking the denial of those human rights, which Paine regarded as the only proper basis for making decisions about government, (Muschamp 1986: 151) but also it acted as a restraint to the living generation (Stirk & Weigall 1995: 107). As Paine explained in a somewhat macabre example, 'the dead have no rights'. Paine dismisses the hereditary style of government and the unwritten style of constitution in Britain in favour of a new style of government based on the individual rights and liberty of its members. In this sense, *The Rights of Man* is not a continuation of a constitutional order, but the originator of a new chain.

From the result of the debate between Burke and Paine, it is clear that it is the style of the latter that, via the French and American revolutions, has had more of an influence on rights-based constitutionalism, than the 'traditional' style of Burke. Indeed, the influence of rights has so perforated present day society, that there are comparable texts in international organisations. Both the United Nations' Universal Declaration of Human Rights (1948) and the European Union's Charter of Fundamental Rights (2000) are examples of 'supranational' bill of rights.

But, what if constitutions did not contain a Bill of Rights? In terms of political theory the state would be unjust, as the individual joins civil society to be better off, in comparison to the 'state of nature' and if these civic rights are not codified and enforceable, then in certain instances, the individual is actually worse off. In a state of nature, the individual can dispense his own justice on others, but in a state where there is no Bill of Rights man has given up certain of his natural rights only to have them not guaranteed by the state, so these are then lost, as in civil society the individual is bound by laws and cannot enact his own punishment to the guilty. In a way, the Bill of Rights is a receipt. The parties to the contract place certain natural rights into the care of the government as they cannot execute them perfectly themselves and in return they are given a receipt, the Bill of Rights.

What if the majority believe that their rights are enforceable via an unwritten

constitution? In this example the majority would be deceived into believing that their rights were guaranteed, but in reality the government, that is a small minority, could either easily amend, remove, or simply not respect these rights. Furthermore, there is the potential for an inconsistency between what the state *believes* is in the Bill of Rights and what actually it *does* contain. As the majority would not know what exactly was in the Bill of Rights, then this leads to the position where individual rights are flaunted by government without their knowledge.

Samuel Finer's argument about the otiose nature of constitution is again here relevant. However, unlike the other parts of the constitution the writers of the constitution can establish a Constitutional Court that acts as the Supreme Court that upholds the rights of the citizen enshrined within the Bill of Rights.

Constitutions and Law

In most constitutional structures the constitution is viewed to be a higher law than 'normal' laws. As K.C. Wheare argues the constitution 'by nature, is not just an ordinary law. It is fundamental law, it provides the basis upon which law is made and enforced' (1963: 9). John Elster and Rune Slagstad similarly argue that; "Under that theory, "higher" law-making in the form of *constitutional politics*, produces the particular norms placed in a constitution itself…The other, lower track of law-making consists of *normal politics*…" (1993: 330. Emphasis mine).

Admittedly the argument in its original context was for a federalist system, but if we also look at unitary states we see evidence of the same relationship. The question here is not that it is widely agreed that constitutional laws are superior, but how should these laws be used in the everyday political and legal life of a state? This leads to further questions. Who ensures that it is not violated by legislative acts? Who has the authority to interpret its meaning? Alexander Hamilton argues that the constitution: "…must be regarded *by the judges*, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body" (in Mueller 1996: 279).

K.C. Wheare highlights five methods of constitutional interpretation, but only in two

may the judicial branch legitimately become involved in constitutional politics. The first, as Hamilton argues, is the role of a Constitutional Court, whose job is to interpret, maintain and uphold the constitution. The second is found mainly in continental Europe. In this system judges may review acts of the legislative body, but they may not enforce the constitution on the legislative body (in this sense they are an advisory body). The final three constitutional interpretations involve either firstly, putting no restraints on the legislative, as in New Zealand, or applying constitutional controls on the legislative, but trusting their acts not to violate these (1963: 146-155). As Wheare himself says;

> Why should judges be thought more trustworthy than legislators or administrators? Or why should judges be thought better equipped to decide what the constitution means than the members of other institutions of government? (1963: 152).

The final structure is found in the Dutch constitution, which states that: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts" (art.120)

Bearing in mind the differing examples of judicial review, is one variant better than others in their interpretation of constitutional laws? In order to answer this question, an exploration of examples of the differing structures needs to be undertaken. The more frequent of two styles is that of a Constitutional Court. This style is usually found in federal constitutions, but is also found in unitary states, such as Slovenia and Ireland. So what is the role of the Constitutional Court? In America this is clear, as Chief Justice Marshall of the Supreme Court explained;

> So if a law be in opposition to the constitution; if both the law and the constitution apply to particular case, so that the court must decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; *the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution and the constitution to any ordinary act of the legislative, the constitution, and not such ordinary act must govern to which they both apply* (www.supremecourtus.gov 1cranch37.

Emphasis mine.).

So one of the roles of the court is to interpret the 'validity of any law having regard to the provisions of the constitution (Chubb 1991: 60). The same ideal is enshrined in the constitutions of Germany (art.93), Austria (art.140), Ireland (art.34)[33], France (art.61-62) Italy (art.127), Portugal (art.277-283), Spain (art.159-160) and to some extent Switzerland (art.189)[34] In this regard, the Constitutional Court provides a safeguard to the 'safeguard provided in our state by the fundamental law of the constitution' (McIlwain 1969: 245).

This style of legal interpretation is reactive, whereas there is a pro-active interpretation that can be adopted, namely the Constitutional Court as an advisory Council.

The role of the French *Conseil Constitutionnel*, which consists of nine members is to rule on the constitutionality of acts of parliament. If the *Conseil* should rule an act to be unconstitutional, the act may not be promulgated or implemented. Furthermore, the decisions of the *Conseil* shall be not subject to appeal as they are final. In this case the *Conseil* works alongside the legislative bodies in order to maintain the constitutionality of their acts. Furthermore the impartiality of the *Conseil* should be ensured firstly, by the fact that it is working within the confines of the text of the Constitution and secondly, the fact that it is jointly appointed by the Presidents of the legislative and executive branches; however, it should be borne in mind that many of the appointments are politically motivated.

There is a possible problem with Constitutional Courts in that their members are humans interpreting a constitution written by humans, and because of this there are several different interpretations that can be reached from the same text. Samuel Finer argues that the same article of a constitution can have four meanings, depending on the school of interpretation. Firstly; what the drafters meant, secondly; what the text means, thirdly; what the reader understands and finally; what the judges say it to

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[33] The *Bunreacht na hEireann* (Irish constitution), amongst others, forbids the legislative from passing any laws that are repugnant to the constitution (art.15:4:1)
[34] The Jurisdiction of the *Bundesgericht* as laid out by the Swiss Constitution gives power to preside over intercantonal law, but article 189(4) states "acts of the *Bundesversammlung* and the *Bundesrat cannot* be brought before the *Bundesgericht*. *Exceptions are established by statute*. (Italics mine) This list of examples is by no means exhaustive, but is intended to highlight the point of the argument.

mean (1995: 4-5).

This leaves constitutional theory with a problem. If the constitution is going to be the fundamental law of the state then it needs to be written in a precise and unambiguous manner. As K.C. Wheare argues;

> It [the constitution] should confine itself, therefore, as completely as possible to stating laws, not opinions, aspirations, directives or policies...The language employed, though inevitably general and wide in some matters, should at the same time avoid as far as possible, the ambiguous, the emotional and the tendentious[35] (1963:73).

The constitution needs to elevated above 'normal' laws in order for it to maintain its fundamental position, not only within the state, but also within the legal system. Despite this, this is not always the case. There are certain constitutional systems in which 'constitutional' laws can be changed in the same manner as 'ordinary' laws. In these examples, there can be either no constitutional law *or* no ordinary law. If both laws are changed in the same way, then the distinction between them is lost.

Secondly, when the constitutional law is not supreme, and if a government can change laws with relative ease, what is to stop them acting dictatorially? Certainly not the constitution or the courts. Finally, with regards to the otiose nature of the constitution, the difficulty or special process needed to amend it will add to its stature. When the government distinguishes between these laws and ordinary laws, then the laws are raised on to a higher pedestal (the so-called lex-superior ideal, Lane 1996: 8).

Althusian Constitutionalism

Recalling the definition offered of the Althusian 'state' in Chapter One, and having identified a catalogue of characteristics of the 'modern' constitution consisting of a bill of rights, a separation of powers, a written text and the supremacy of law, let us compare these features to Althusian constitutionalism. In general terms, the constitutionalisation of the differing *Consociatios* is dependent on a set of common

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[35] Royce Hanson argues that as 'constitutions are written by politicians and not by philosophers, the values embedded within a constitution are often vaguely stated or implicit' (1966: 106).

factors: a set of common laws and a means to communicate things, services, rights and mutual benevolence. This method of constitutionalisation can be seen as both tiered and collectivist, which is a stark contrast to the *Societas* constitutionalism that revolves around the individual and a single agreement to establish a State. Another interesting difference can be found in the work of both Hobbes and Rousseau. For the latter, the agreement centred on subjects of a state willingly gave up political power to a government through fear of other subjects (Rousseau *Social Contract*: 130), while for Hobbes man the agreement joined civil society due to partially due to mutual fear of others. For Althusius, this is quite the reverse, as can be identified by the fact that, as we shall see in Chapter Three, Althusian political theory needed no fictitious 'state of nature' in which to start. In addition to the sociability of man, for Althusius, the communication of things, services, rights and mutual benevolence is for the good of the immediate *Consociatio* and indirectly for him, as the individual can only realise himself within the *Consociatio*, thus it is in this individual interest to foster communication.

The Need for a Written Text?

Whether or not the covenant needs to be written will depend largely on the level the *Consociatio* occupies within the system. The covenant for a Collegium of three members may opt for a verbal agreement, as a necessity of efficiency. Likewise, it would be rather strange if a family, although a political *Consociatio*, had a covenant; this is more likely to be based on the marriage between the man and the woman.

The need for a written covenant increases with the number of members. If the cities and provinces that comprise the Commonwealth all have written covenantal agreements, then the likely outcome is that the Commonwealth will also have a written agreement as: "...the Universal Association [Commonwealth] has been constituted under the fundamental law of the realm, and this law is nothing but those pacts by which many cities and provinces agree upon the establishment of a commonwealth" (Hueglin 1979: 19).

The Bill of Rights

The *need* for a Bill of Rights to protect individual liberties and/or rights is removed. In the *Societas* canon, the individual can realise his rights perfectly within the state of nature, but on leaving and joining the state, he surrenders some of these rights to the government created by contract, as the individual can no longer perfectly realise *all* of his rights. In this Thomas Paine inspired notion, the Bill of Rights can be viewed as a receipt for those rights that the individual surrenders to the government. In this way the Bill of Rights, usually through the enforcement of a Court, can be seen as a safety barrier as it ensures that rights are not encroached by government actions.

In the Althusian *Politica*, the emphasis on individual rights in a centralised document is removed. The emphasis here is shifted onto the individual in direct relation to his immediate *consociatios* and the subsequent rights and duties that result from membership. In the Althusian 'state', man joins into *consociatios in order* to realise himself. Through the communication of rights each member of the *consociatio* agrees with every other to be ruled by a certain set of rules, but this does not necessarily refer to a Bill of Rights in the *Societas* sense. The shift away from individual rights, via a bill of rights, is also affected by the removal of the conflictual nature of the political system. If a majority makes a decision, there is always the potential for a minority to feel that they have had their rights infringed. In *Politica*, the emphasis is on consensual politics within each *consociatio*, thus the possibility of rights being 'infringed' is greatly reduced, if not removed, as due to the efficiency of size, each member has the ability to participate. If one member of the *consociatio* does act in a selfish and individualistic way, this will not only be to the detriment of himself, but also to the *consociatio* as a whole, as the individual's self-improvement is directly linked to that of the *consociatio*.

Secondly, and also in relation to the nature of man within the *Societas* canon, this individualism creates a position in which rights are the predominant feature. This position is clearly influenced by the natural right theorists such as Locke, but even if a *Societas* position that does not rely on a 'state of nature' is observed, such as that of

Burke[36] or Paine, the important aspect is the natural and civil rights that man enjoys in relation to the government of the society.

In comparison, Althusius has no interest at all in theories about human rights (Carney 1995: xvi), whether natural or civil. What does interest him is the extent to which any association fulfils the purpose for which it was intended, and this intention will be satisfied by the differing members of the *consociatio* fulfilling their duties in relation to the *consociatio* as a whole. This is not to deny the absence of rights in Althusius' work, but due to man's mutually dependent nature, if the individual is to realise himself fully, it will be through his service to the respective *consociatio* of which he is a member. In this respect, Althusius would oppose tyrannical government, not because it is 'undemocratic' or endangers individual rights, but because it is ineffective in supporting the ends for which each person originally entered into the association (Ibid.).

The Separation of Powers

Although Althusianism may or may not be written and may or may not contain a Bill of Rights in the *Societas* sense of the word, the text or covenant will be the supreme or fundamental law and it will contain a very intricate separation of powers. The covenant will be the fundamental law of the Common Rights (*jus commune*) of the Collegium (*Politica*: 36), which Frederick Carney notes is the fundamental law or the constitution of the association (Ibid: fn 11). Indeed for Althusius it is 'indeed the pillar of the realm' (Carney 1964: 128).

In *Politica*, we find a separation more elaborate than that advocated by Locke, Montesquieu or Madison. Subsidiarity, a term fully discussed in Chapter Five where we explore its relationship to federalism, is inherent in the Althusian system, and meant that no one body could dominate the others. The Commonwealth was merely the product of previous *consociatio* and so dependent on these agreements for its

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[36] Despite the fact that Burke was adamantly opposed to the revolutionary nature of the French Revolution and the notion of basing a Government on rights, he did not deny that man did have natural rights; however these were relevant to a pre-civil, natural society and were to be exchanged for real rights, which could actually be enjoyed by living in a particular community (McClelland 1996: 390).

existence. If the Commonwealth began to act in a tyrannical way, its constituent parts would simply either dissolve it or cede from it and form a new one. The presence of subsidiarity within the system (*Politica*: 197) ensures this.

The second 'prong' of the Althusian separation of power is that in each level of *consociatio*, although the prefect was elected to oversee the general running of the *consociatio*, he only has power over his colleagues individually, not as a whole. In this way, although the prefect is superior, he is inferior to the Collegium that elected him and to whose pleasure he must serve[37] (*Politica*: 34): "And so these general administrators of the community are appointed by the city out of its general and free power, and can even be *removed from office* by the city. They are therefore temporal, while the community or city may be continuous and almost immortal" (Ibid: 41. Emphasis mine).

At the level of the Commonwealth, this separation is further complicated. The Supreme Magistrate: "...exercises as much authority as has been explicitly conceded to him by the associated members or bodies of the realm. And what has not been given to him must be considered to have been left under control of the people or universal association. Such is the nature of the contractual mandate" (*Politica*: 126).

In keeping with the practices found in the other *consociatios*, the Supreme Magistrate is supreme in relation to individuals, but he is not supreme in relation to his subjects collectively, nor to the law, to which he himself subject' (*Politica*: 120).

In addition to this, the Supreme Magistrate is also checked by the Ephors, to whom Althusius gives five fundamental rights, of which four are imperative for the separation of powers:

1. The Ephors contain the supreme magistrate and general administrator that they have constituted within the prescribed and accepted limits of his universal administration (*Politica*: 103-104).
2. To constitute themselves guardians, trustees, and administrators of the realm upon the supreme magistrate's capacity, death, madness, imbecility,

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[37] Although this reference was taken from Althusius' discussion on the Collegium, it can be found throughout his structure.

minority, prodigality, or other disorder and impediment rendering him incapable or harmful in administration (Ibid: 107).

3. To resist a supreme magistrate who abuses the rights of sovereignty, and to discharge and remove him when he scorns and violates the rights and laws of the realm, and practices tyranny (Ibid: 108).

4. To defend the supreme magistrate and his rights against the ambitions, conspiracies, and plots of subjects, against the pride of the nobles, and the factions and seditions of the mighty, against those who act improperly towards the supreme magistrate's royal power, weakening him or impeding him, depriving him of it, or inflicting force and violence upon him (Ibid.).

In this way neither the Ephors nor the Supreme Magistrate can usurp the power of the other, as although they are both powerful, in relation to each other they are mutually checked.

If we take the separation of powers to refer to the relationship between the legislative and executive branches of government then this *can be* found in *Politica*. For the *consociatio* that are lower than the Commonwealth, i.e. cities, Collegiums or province, the executive is mandated in the prefect, who in turn is not only checked by the *consociatio* as a whole, but also by elected representatives (a form of Ephors). The separation can best be found within the relationship between the Supreme Magistrate and the Ephors within the Commonwealth. While the Supreme Magistrate is clearly the executive, his powers are checked not only by the mandate he is given, but also by the Ephors themselves. This arrangement, to an extent, also applies to the Ephors, they check the Supreme Magistrate, but in turn are also checked by him.

The final prong of the separation of powers emanates from the subsidiarity principle and thus continues largely from the first. Within each *consociatio* there will be two sets of agencies, one representing the lower levels, which must retain as much power as possible, the other representing the higher levels, whose jurisdiction is limited by the lower levels (de Benoist 2000a: 33).

From the discussion above, it is evident that the variant of constitutionalism presented by Althusius differs in several fundamental ways to that of the *societas* canon. *Societas* constitutionalism represents a legal form of agreement between individuals to form a state, with the text designed to protect the liberty of the individuals, via both the bill of rights and the separation of power. For Althusius, the constitution represents a form of organising differing levels of *consociatios*, each of which is based on its own agreement. Moreover, as Althusius' emphasis is on organisation and the extent to which each *consociatio* fulfils the purpose for which it was formed rather than individual liberty, his form of constitutionalism, while containing a more elaborate separation of power than the *societas* variant, does not contain a bill of rights in the *societas* sense.

We have suggested two reasons for the difference between the Althusian and *societas* constitutions: the lack of the contemporary state in 1603; second, the practical manner in which Althusius approached his perceived political problems. With the absence of the sovereign 'state', Althusius does not have to contend with the centralised nature of power in the way that *Societas* authors were forced to. In addition, Althusius' strong Calvinism influenced the lack of centralisation in *Politica*, and so Althusius would naturally seek to leave as much power as possible at the lowest, and most appropriate, level.

Having compared the *Societas* variant of constitutionalism and that of Althusius, how is this discussion affected by the addition of the word 'treaty'? While it is clear that for the *Societas* canon, Treaty Law would govern any agreement between states, what alternative does Althusius offer, bearing in mind the absence of the state, in a *societas* recognisable term, within *Politica*?

What is a Treaty? Generic v. Specific definitions

Since the time of Grotius, the science of the Law of Nations has not ceased attempting to formulate a satisfactory classification of the different kinds of treaties (Brandon 1953: 56) and, despite the fact that there are International Conventions on the Law of Treaties, a definite term is still elusive. Indeed, Hugh Thirlway notes that 'if we

decline to essay any general answer to the question, What is a treaty?, we do so in good company" (1991: 4). The one dissenting voice in the literature is that of Arnold McNair who, in 1961, states that 'the user of a book entitled *The Law of Treaties* has a right to know the what *the author* means by the word 'treaty' (1961: 3. Emphasis mine), before using a definition given by Hersch Lauterpacht in his first report to the ILC in 1953: "...a written agreement by which two or more States or international organisations create or intend to create a relation between themselves operating within the sphere of international law" (Ibid.).[38]

In support of this, McNair declares that this definition: "...is submitted as an attempt to indicate what most persons, whether judges, counsel or authors, usually have in mind as a definition or description of a treaty" (Ibid: 4).

Yet these definitions of the term Treaty are still problematic, which is itself a problem, bearing in mind that 'for the foreseeable future, the 'treaty' will remain the cement that holds the world community together' (Kearney & Dalton 1970: 495). Authors have consequently, in a similar manner to the constitutional exercise in the previous chapter, attempted to identify common characteristics that 'treaties' share. In this way, Kelvin Widdows argues that a treaty in its narrowest sense is a formal instrument recording and constituting an international agreement, but the term is elastic and employed just as often to describe any binding international agreement (1979: 117). Denys Myers, largely supported by Michael Brandon (1953: 56), argues that; "...all agree that Treaties generically have the characteristic of legally recording what the parties have agreed to, and, beyond that, all hedge on completing a definition" (1957: 574).

This difference, noted by Widdows, is echoed in the United Nation Treaty Collection where 'treaty' as a *generic* term and 'treaty' as a *specific* term are differentiated. Whilst the *specific* term denotes the characteristics of each individual treaty, the generic term embraces 'all instruments binding in international law concluded between international associations, regardless of the their formal designation'. (http://untreaty.un.org/english/guide.asp) T.O. Elias observes that nearly all jurists

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[38] See Lauterpacht, (First) Report on the Law of Treaties, 1950 I.L.C. Yearbook (II) 92, U.N. Doc A/CN.4/63 "...a written agreement by which two or more States or international organisations create or intend to create a relation between themselves operating within the sphere of international law."

now accept "Treaty" as the *generic* term embracing all kinds of international agreements in written form, whatever their particular designation. (1974: 14) The problem with the *specific* term remains, however. Despite the existence of the Vienna Convention on the Law of Treaties (Vienna), 'there are no consistent rules when state practice employs the term "treaty" as a title for an international instrument' (http://untreaty.un.org/english/guide.asp).

This aim of the following discussion is to identify a general definition of a treaty from the existing legal literature. The reason why the generic, rather than the specific definition is sought can be found in the difference between the two. The specific example will talk about *the* treaty, while a generic will talk about *a* treaty. To find a specific definition of a treaty is relatively simple; an analytical investigation of any treaty, whether a peace treaty, friendship treaty or arms limitation treaty, will reveal a definition and structure for *that* treaty, however this definition will then have its limitations to its applicability to other treaties. Clearly, as the aim of this discussion is to find a working definition for a treaty, this specific definition does not serve our purpose.

The Vienna Convention (1969)

If we use the definition given by the first attempt at the codification of treaty law – the Vienna Convention on the Law of Treaties[39] we find a definition as follows:

> An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (article 2(1)).

However, the problem for Anthony Aust is not 'with the definition itself, but with whether a particular instrument or transaction falls within the definition' (2000: 14). D.P. O'Connell also finds the definition of a treaty unproblematic: For him a Treaty is

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[39] The majority of books written on treaty law after 1969 use the articles of the Vienna Convention as a base, and a good concise description of the Treaty and the process of its writing can be found in Richard Kearney and Robert Dalton's "The Treaty on Treaties" in the American Journal of International Law vol,64 1970 pp.495-561. All references to the Vienna Convention will be taken from the United Nations Treaty Collection at http://www.un.org/law/ilc/texts/treaties.htm

an agreement between States, governed by international law as distinct from municipal law:

> The name given to the instrument is immaterial provided the parties have contractual capacity in international law, and provided their agreement is intended to create rights and obligations, or to establish relationships governed by international law (1970: 195).

In support of O'Connell's point, Elias notes that formal agreements strictly described as Treaties have been called *conventions, protocols, pacts, acts, statutes, charters, covenants, concordats, declarations, agreements and modi vevendi* (1974: 14) and to this list, Aust adds *compact, solemn declaration, administrative Agreement, Platform, Agreed Minute and Terms of Agreement*[40] (2000: 22).

Despite the fact that there is a definition of a Treaty contained in the Vienna Convention, this is still problematic for a number of reasons. Firstly, although the article refers to a 'written text', this does not mean that oral agreements are excluded from the law of treaties (Elias 1974: 14). Jan Klabbers argues that verbal agreements were not included in the Convention; "...for the simple reason that it would have been difficult, if not downright impossible, to deal with both oral and written agreements in a single agreement" (1996: 8).

The lack of inclusion does not affect the validity of verbal agreements; (art. 3) indeed, the findings of the Ihlen Declaration in the Legal Status of Eastern Greenland case (1933)[41] were that a Foreign Minister may commit his State to a treaty merely by words, and unilaterally at that (O'Connell 1970: 203).[42] The Court found that when acting in an official capacity: "...the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, in regard to a question falling within his competence, is binding upon the country to which the Minister belong" (Ibid.).

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[40] Denys Myers, in his tabulation of the usage of treaty names from 1864-1952, could add to the list *at least* twenty more titles.
[41] P.C.I.J., ser. A/B, No. 53, p.70 (1933) in O'Connell (1970: 202)
[42] See also Elias 1974: 154-155 & McNair 1961: 9-10

In support, Arnold McNair argues that; "...provided that the two persons whose spoken words are relied upon as evidence of their agreement, are duly authorised to bind their states, there should be no reason in principle why a binding relation should not result" (1961: 7). However, as K.I. Igweike notes of the Court's decision: "...the Court did not expressly state that the verbal engagement was a treaty, but Judge Anzilotti in his dissenting judgement had no hesitation in concluding that there was "an agreement" concluded "by means of purely verbal declarations" and that "there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing in order to be valid" (1988: 224-225).

Furthermore, if the text of the Treaty is written, it does not necessarily have to be typed or printed. There is no reason why a treaty should not be contained in a telegram, telex, fax message or even e-mail (Aust 2000: 16).

The second problem is that as Treaties are usually written and between states, the Vienna Convention deals with these alone (Reuter 1989: 22). However, this does not mean that Treaties have to be solely between states. Indeed, a treaty can be concluded between a state and another subject of international law, in particular an international organisation, or between international organisations[43] (Aust 2000: 15). However, it must be made clear that International Organisations, unless given legal personality, do not possess the right to sign treaties independently of their members (Reuter 1989: 59). The most recent example of this situation, and one that is of interest to our discussion, is proposed article I-7 'Legal personality' of the Treaty Establishing a Constitution for Europe, which although not yet ratified, states that 'The Union shall have legal personality'.

In addition to the problems of definition, it has also been noted that the Vienna Convention has numerous flaws. Firstly, it only applies to treaties that are between States and ones that were 'concluded...after the entry into force of the present Convention with regard to such states'. (article 4) Secondly, despite covering the most numerous type of agreement (written and between states Reuter 1989: 22), it does not cover other significant aspects of treaty law, such as: "...treaties providing for

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[43] Although not covered by the Vienna Convention of 1969, a subsequent Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) has since been convened, although it is not yet in force.

obligations or rights to be performed or enjoyed by individuals, the effect of outbreak of hostilities upon treaties, succession of states in respect of treaties[44], [and] international responsibility of States in respect of failure to perform a treaty obligation..." (Elias 1974: 17).

Definitions & Structures

There are definitions of Treaties, however, which despite not being consolidated in international law are useful for the present debate, probably the best definition being that given by Sir Gerald FitzMaurice, Legal Advisor at the UK foreign office from 1945 - 60:

> ...a treaty is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between *associations* both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law" (in Thirlway 1991: 5 & Myers 1957: 575).

As this definition of a treaty is one of the most 'all-embracing', it would be useful to examine it in more detail to find the workings of a treaty. From the definition, six main points can be established;

1. A Treaty is an international agreement. As Anthony Aust notes, to be a treaty an agreement has to have an international character (2000: 14).
2. The text can be embodied in a single formal instrument (whatever its name, title or designation.)
3. The Treaty is made between associations both or all of which are subjects of international law.
4. The subjects possess international personality and treaty-making capacity.
5. The treaty is intended to create rights and obligations, or to establish relationships.

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[44] This has since been covered by the Vienna Convention on Succession States in Respect of Treaties 1978, which only entered force in 1996 and by 1998 still only had fifteen parties (Aust 2000: 305).

6. These relationships are governed by international law.

From this definition, it is possible to ascertain a working definition of a treaty. Having identified this definition, and similarly the discussion on the constitution above, it is now possible to compare the *societas* treaty with a comparable idea in *Politica*.

Althusius' Relationship to Treaties

Althusius' connection to international treaty law cannot easily be made, largely because modern treaty law has significantly evolved since the 19th Century, but this is not to say that Althusius was not interested in 'international' relations. *Politica* is a political theory proposing an internal political structure for a political association, like the Empire. Despite this emphasis on the internal governance, we can discern attention to treaty-like matter in *Politica*. More specifically, not only does Althusius appear to equate 'treaty' with 'agreement', but also in certain parts of the text, he offers practical advice on how the Supreme Magistrate should conduct affairs of this nature (*Politica*: 150, 180, 181). In Althusius' practical approach to political organisation, each association was to meet the desired end for which it was established. Those tasks that could not be achieved at the level of the family were mandated to the guild or to the village. Likewise, the tasks that could not be realised at this simple level of association were further mandated to the subsequent level. In this way, Althusius does foresee a situation in which the universal association may need to associate with other like-minded associations for the purpose of 'the augmentation and extension of the goods of the associated body'.[45] In this category Althusius differentiates between two positions; 'confederation or association with others' and 'a confederation with foreign people' (*Politica*: 89). Despite the fact that the two may appear to be arguing the same point, there is a subtle difference between the two. To highlight the former, Althusius argues that:

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[45] In addition to the agreement between bodies, Althusius also notes that: "The universal association is also augmented by legitimate occasions and titles other than by confederation, as by testamentary succession ... by donations and gifts of others, by legitimate war, by purchase, and by the marriage of the administrators of the commonwealth..." (*Politica*: 90)

In such a confederation other realms, provinces, cities, villages, or towns are received into and associated with the communion and society of the one body. By their admission, *the body of the universal association is extended, and made stronger and more secure* (*Politica*: 89. Emphasis mine).

Clearly, this is a situation that affects the evolution of the internal agreements of the universal association and so can be deemed to be constitutional. The latter example, however, can be deemed to be discussing treaties, as Althusius refers to an agreement with 'foreign' bodies. In furthering this point, he offers two distinct examples of such an agreement: 'partial' and 'complete' confederation.

The latter occurs when a:

> ...foreign realm, province, or any other universal association, together with its inhabitants, are fully and integrally coopted and admitted into the right and communion of the realm by a communicating of its fundamental laws and right of sovereignty (*Politica*: 89-90).

The subtle difference between this and the previous example of a 'confederation or association with others', is that in the former, the third party association becomes part of the existing fundamental law by integrating its own fundamental law with that of the universal association; in this way it is 'absorbed' into the universal association. In the case of the 'confederation or association with others', the two parties both agree to expand the universal association by creating a new joint fundamental law, thus both becoming equal partners in the venture.

The final type of confederation discussed by Althusius is the partial, in which:

> ...various realms or provinces, while reserving their rights of sovereignty, solemnly obligate themselves one to the other by a treaty or covenant made preferably for a fixed period of time (Ibid: 89-90).

From this analysis it is clear that the 'partial' confederation is where Althusianism is comparable to the international relations of the *societas* canon. In this example, two or more universal associations agree to enact one of their roles on a collective arena, but retain the right of sovereignty. The agreement that forms this relationship is a

treaty, similar to the Washington Treaty and NATO. Although there is an agreement in a complete confederation, this is not a treaty, as one association has agreed to join another by adopting the fundamental laws of the latter – this remains a matter of the fundamental law or constitution of each association. It is clear that it is the partial confederation that can be seen as dealing specifically with international relations and the creation of a supranational, treaty-based organisation. How, then does this relate to our understanding of the constitutionalisation of *Sui Generis* associations from an Althusian perspective?

Usefulness of *Politica* in Explaining *Sui Generis* Associations?

Can the EU be described as a 'complete' confederation? During a period of accession, when applicant countries are engaged in the negotiations of the inclusion of the *acquis Communitaire* to their legal systems, the EU can also be seen as being a complete 'confederation'. During this period, 'a foreign realm, province, or any other universal association' is integrated within the existing legal framework of the EU and becomes an associated part of the whole.

Can the EU be more fully described using the 'partial confederation' found in *Politica*? Like the previous example, this example offers greater potential than the vocabulary of the *societas* canon. The EU was founded in order for various states to 'solemnly obligate themselves one to the other by a treaty or covenant made preferably for a fixed period of time' (Politica: 89-90), with the aim of enacting their sovereignty on a higher, collectivised level *but* they retained their right of sovereignty.[46] In this instance, during the accession process, a new member would accede to the existing framework *established by the treaty*.

What can be discerned from the application of the ideas of partial and complete confederation of Althusius to the EU is that simultaneously they both offer a limited

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[46] That is in theory it is possible to leave and this right to leave was enshrined in the Treaty Establishing a Constitution for Europe under article I 59. At the time of writing, however, both the French and Dutch peoples had rejected the Constitution in a referendum, and so its future remained unclear. Even if the Constitution does not enter into force, it is possible to foresee some institutional changes to facilitate the 2004 enlargement, but whether the inclusion of the right of to leave the Union will be included is impossible to speculate upon.

understanding of the EU. For Althusius, the purpose of *Politica* appears to be the understanding of the internal relationships of the universal association, as opposed to the external relations that the universal association may enter into. In this manner, this limited discussion on the 'treaty' in *Politica* merely replicates the confusion found in the *societas* discussion. Whilst this represents a limit to Althusius as a medium of study for *sui generic* associations, it does not represent a barrier or a reason to dismiss *Politica*, as it should be remembered that Althusius' main discussion is of the constitutional structure *within* the universal association, not attempting to define the relationship between two or more universal associations on an 'international' stage.

Althusius' Relationship to the Treaty – The Right of Secession?

In addition to the possibility of the province or universal association being able to enter into partial confederations with others, there is also the possibility for any association to leave its current position and join another, if the "...public and manifest welfare of this entire part altogether requires it, or when the fundamental laws of the country are not observed by the magistrate but are obstinately and outrageously violated..." (*Politica*: 197)

In current vocabulary, this is the right to secession, which presents a fundamental alternative to contemporary practice, because in contemporary legal terms "there is no right, under...international law to...secession" (Crawford 1998: 99). Indeed, if secession did exist, this would mean that there would need to be an international law that allows a state to disintegrate without its consent. To confuse the matter further, international law also promotes the idea of 'self-determination' and this poses a problem to the territorial integrity of the state. On the one hand, the centralised state is favoured by the international system; while on the other, self-determination could lead to the disintegration of the centralised state. As Miller argues, secession is simply a matter of: "...whether national minorities who come to want to be politically self-determining should be allowed to separate from the parent state and form one of their own" (1998: 63).

Within the current system of international relations, for the reasons described above, this confusion is problematic. As Althusius' theory is not concerned with preserving the sanctity of the centralised state, he is in a better position to offer logical solutions to the problems of secession. In fact the logical conclusion, in Althusian terms, of an irreparable disagreement between levels of association is for the lower one to secede and join another association.

Despite identifying the possibility of secession within the Althusian variant, this does not mean that this can be seen as a 'digest for anarchy', as this must be reconciled with the rest of the *Politica*. This right to leave an association would be the last resort for an association to take, as one of the roles of the Ephors is to stop a situation in which the Supreme Magistrate violates the laws; in addition it is the fundamental role of the Supreme Magistrate to preserve the universal association. Secondly, although Althusius claims this right, arguably it is not meant to be enacted, due to the serious economic, political, geographical and military problems that would occur if one association ceded, but no other association did. Although theoretically possible, how is it practically possible for a city such as Emden to secede from the Empire and join the Swiss Confederation? The geographical implications for this alone were a significant barrier. In addition to this, the communications of the 1600s were primitive, and so everyday political life would be seriously hampered by a significant time delay.

Although secession appears to be an integral part of *Politica*, how realistically this right could be enacted this is thus a different matter. It could be perceived, however, that the right of secession was made known to the Supreme Magistrate in order to act as a constraint. That is, in addition to the complex separation of powers and mutual restraints between the Supreme Magistrate and the Ephors, the right of secession was used to further reinforce the notion that the job of the Supreme Magistrate was to govern for the welfare of the association, rather than for personal gain.

Conclusion

To sum up, the aim of the chapter was to address the issue of the constitution and treaty, as it is these two terms that dominate intra- and inter-state political relations in current legal discourse; but this duopoly has also been replicated in the EU constitutional discussion, and has led to confusion due to the *sui generic* nature of the EU. What has been shown is that although *Politica* addresses aspects of both the constitution and the treaty, it does so in a manner not dominated by the centralised state. What is also evident is that Althusius' version of the constitution shows more potential for the process of constitutionalising a *sui generic* association, than does his take on the treaty. The reason for this is simple. The aim of *Politica* was to offer a structure that would ensure that not only was the aim of government the promotion and furthering of the welfare of the specific association, but also that all those roles and responsibilities that could be undertaken by the primary associations were done so. In contrast, the sole aim of Althusius' brief discussion on the treaty was to either to develop a new arena that would enable associations more efficiently to act or describe a situation where one association joins another and becomes an association of the latter.

Therefore, despite the fact that the Althusian version of the treaty proposed some interesting consequences for the contemporary discussion, it will be the constitutional side of Althusius work that will be furthered, with the aim of comparing this to the possibility of constitutionalising a *sui generic* association. In order to do this, the following three chapters will explore, respectively, the three main areas of Althusian constitutionalism raised above: the social contract, sovereignty and the federalism. Similarly to the above discussion on the constitution, the main contention of each chapter is that the Althusian understanding of each concept offers a greater degree of understanding for that specific aspect of *sui generic* constitutionalism, than does its *societas* counterpart.

Chapter 3: The *Societas* canon, *Politica*, the States of Nature and the Social Contract

To early seventeenth –century writers, more or less selectively, over the whole expanse of human understanding, it was natural to treat political questions in the traditional way. *They asked how the state originated; and answered the question with little or no regard to historical evidence.*

D.H. Pennington 1972: 175. Emphasis mine.

This and the following two chapters will focus on an exploration of the theoretical aspects of Althusian constitutionalism in comparison with that of the *societas* canon. In this way, we will focus on the three key areas of Althusian constitutional theory: the social contract, sovereignty and federalism (Hueglin 1999b: 29). Not only are these three topics the main discussion pieces in the *societas* canon, but also these topics can be identified in *Politica*. Consequently, the chapters will explore the problems associated with the issues of sovereignty and federalism as they relate to the EU through Althusian 'lenses' to ascertain whether Althusianism presents a more fruitful theory of constitutionalism.

This chapter will discuss the issue of the state of nature and the social contract, as it is in these ideas that the basic features of the 'modern' state, such as individualism, can be located. The importance of this is twofold: firstly, these features will underpin the discussion of the next three chapters, and so it is important to discuss them at this juncture; secondly Althusius, while recognising a social contract, does not recognise a 'state of nature' and as a result presents a fundamentally different version of the social contract to that of the *societas* canon. The argument here is that this alternative version of the social contract presented by Althusius is better suited to the understanding of *sui generic* constitutionalism, for two reasons: firstly, it is not based on the same political principles as those of the sovereign state; secondly, as was seen in Chapter Two, rather than a single social contract, each individual consociation is founded on an individual contract.

The chapter will proceed as follows. First, the state of nature will be discussed in its Hobbesian, Lockean and Rousseaunian forms. While the type of state of nature

differed between the three, there were similarities between them, as the idea of the state of nature was methodologically used to serve an identical purpose, that is to offer a theoretical justification for the creation of the state. Second, the discussion will identify three fundamental differences between Althusius and the *societas* state of nature: for Althusius the man is naturally social and political, the basis of the Althusian 'state' is the individual collective, as opposed to the individual and finally, the notion of equality is questioned in *Politica*. An aspect of this discussion will clarify an important theoretical aspect of Althusius that has important ramifications for the idea of *sui generic* contractarianism, and that is the status of the 'individual' in *Politica*, the consequences of which will be explored both after the initial discussion and also in the conclusion to this chapter.

Third, following on from the discussion of the state of nature, the chapter will turn its attention to the social contract, and will focus on the criticisms made of the notion, most notably by King James I of England and VI of Scotland, Robert Filmer and David Hume (Lessnoff 1986: 83-86), paying particular attention to Hume's attack on Lockean contractarianism. After this, the discussion will focus on the response to these criticisms by Jean-Jacques Rousseau, as it is in the work of Rousseau that many of the faults of the social contract appear to be addressed. Following this theoretical discussion, the chapter will move onto the limited occasions in which the idea of the social contract has been used to describe the formation of a *sui generic* entity, in this case the European Economic Community. Fourth, the discussion will focus on *Politica*, as despite being presented as being in opposition to the *societas* canon, Althusius entire work is based on contractarianism, yet, in theory, Althusius' version represents a more applicable style of contractarianism to the complex nature of *sui generic* associations.

The State of Nature

Figure 7 shows the significant characteristics of Hobbes, Locke and Rousseau's state of nature. These writers used the state of nature to denote a pre-political condition or a time before the creation of the state that can be used for the

justification for the creation of the state and government. In this manner, the idea behind the state of nature is a logical hypothesis and is actually very simple.

Figure 7: Key features of the Hobbesian, Lockean and Rousseaunian state of nature

Author	Features of state of nature
Thomas Hobbes	Behavioural state of nature Law of nature induces men to leave Individualistic Equality Selfish 'Warre'
John Locke	Moral state of nature Ruled by inherently known law of nature Individualistic Equality Self-centred Competition
Jean-Jacques Rousseau	Hypothetical/Abstract state of nature Individualistic Equality Passive Lack of human contact

Source: The author

Whereas political societies vary from place to place and so were hard to predict, nature manifests itself in regular unchanging laws. Therefore, in order to add a level of certainty to the study of politics, it was essential to understand man and society in

abstract form, so that he, analytically speaking, must be moved from a natural condition governed by these natural unchanging laws (Hall 1973: 24) As Locke argue

> To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man (*Treatise*: 8).

Thomas Hobbes (1588-1679)

The focal point of the state of nature as a theoretical tool is undoubtedly Thomas Hobbes' *Leviathan*, which with the alternative title of 'The Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil', represented a watershed in the discussion of political association. The most significant feature of *Leviathan* was the rejection of Aristotle as a thinker, and the subsequent scientific approach adopted by Hobbes. It will be remembered that for Aristotle, man was *Zoon Politikon*: a social animal, and the symbiotic life for him is so natural that without it he could not realise himself (de Benoist 2000a: 31). For Hobbes, using this assumption as a foundation to build up a 'Doctrine of Civill Society', is:

> ...yet certainly False, and an errour proceeding from our too slight contemplation of 'Human Nature' as the exploration into the causes of man coming together will reveal that they do so not naturally, but by accident (*De Cive*: 22).

Indeed, the negativity that Hobbes saw in human nature is elaborated in *Leviathan*, in which he argues:

> Againe, man have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power to over-awe them all (*Leviathan*: 185).

For Hobbes, this negative aspect of human nature was a result of deep-rooted egoism that limits the possibilities for human co-operation (Held 1984: 33). Indeed, it is a time when all men seek to preserve life and acquire satisfactions and the means to satisfactions, and they seek to avoid death, dissatisfaction, sorrow, and those things that lead to them (Goldsmith 1966: 86). In addition to this egoism, the limited contact between individuals in the state of nature meant that the natural condition of mankind is inherently unstable (Gauthier 1969: 17) and the life of man is famously 'solitary, poore, nasty, brutish, and short' (*Leviathan*: 186).

This instability and egoism is not aided by the fact that in the state of nature all individuals are equal, although this does not mean that the state of nature is a time of perfectly identical clones. Rather, Hobbes argues that man consists of four parts: bodily strength, experience, reason and passion; the equality arises from the fact that these different parts will always consist of the same equal number. That is, although one man may be stronger or cleverer than the next man, he is still equal, as the four components of the individual will always be equal. As Hobbes demonstrates:

> For as to the strength of the body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe (*Leviathan*: 183).

In addition to this "equality", in this natural condition the selfish interests of the individual leads not only to both a suspicion of others (McClelland 1996: 193) and an equal hope in each man to satisfy his needs[47] (Goldsmith 1966: 87), but also to competition and aggression (Hood 1964: 75). As for Hobbes, life in the state of nature revolved around desires: 'Life it selfe is but Motion, and can never be without Desire'[48] (*Leviathan*: 130). It is these desires that lead to aggression and conflict, as due to the nature of the individual if two men desire the same thing 'very often they can neither enjoy in common, nor yet divide it; whence it follows that that the strongest must have it, and who is strongest must be decided by the Sword' (Hobbes *De Cive*: 27).

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[47] In this sense a man's 'needs' are not a single particular thing, but the generalised capacity to satisfy new desires as they emerge (Hampsher-Monk 1992: 23).
[48] Goldsmith clarifies this position with the macabre notion of 'only the dead are without desire' (1966: 86).

The paradoxical point of this selfish aggression, is that the preservation of many men is frustrated by the exercise of this right of each to preserve himself, so 'Reason suggesteth convenient Articles of Peace, upon which men may be drawn to agreement' (Hobbes *Leviathan*: 188). In other words, while the individual can exist in the state of nature, in order to achieve a greater degree of stability of life by avoiding harm and risking an early death, let alone to ensure the conditions of greater comfort, the observation of certain laws is required (Held 1996: 41).

As Hobbes demonstrates, these laws are needed as, in the absence of a supreme authority, man's rational individual calculation to preserve his own interest brings about an unwished for and disastrous consequence for all concerned (Hampsher-Monk 1992: 25). For Hobbes, these Articles of law of nature, were:

> ...a Precept, or generall Rule, found out by Reason, by which man is forbidden to do, that, which is destructive of his life or taketh away the means of preserving the same (*Leviathan*: 189).

More specifically, this 'generall Rule' should be:

> *That every man, ought to endeavour Peace, as farre as has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre* (Ibid. Emphasis in original.).

These laws of nature not only impose an obligation on man to leave the state of nature, but also to enter into a situation where the laws of nature are fully obligatory; that is to say, they oblige *in foro interno* or they bind a desire that they should take place (*Leviathan*: 215) in civilised society.

Hobbes' state of nature thus revolves around radical individualism and egoism, which in turn leads to instability, a pessimistic view of mankind that was influenced by the fear he himself had about the Civil War in England (1641-1649). Due to the instability caused by the rebellion to the Crown, Hobbes argued that an individual will not naturally enter society unless there is a sovereign power to over-awe him, as man is, by nature, a solitary and individualistic creature, who is either at war or who will ridicule his fellow men. In this natural state, there is no right or wrong, just or unjust,

simply because there is no common power (or Leviathan), thus there is no law (Murray 1929: 209).

The problem with this stance is that it is in conflict with Hobbes' concurrent theme in both *De Cive* and *Leviathan*; that is, that man's sole aim in life is to maximise his individual happiness. How can this be achieved in a state of nature where there is no culture, no use of the seas, no account of time, no arts, no letters or no society (Hobbes *Leviathan*: 186) and where private property consists *only* of that which man can defend? (Ibid: 188) So the question becomes how can man form a society when a) all he has known is a state of Warre?[49] and b) he is fearful and mistrusting of his common man? Hobbes argues that as man naturally desires that which is good for him, (*De Cive*: 30), it is 'easily judg'd how disagreeable a thing the preservation either of Mankind, or each single Man, a perpetuall Warre is' (Ibid: 30). This state of war within the state of nature will be 'perpetuall' as it cannot be ended by victory, simply because no man is strong enough to do so. So in order to end the Warre and enter into a contract each man has to authorise and give up their right of governing himself to this man, or this assembly of men, on the condition that thou give up thy right to him, and authorise all actions in a like manner (Murray 1929: 210). Thus, via this contract, both the society and the government, or more specifically the Leviathan, is formed.

John Locke (1632-1704)

The negativity of the state of nature that is a common feature in Hobbes is absent for Locke. Although Locke's *Second Treatise* contains many similar aspects to Hobbes' thesis, it can be viewed as an attack on, or at the very least an attempt to repudiate, the *Leviathan*[50] (Van Creveld 1999: 180). Locke raised a fundamental objection to the

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[49] It must be clarified here that by Warre, Hobbes did not just mean 'Battel onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of *Time*, is to be considered in the nature of Warre; as it is in the nature of Weather' (*Leviathan*: 186).

[50] The reason why *Treatise* attacks Sir Thomas Filmer personally, rather than Hobbes directly is that amongst the Royalists, Hobbes was not a fashionable character. Despite being given a job by Charles II after the restoration, prominent Royalists believed him to be a turncoat, as *Leviathan* could be used to justify Cromwell's rule; indeed some Royalists believed *Leviathan* was written to flatter Cromwell (Sabine 1941: 456). Although *Leviathan* could be used to justify Cromwellian rule, this did not make

negative Hobbesian view of mankind according to which individuals could only find peaceful life if they were governed by the dictates of an indivisible sovereign. Instead, Locke saw mankind in a more positive light in that rather than keeping the people in awe, the state should protect the life, liberty and property of the individual as laid down by the law (Hall 1984: 37), which would be established and controlled by the sovereign people, rather than made by an individual *Leviathan*.

This position could be achieved in two ways: firstly, while Hobbes' state of nature is a pattern of behaviours carried out by individual man, Locke's version is moral (Simmons 1989: 450) and refers to the rules which men are morally obliged to obey when they have not contracted or promised to modify their behaviour in any way (Hampsher-Monk 1992: 84). Secondly, while the state of nature for Hobbes was a time of 'perpetuall Warre', for Locke the state of nature is neither a state of war nor a properly political condition (Dunn 1969: 111).

In addition to this, not only does Locke deny that the state of nature is not a state of war, due to the adherence of the natural law (Hall 1984: 38), but also the state of war, which is brought about by a breach of the natural law, is one great reason for men putting themselves into society and quitting the state of nature.

In this Lockean version of the state of nature, the individual lives in a 'civilised' state; but rather than being ruled by an elected or hereditary government, he indirectly rules himself through the law of nature which is totally operable within the state of nature. As Jean-Jacques Rousseau acutely remarked of Locke, 'Primitive man is on his lips, but the portrait he paints is that of civil man' (Murray 1929: 223).

The positive position adopted by Locke allowed for a more elaborate discussion of the state of nature to occur. Indeed, there are two main features of the Lockean state of nature that highlight its progressive nature: there exists a law of nature to govern it (Locke *Second Treatise*: 9); and the presence of property. For Locke, the natural law was a set of fixed and permanent moral rules that are firmly rooted in the soil of human nature (Ashcraft 1968: 906), and man will naturally live by the laws of nature as they are transcended from God, and to break these laws goes against God's purpose

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Hobbes a 'turncoat', as he remained loyal to his philosophy, which was not loyalty not to a particular party, but to peace (Lessnoff 1986: 48).

and contradicts our own nature (Hampsher-Monk 1992: 82). If anyone did break these natural laws:

> ...the offender declares himself to live by another rule than that of reason and common equity, which is the measure God has set to the actions of men, for their mutual security; and so he becomes dangerous to mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him (Locke *Second Treatise*: 10).

This knowledge of the law of nature results in the fact that as there is no government or overarching power to keep men in awe in the state of nature, each man has the individual right not only to punish an offender who breaches the law of nature, but also to compel justice on other wrong doers and be executioner of the law of nature for others (Ibid.).

One major criticism that could be made at this juncture centres on man's inherent ability to know the 'laws of nature'. In *Politica*, Althusius argued that 'natural law is not so completely written on the hearts of men that it is sufficiently efficacious in retaining from evil and impelling them good' (*Politica*: 139-140). Locke did foresee this criticism to a degree, noting that some people may have been brought up in vice, and thus may not know the law of nature; however for Locke, the important feature was whether a man, through the social conditions of the state of nature, could gain knowledge of the natural laws. This is a distinct possibility, as it must be remembered that Locke's state of nature is developmental, not static (Ashcraft 1968: 906).

The second fundamental aspect of Locke's state of nature is the presence of property. Indeed, Locke argued that there were two 'states of nature', one before and one after the introduction of money. Unlike Hobbes, who saw no distinction between *mine* and *thine* (Murray 1929: 209) and private property was that which man could defend, for Locke the law of nature allows property and trade to be developed, *as long as* every man has an understanding of the law of nature (McClelland 1996: 234). As Gough explains:

> The only guarantee of the immunity of a man's person or possessions in the state of nature is the respect of his neighbours for the law of nature, which is

only another name for moral obligation, and which wicked men will ignore (1957: 141).

As Locke's primary objective was personal fulfilment, then mutual co-operation and limited contractual agreements, governed by the natural law, are the logical and natural course of action to take.

This picture of a perfect society governed by man's intrinsic understanding of the natural law, where there is hesitation to compel against another's life or property and where man can justly execute natural law against wrongdoers appears to be better than a political society, so what compelled man to leave this utopia? Indeed, Locke himself addresses this question directly:

> If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with this freedom? Why will he give up the empire, and subjugate himself to the dominion and controul of any other power? (*Second Treatise*: 65)

In answering the question, Locke argues that 'civil government is the proper remedy for the inconveniences of the state of nature' (*Second Treatise*: 12). These inconveniences stem from man's potential tendency to commit crimes against his fellow man and the danger of the victim to over-compensate in terms of justice. If there is no overarching power, or government, to execute the laws (the Hobbesian *Leviathan*), then the state of nature ceases to be a state of peace and reverts to a state of war. Secondly, and more importantly for the overall argument of *Second Treatise*, the state of nature is left, as while man lives in it 'the enjoyment of property he has in this state is unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual danger' (*Second Treatise*: 66). For Locke, the 'holy trinity' of life, liberty and property can be more effectively insured under a government, than it can in the state of nature.

<u>Jean-Jacques Rousseau (1712-1778)</u>

While Hobbes' state of nature reflected the most negative aspects of human nature, and Locke's reflected the positive outcomes through inherently known natural law, Rousseau's state of nature can be as 'historical'. For Rousseau:

> The philosophers who have examined the foundations of society have all felt it necessary to go back to the state of nature, but none of them has succeeded in getting there...It has not even entered the heads of most of our philosophers to doubt that the state of nature once existed, yet it is evident from reading the Scriptures that the first man, having received the light of reason and precepts at once from God, was not himself in the state of nature (*Inequality*: 78).

Gough argues that:

> The original state of nature, according to Rousseau, was neither a Hobbesian war of all against all, nor a Lockian abode of peace and goodwill; it was just a condition of brutish isolation, in which men were physically much stronger than they are today. Society developed by the family widening into a tribe, a nomadic existence giving place to fixed residence, and the consequent acquisition of property (1957: 164).

Despite this claim, the state of nature appears not to play the predominant position it does in either Hobbes or Locke; rather Rousseau's contribution to the overall discussion is focused on the social contract, rather than the state of nature. While Hobbes' *Leviathan* and Locke's *Second Treatise* were influenced by practical events,[51] Rousseau's social contract can neither be described as 'practical' in a Hobbesian or Lockean sense, nor can it be described as 'academic', a term Lessnoff uses to describe the latter social contracts of Pufendorf and Kant (1986: 70). Rather, Rousseau's theory needs be understood as a response to the author's own experience of contemporary European society (Ibid: 71): that is, the examples of Hobbes and Locke were written as a response to an actual political event, while that of Rousseau is a culmination of the writer's travels around the continent and is tied to no single specific event, but to a continuum of minor events.

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[51] For Hobbes the English Civil War, and Locke the Glorious Revolution of 1688.

The main criticism Rousseau made of Hobbes highlights the weakness of the abstract character of the state of nature; as although Hobbes attempts to describe a situation where all known laws are removed, he fails to remove the social consequences of the laws.[52] To this extent Rousseau implies that Hobbes has attributed 'social characteristics' to natural man, even though he was yet to develop the vice for *amour propore* (or Glory) as this would imply a desire for the superiority over others, which is a product of society (Lessnoff 1986: 77).

There are, however, three Hobbesian-like features within Rousseau's state of nature. Firstly, Hobbes' individualism and mutual fearing and mistrust are echoed when Rousseau notes that:

> ...it is impossible to imagine why in the primitive society one man should have the need of another man...or if such a need were assumed, to imagine what motive could induce the second man to supply it, and if so how the two could agree the terms of the transition (*Inequality*: 97).

Secondly, Hobbes went to great lengths to emphasise that due to the lack of a Leviathan in the state of nature, there could be no right or wrong, good or bad. Rousseau almost repeats this verbatim, when he notes man in the state of nature having no kind of moral relationships, or any known duties, could be neither good nor evil (Ibid: 98). Locke also shares the third Hobbesian characteristic, although for Rousseau it is slightly more complicated. Although *natural* inequality may exist in the state of nature, i.e. natural deformities, mental problems, problems associated with age or gender etc, there is no *social* inequality. This is because firstly man can and does exist independently of his fellow man and secondly; as no contact occurs social inequality *cannot* exist, as for a notion of social equality or *in*equality to exist, this has by nature preconditions of some form of collective groupings. Rousseau himself recognises as much when he states:

> ...it is impossible to enslave a man without first having to put him in a position where he cannot do without another man, and since such a situation

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[52] For instance, Hobbes' reliance on passions, appetites and desires for honours such as glory (Hobbes *Leviathan*: 128-130) within the state of nature.

does not exist in the state of nature, each man is therefore free of the yoke, and the law of the strongest is rendered vain" (*Inequality*: 106).

Although Rousseau does appear to share several similarities with Hobbes, he also displays one main similarity with Locke, but for a different reason. The main Lockean feature of *Inequality* is that man is naturally passive towards others. Rousseau, in concluding the first part of *Inequality*, finds savage man: "...wandering in the forests...without war, without relationships, without any need for his fellow man and without any desire to hurt them..." (*Inequality*: 104)

This lack of the will to make war was also found in Locke's primitive society; however for Locke this was due to man's inherent understanding of natural law, whereas, for Rousseau it is due mainly to lack of familiarity between men and the fact that man *does not* have to make war.

To sum up the *societas* state of nature in its Hobbesian, Lockean and Rousseaunian guises, it is clear that while the three writers viewed the state of nature in quite fundamentally different ways, there are common characteristics such as the emphasis on the individual, on individual equality and on the need to leave the state of nature and form a more secure agreement in the state. The other common feature they share is the use of the state of nature as a descriptive tool: as was touched upon above, the state of nature was not an actual time that existed prior to the state, but rather was a philosophical tool intended to explain the purpose, reason and need for the state.

Althusius and the "State of Nature"

As we have seen in Chapter One, Althusius was influenced by Aristotle, but also by Paul Ramet and so adopted a fundamentally different position to the 'state of nature' debate. Indeed, from an exploration of *Politica*, it is possible to highlight three fundamental differences between Althusius and the *societas* canon on the nature of the founding of the state, for which the state of nature served the *societas* canon: first, for Althusius, man is naturally social and political; second, the foundation of the Althusian "state" is the aggregate of individual consociations, rather than individual

persons; third, for Althusius, man is naturally unequal and this forces him to be social and political: 'necessity therefore induces association' (Carney 1995: xvi).

Man is Naturally Social and Political

The first argument why Althusius' theory could not start from a 'state of nature' is based on the author's interpretation of the Paul Ramet's (1515-1572) law of justice and law of truth. Ramus' interpretation of "invention", which is a strand of the theory of logic, made use of three laws he adapted from Aristotle's *Posterior Analytics* (Carney 1995: xiii): The law of justice (*lex justitiae*), the law of truth (*lex veritatis*) and the law of wisdom (*lex sapientiae*). the law of justice (*lex justitiae*) indicates that each art or science has its own purpose, that this purpose serves as a principle for determining what is proper to a given art (*suum cuique*), and that everything not proper to it is to be rigorously excluded (Carney 1995: xiv). Althusius utilises Ramus' law of justice in relation to "the purpose of political science", which according to Althusius, "is the maintenance of social life among human beings. He therefore proposes to remove certain legal, theological, and ethical material from it by which others in his judgment had confused and compromised its proper operation" (Carney 1995: xiv). From this theoretical position it is possible to draw the conclusion that Althusius would not have adopted the scientific approach of subsequent *societas* authors, as this would introduce external material, namely science, which may confuse and compromise the proper operation, not only of science itself, but also the maintenance of social life among human beings.

In addition to the use of the law of justice, Althusius used the law of wisdom, in which a proposition should be placed with the nearest class of things to which it belongs rather than with matters on a higher or lower level of generality (Carney 1995: xv), giving *Politica* a very ordered and structured appearance. This methodical structure appears to be in conflict with the scientific approach of the *societas* canon: logically, how could the state of nature affect all men, and if it did not, why did it only affect certain groups? These questions, coupled with the Althusian assumption of man being a public and political animal, results in the conclusion that theoretically Althusius could not start from the 'state of nature'.

Natural Inequality *v.* Natural Equality

A second key difference between the *societas* canon and Althusius, is that for Hobbes, Locke and to an extent Rousseau[53], man was an individual creature attempting to serve his own individual needs. Also, man in the state of nature for Hobbes, Locke and Rousseau is equal. Hobbes starts chapter XIII of *Leviathan* by stating that:

> Nature hath made men so equall, in faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body or of quicker mind then another; yet when all is reckoned together, the difference between man, and man is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he (*Leviathan*: 183).

Similarly, Locke opens Chapter II of *Two Treatise* by noting that:

> A state of equality also, wherein all the power and jurisdiction is reciprocal, no one having more than another... (*Treatise*: 4)

Conversely, Althusius, free from the abstraction of the state of nature argues that man, due to God giving uneven talents to each, is naturally unequal and so:

> ...while some persons provided for others, and some received from others what they themselves lacked, all came together into a certain public body that we call the commonwealth, and by mutual aid devoted themselves to the general good and the wealth of this body (*Politica*: 23).

Not only did this inequality make man seek an association with others, it also makes man helpless on his own, and therefore requires social communication in order to overcome this state of indigence (Hueglin 1979: 25):

> For this reason it is evident that the commonwealth, or civil society, exists by nature, and that by nature man is a civil animal who strives eagerly for association. If, however, anyone wishes not to live in society, or needs

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[53] For Rousseau, when man bound himself by the Social Contract he became 'collectivised', but Rousseau's initial theoretical basis was on man as an individual in the state of nature.

nothing because of his own abundance, he is not considered a part of the commonwealth. He is therefore either a beast or a god, as Aristotle asserts (Althusius *Politica*: 20).

The Foundation of the "State": aggregate total of the individual collectives *v.* the Individual

A third key difference between the two canons, and one that is central to this thesis is the foundation of society and government, which for Althusius is the aggregate total of individual collectives, whereas for the *societas* canon it is the individual himself. For Althusius, all human activity is seen as contributing to, and, in the end, constituting an integrated social whole (Hueglin 1999: 92). Conversely, for Hobbes the natural selfishness and self-interestedness of man meant that all his springs of actions aim either at self, its preservation or enlargement, or greater gratification (Murray 1929: 207). A further consequence of this starting point of man in different collectives, starting with the family[54], rather than on the fictitious state of nature, enabled Althusius to base his political theory in a more 'realistic' natural environment, than the abstract and much criticised state of nature.

Althusius and the Individual

Despite the fact Althusius was influenced by Aristotle's *Zoon Politikon*, so consequently there is no great emphasis on the 'individual' in Althusius, this does not meant that the individual does not exist. Rather the individual exists, but not in a manner in which current political vocabulary could describe him. This point needs to be emphasised as it has ramifications not only for our study of *sui generic* constitutionalism, but also for the issue of the social contract.

For Althusius, after the creation of man, necessity forced men to build separate houses, villages, counties 'since we cannot assume that all men lived together for any length of time at one place or in one family' (Friedrich 1932: lxix). As a result of this,

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[54] Locke himself recognised that the family was the basic unit of the first society (Dunn 1969: 114), but the emphasis was still on the individual in relation to the state, rather than the Althusian collective.

whenever Althusius discusses the "state", the 'consociatio symbiotica' or the body politic (*Politica*: 17-26):

>...he thinks of it as a vital phenomenon, as a natural phenomenon which leaves no choice to the individual. The notion that the people could choose in this matter is simply inconceivable from Althusius' point of view (Friedrich 1932: lxx).

This view results in Althusius' assertion that the man who lives outside of society is either a God or a beast (*Politica*: 25). In this way, the individual exists for Althusius, but only insofar as he is a member of a *consociatio* that is that he is engaged in symbiotic life, as a symbiote (*Politica*: 17). It is the family as a consociational group that is the basis and the key to understanding of any universal association; yet "...the head of the family goes out of his house, in which he exercises domestic imperium, and joins the heads of other families to pursue business matters, he then loses the name of head and master of the family, and becomes an ally and citizen" (*Politica*: 33).

Despite the fact that the head of the family is initially a symbiote in simple and private association (the family) once he leaves, he remains an individual, *so long* as he joins another simple and private consociation (the guild). The emphasis here is on practicality, both of representation and of political life. In support of this, Hueglin notes that 'the argument that there is no individual to be found in the Althusian state evidently does not hold' (1979: 21). Rather:

>...the individual participates in the state through the plurality of federally organised associations, which are all essentially political, and which all act as the natural mediators between the universal association and the individual, who is essentially defined as a private, social and political being (Ibid.).

In this way the discussion of the individual in Althusius thus becomes not one of 'does the individual exist?', but one of 'how is the individual represented in the

individual associations and commonwealth?' or 'how can the link between the individual and these associations be realistically connected?'[55]

In the 'traditional' social contract theory of Hobbes and Locke, the contract was an agreement between individuals to leave the state of nature and form a state, and in this respect P.J. Winters argues that a social contract is impossible in Althusius:

> ...because the universal association is not composed of individual or private association, but of cities, provinces and regions, which agreed on the constitution of the one political body, there is no individual to be found in the sphere of the state...it is therefore impossible to speak of social contract, which would necessarily have to originate in the free declaratory acts of autonomous individuals (in Hueglin 1979: 19-20).

In addition to the methodological differences between Althusius and the *societas* canon, the problem with regards to Althusius is the presence of these 'intermediary' levels between the individual and the "state" and their effect on the contract between the individual and the "state". Of these 'intermediary' contracts, Georg Jellinek argued that they would obscure the relationship between the individual and the state (quoted in Hueglin 1979: 21). In response to this, and in defence of Althusius, Gierke argued that there was no reason why the socialisation by successive steps as found in Althusius could not be explained in terms of a social contract, even if this contract is not yet based on the extreme individualism of later times (Hueglin 1979: 21). Again here the emphasis is on practicality, and in this runs counter to the established 'scientific approach' to politics that originated in the work of Hobbes and Locke, and can be seen in scientific notions such as 'the state of nature'.

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[55] There is a further debate related to Althusius and the individual that will be briefly touched upon here. For Friedrich, the true individual in Althusius' thought, is the religious individual. As Carl Friedrich notes: "...he [Althusius] is emphatic in rejecting majority decision in matters of religion because religion concerns individuals" (1932: lxxxii). Althusius, states that: "...faith is said to be a gift of God, not of Caesar. It is not subject to the will, nor can it be coerced. If in religion the soul has once been destroyed, nothing henceforth remains, as Lactantius says. We are not able to command religion because no one is required to believe against his will. Faith must be persuaded, not commanded, and taught, not ordered" (*Politica*: 172). This aspect of the discussion will not be pursued as this increasingly opens a theological debate, which does not serve the interests of the present discussion.

Hume and the Criticism of the Social Contract

Having discussed the theoretical origins of the *societas* state, the discussion will now shift to the logical conclusion of the state of nature: the social contract; focusing on criticisms made by David Hume and the Rousseaunian 'revival' of the term in the *societas* canon, and how the social contracts of Hobbes, Locke and Rousseau have been used as a tool of understanding for the original EEC, before moving onto the Althusian variant of the term, focusing particularly on the integral nature of the contract for all aspects of the Althusian structure, and certain structural constitutional characteristics that are to be found in *Politica*.

The notion of a social contract in whichever form, had by the time of Rousseau received such a volume of criticism as to kill off the theory more or less (Lessnoff 1986: 83). The first of the main critics of the idea was King James VI of Scotland and I of England. He argued that Kings ruled by divine right, and that if the King was established as a result of a contract, this would mean that there was a independent judge to decide on conflict that arose from the ruler and the ruled. According to James, the absence of such a judiciary highlighted the absurd nature of the social contract (Lessnoff 1986: 84-85). Richard Filmer's *Patriarcha or the Natural Power of Kings* (1680), the book that was famously refuted by John Locke in the *First Treatise of Government*, adopted a second line of attack. For Filmer, the idea of the social contract was nonsensical for two main reasons. Firstly, and as the title of his book showed, Filmer believed that Kings inherited their powers from Adam (comparable to the divine right of kings). Indeed, Filmer argues that:

> It follows that *civil power not only in general is by divine institution*, but even the assignment of it specifically to the eldest parent, which quite takes away that new and common distinction which refers only power universal as absolute to God, but power respective in regard of the special form of government to the choice of the people. *Nor leaves it any place for such imaginary pacts between kings and their people and many dream of* (*Patriarcha*: 7).

Secondly, Filmer used what Lessnoff has called the 'argument of the plain man of the common sense against the philosopher' (1986: 85): "Quite simply, the notion that

government originated in a contract – of whatever kind – is hopelessly unrealistic."
(Ibid.)

The third main line of attack, and arguably the most damning, was that of David Hume's *Of The Original Contract* (1748). Although Hume recognises the initial social contract, he also argues that man will only bind himself through his own consent:

> If this, then, be meant by the *original contract*, it cannot be denied, that all government is, at first, founded on a contract, and that most ancient rude combinations of mankind were formed chiefly by that principle (Ibid: 211-213. Italics in original).

Hume's criticism of the social contract theory stems from an observation of the world in which the social contract theorists would meet with nothing that, in the least, corresponds to their ideas, or can warrant so refined and philosophical a system (Ibid: 213-214). For Hume the problem arises after the original contractors have died:

> ...the contract, on which government is founded, is said to be the *original contract*: and consequently may be supposed too old to fall under the knowledge of the present generation. If the agreement, by which savage men first associated and conjoined their force, be here meant, this is acknowledged to be real; but being so ancient, and being obliterated by a thousand changes of government and princes, *it cannot now be supposed to retain any authority*. If we would say anything to the purpose, we must assert that every particular government which is lawful, and which imposes any duty of allegiance on its subjects, was, at first, founded on consent and voluntary compact (Ibid: 215. Emphasis mine).

Hume, however, rejects the notion of present governments being based on an *original contract*: "Almost all the governments which exist at present, or of which there remains any record in history, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people" (Ibid: 215-216).

Hume demonstrated that the state in its modern form was not directly based on a social contract, but through usurpation of power or occupation by foreign power, so that clearly the issue of consent to be bound by a contract was no longer was applicable to the discussion. In response to this, and this is one of the main pieces for the idea that Hume was directly attacking the issue of consent in *The Second Treatise*, Locke argued that the 'tacit consent' of the individual is sufficient to bind him to the contract, but this notion has been highly problematic, as for many critics, 'tacit consent is no consent'. On this issue, Hume famously quipped:

> Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives by day to day, by small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consent to the dominion of the master, though he was carried on board asleep, and must leap into the ocean, and perish, the moment he leaves her (*Original Contract*: 221-222).

The issue Hume appears to forget is that during this period, several people did leave the United Kingdom to find 'a better life' in the United States.[56] Regardless of this, Hume's criticism does appear to be focused on the Lockean variant of the social contract.

Hume's Attack on Lockean Contractarianism

The prominence of Locke in the debate on the social contract is interesting. Martyn Thompson argues that David Hume's criticisms of the social contract were (mis)directed at Locke (in Buckle & Castiglione 1991: 470), while Buckle and Castiglione note that in Locke's time, there were three variants of the 'fashionable theory': that of John Locke, or philosophical contractualism; the constitutional contractualism of William Atwood, Robert Ferguson and Samuel Johnson; and the 'integrated' contractualism of James Tyrrell and Algernon Sidney. Whilst Locke can

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[56] The actual number of immigrants to the USA prior to 1821 can only be speculated at, as before this time the Federal Government did not keep immigration records. However, Mark Nowak suggests that the number of immigrants from 1776 to 1819 was 300,000, but this includes *all* immigrants, rather than just those from England. One of the most famous of the English immigrants to the United States was Thomas Paine, who emigrated in 1774.

be seen as a social contract theorist alongside Hobbes and Rousseau, he appears to place less stress on the contract than either Hobbes or Rousseau, and this largely results from the positive view Locke has of the state of nature. Indeed, the presence of natural law in the state of nature makes it both possible and advantageous to enter into limited contracts with others.

In criticising Locke, Hume differentiated between the origin of government and the reasons why governments should be obeyed (Lessnoff 1986: 87). The protection offered by a government was essential for the human race to subsist in any sort of comfortable or secure state (*Original Contract*: 210), and so the government must be obeyed, not because of a contract, but for the 'sake of peaceful and orderly society (Lessnoff 1986: 87). This very stability of government was threatened by Locke's social contract as this contained the right to resistance against tyrannical government (Buckle & Castiglione 1991: 472); yet Hume saw government as both essential and serving a specific God-given, rather than socially constructed, role:

> As it is impossible for the human race to subsist, at least in any comfortable or secure state, without the protection of government, this institution must certainly have been intended by the Beneficent being, who means the good of all his creatures... (*Original Contract*: 210)

Whether or not Hume's criticisms were directly levelled at Locke or not is irrelevant in this context. What is of importance to our discussion is the response made to these criticisms by Jean-Jacques Rousseau. In many ways, the argument in both *Inequality* and *Social Contract* appear to heed the criticisms of Hume and respond to them in a manner in which the social contract is restored. Despite its abstract, or even utopian nature, Rousseau's *The Social Contract* (1762) arguably marked the first (and final) attempt to salvage the notion of the social contract.

The Response by Rousseau

The key point in Rousseau's theory is that society is formed via a social contract after the state of nature has been left, but that this society is unjust. In order to combat this,

Rousseau's invents *two* social contracts, one to form the state, and the second to equate to a governmental contract, or constitution. This notion of the dual contract represents a progression from the contractarianism of Hobbes and Locke; but it does so in such a way as to discredit Hume's criticism about the validity of the original contract. Rousseau would agree that the original contract cannot be seen to be the legitimate agreement of the state not because it is superseded by political practice, but due to the unequal nature of the original contract: in the state of nature the individual is equal, yet once in civil society, contact and relationships between different individuals ultimately led to inequalities emerging:

> ...inequality of influence and authority becomes inevitable among individuals as soon as, being united in the same society they are forced to compare themselves to one another and to take into account the differences they discover in the continual dealings they have with one another" (*Inequality*: 132).

From these relationships expressions such as 'large', 'small', 'weak', 'strong' and 'fearful' began to emerge (Ibid: 110). For Rousseau, in order to protect the weak from oppression, to retain the ambitious, and to ensure for each the possession of what belongs to him, (Ibid: 121) all must agree to unite their forces for the good of whole, and this finds face in the General Will.

Social Contract Theory and the EU

Despite the fact that authors such as Hume largely discredited the theory of the social contract, there has been a recent revival of the idea. Indeed, the idea has even been applied as a descriptive tool to understand the original institutional structure of the EU, or to be precise the EEC. One of the aims of Michael Newman's *Democracy, Sovereignty and the European Union* (1996), is to apply the social contract theories of Hobbes, Locke and Rousseau to an analysis of the original institutional structure established by the Treaties of Rome as a descriptive tool. Newman rejects the social contract of Hobbes and Rousseau as they involve the transfer of power by the individuals to the state, which then has full power over the constituent parts. Of

Hobbes' contract, Newman argues that: "The Hobbesian contract is *not* applicable to the EU, since it would suggest that the MS [member states] had agreed to abandon their right to self-government and to hand over all their power to a new supra-national state which could rule over them. This new Leviathan would then also possess full law-making powers throughout the Union, and the MS would be reduced to being passive recipients of its decisions" (1996: 26). Newman also dismisses Rousseau's contract as not only being a 'highly idealistic version of reality', but also suffering from the same fundamental flaw as Hobbes identified above.

Rather, Newman's argument presents Locke's theory as offering the best model of understanding the original Treaties of Rome, for three main reasons:

Firstly, 'for Locke, the new state was really an instrument to *facilitate* the attaining of existing interests' (1996: 27. Emphasis in original). In comparison, as each of the original member states had economic interests, the creation of the EEC merely offered an instrument to facilitate the attainment of these interests.

Secondly for Locke, while individuals were able to define their own goals, it was necessary to establish new 'legal and political institutions so that these goals could be attained more effectively', or in the case of the EEC; Community Law, with the ECJ to preside over it, and the Commission to suggest policies towards these aims (1996: 27).

Thirdly, in Locke's theory, the individual (through a legislature) retained the ultimate right to determine the law and the extent of power wielded to the executive and this is akin to the relationship between the governments of the member states and Brussels. As Newman argues, there was a tension in Locke's work between the creating:

> ...institutions with sufficient *independence* to achieve the aims which had been defined, and the need to ensure that they were ultimately in a relation of *dependence* on the governments that had created them (1996: 27).

This does not mean that Locke's theory is a perfect representation of the original European Economic Community (EEC); Newman highlights, for example, the fact

that Locke's political system was concerned primarily with the interests of those who already had power in pre-political society:

> Locke's system contained no mechanism for securing the consent of those without power in society, but the founding treaties of the EU were designed to accommodate the individual interests of all the MS (1996: 28).

The interest of Newman's exercise for the argument of this chapter is twofold. Firstly it represents an original attempt to apply the political thought of Hobbes, Locke and Rousseau to the EU, albeit in its original incarnation as the EEC. Secondly, it reveals that the idea of applying Locke's original contract is now no longer relevant, and so a new version of the contract is needed; but this does not mean that the idea of the contract cannot be used as a descriptive tool in the EU setting.

The contract proposed by Locke was a legislative contract in which the members, while retaining legislative power, agreed to form a government effectively to 'enforce the law of nature' (Lessnoff 1986: 62). While this analogy could be applied to the original EEC, as the purpose of the European institutions was to more efficiently enforce the trade interests of the original signatories; this analogy is no longer applicable. If the social contract to be of relevance for the current EU, it would need to be able to accommodate the European institutions, sub-state actors and other interested groups, as it was these actors who were evident in the European Constitutional Convention (2002-2004): thus, the application of Locke's social contract to the EEC has been superseded by progress. If the social contract is to again become relevant as a theoretical tool for understanding the EU, the contract in question must be able to accommodate the numerous non-state actors that are evident in the EU, *as well as* the Member States and the European institutions themselves.

Althusius and the Social Contract

Although this dissertation presents Althusius *in opposition* to the *societas* canon, this does not mean that the notion of the social contract is absent from his work. In the same manner as the discussion on the individual above, the social contract is an

integral part of *Politica*; yet its mistaken absence arises from Althusius' use of the term. Rather than Althusius advocating the social contract as representing an agreement between individuals to form a state, the contract represents the agreements reached by each individual level of *consociatio*:

> ...no realm or commonwealth has ever been founded or instituted *except by contract entered into one with the other*, by covenants agreed upon between subjects and their future prince, and by an established mutual obligation that both should religiously observe. When this obligation is dishonoured, the power of the prince loses its strength and is ended. Whence it follows that the people can exist without a magistrate, but a magistrate cannot exist without a people, and that the people creates the magistrate rather than the contrary (*Politica*: 122. Emphasis mine).

In addition to this, recent interpretations of Althusius also support the important role played by the social contract for Althusius. Michael Lessnoff, quoting Otto von Gierke, argues that it was Althusius who 'raised the idea of the contract to the level of theory' (Lessnoff 1986: 35). George Sabine contends that the contract figured in Althusius in two ways: firstly, it had a specifically political role in explaining the relations between a ruler and a people, but it also had a general sociological role in explaining the existence of any group whatever (1941: 417). Thomas Hueglin, moreover, argued that Althusius was one of the first great social contract theorists before Hobbes (Hueglin 1999: 86).

In relation to Althusius' use of the contract, an important qualification nevertheless needs to be made. The contract of the "state" is not an agreement between the individual members, but the individual consociations, which in turn are founded on contracts. A second important fact to remember at this juncture is that unlike the *Societas* canon, *all* the consociatio are political – even the family. In this manner, each of the individual consociatio has its own compact (or constitution) on which it is agreed:

> The simple and private association is a society and symbiosis initiated by a special covenant (*pactum*) among the members for the purpose of bringing together and holding in common a particular interest (*quid peculiare*). This is

done according to their agreement and way of life, that is, according to what is necessary and useful for organised symbiotic life. Such an association can rightly be called primary, and all others derivative from it (Ibid: 27).

A further concurrent theme of the Althusian social contract involves the idea of the oath of allegiance, which appears in relation to the superior (*Politica*: 40-41) and the senatorial committee (Politica: 42-43), to the Ephors (*Politica*: 58), the Supreme Magistrate (*Politica*: 93 & 106) and finally between the supreme magistrate and the people (*Politica*: 133). In this way, Althusius recognises that in some instances there is already a landed gentry within a consociation, and so the concern is how to limit them to serving the good of the collective, rather than using the collective to further their own personal gain.

So, what does this mean for our discussion on developing an understanding of *sui generic* constitutionalism? In general terms, *Politica* offers a system of social contractarianism, which, rather than relying on a fictitious contract between a group of abstract individuals to create a state, relies on social contractarianism as a logical progression from the smallest consociation to the Universal Association. In this way, the idea of the contract is an integral part of the Althusian system, and reflecting the nature of *Politica*, reflects a practical use of the term. With specific relation to the EU, relating the discussion back to Newman's application of the social contract to the EU setting, Althusius' model of constitutionalism offers a more realistic theory to that of the *societas* canon, as rather than starting from an abstract point, that is the state of nature, it reflects and takes into account the existing political structure of the body it attempts to constitutionalise. In this way, the Treaties of Rome founded the governmental structure and system of the EU, while the Constitutional Treaty attempts to define the roles of both the ruler (the European institutions) and the ruled (the member states).

Constitution Related Issues: The Removal of the Parliamentary System

There remain a number of characteristics of the Althusian political system that require exploration, as although they are not part of the constitution, there are principles that

emanate from the constitution: the first of these is that the conflictual nature of the current mode of parliamentary party politics would be largely removed from an Althusian inspired *sui generic* association. In the Althusian system, the main decisions and framework of the individual consociations have already been achieved through the establishment of the consociation, and so subsequent decisions need to reflect the fluidity of everyday decisions, for which the entrenchment of political views in parties is not effective. Rather, the lack of political parties within the decision-making process was offset by the guiding presence of strong Calvinist ethics in *Politica*. Indeed, Althusius notes that: "For a sound worship and fear of God in the commonwealth is the cause, origin, and fountain of private and public happiness. On the other hand, the contempt of God, and the neglect of divine worship, are the causes of all evil and misfortune" (*Politica*: 161).

One of the qualities of this approach is that it avoids the 'abstract' nature of parliamentary democracy and, as was seen in Chapter One, this is a point reiterated in Titoism. In representative democracy, it is impossible for each individual's views to be represented in a centralised parliament. Instead, the views of the constituents are reduced to 'abstract' collective wills, which the elected 'representative' then represents within the parliament. In this way, the political system is in many respects unrepresentative as the centralised nature of power does not allow the process to focus on individuals 'real' needs, so 'abstract' as opposed to 'real' views are represented. In *Politica* 'nowhere do the contracting parties appear alienated from any of their rights or wills' (Hueglin 1999: 86). As was seen in the Chapter One, the nature of the Yugoslav system consciously attempted to avoid the notion of the western parliamentary 'abstract citizen' who is divorced from the fundamental social relationships in which he develops: "Such an abstract and isolated individual can be represented only by an alienated, general deputy who pursues some sort of fictive general interest" (Todorović 1974: 3).

It must be made clear that this lack of political parties can also be found in Hobbes' and Rousseau's writings, indeed the latter vehemently attacked the idea of representation. In a chapter on the social contract entitled 'Deputies or Representatives', Rousseau argues that:

Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards...The idea of representation is modern; it comes to us from feudal government, from that iniquitous and absurd system which degrades humanity and dishonours the name of man...In any case, the moment a people allows itself to be represented, it is no longer free: it no longer exists (Rousseau *Social Contract*: 96-97).

Rousseau's solution to this problem was the notion of the General Will, which by its very nature could only work in small communities in which the individuals had a chance to participate directly in the running of the affairs, so individuals could act as 'stewards' of the general will. The problem here, and one that plagues much of Rousseau's work, is its abstract nature. The idea of the general will and each giving their all, but remaining as free as before is very much a utopian view; in stark contrast, Althusius' lack of political parties is based on methodical and practical solutions to the idea of multi-level constitutionalism, in which the 'general will' is the practice of prior consociations acting for a common purpose.

Politica and Decision-Making

The decision-making procedure outlined by Althusius also provides some interesting outcomes, not least that each consociation appears to have its own unique procedure. In the simple consociations, namely the collegium or guild, Althusius offers a subtle distinction between two forms of decision-making. For those issues 'common to all colleagues, or pertaining jointly and wholly to the colleagues as a united group, but not in matters separately affecting individual colleagues outside the corporate fellowship' (*Politica*: 37) a majority vote will bind the minority. The subtlety is that a majority decision cannot bind in matters 'common to all one by one, or pertaining to colleagues as individuals' (Ibid.), in which case decisions have to be made by unanimous decision, as 'what touches all ought to be approved by all'. (Ibid.)

Within the city, Althusius argues that there should be both 'a prefect or superior of the city' and a 'senatorial collegium' (*Politica*: 42), with the latter consisting of 'wise and select men to whom is entrusted the care and administration of the affairs of the city' (Ibid: 43). With respect to the decision-making process, a majority of the senators, either of all senatorial colleagues without exception, or with at least two-thirds of the colleagues of the entire collegium have to be present. Although this differs little from modern contemporary procedure, Althusius does add a condition. If, after the senators have voted, the 'gravity of the matter so demands' and 'the majority is thought to have decided incorrectly' the president of the senate may order the majority to consider the view of 'the dissenting minority' and 'discuss the matter anew'. After this process has occurred, the president 'decides on the basis of considered votes of the majority' and so a position is adopted. In addition, the minority is required to consent itself to the decision of the majority so that 'the decision of the majority is declared and held as the judgement of the whole senate or consistory, and binds the entire community' (*Politica*: 44).

The point of finding a consensus decision refers back to the idea of what is touched by all, ought to be approved by all. Only a consensus decision 'is sufficient in those matters that pertain to persons as a group, or that are done by the many as by everyone and the groups' (Ibid: 45).

The problem here is that Althusius does not give examples of situations where the 'gravity of the matter' so requires a 'rethink', and so this procedure may appear surprising. However, it must be remembered that Althusius saw that the senate and president were not only 'wise and learned' men, but also that as a group they were inferior to the consociation as a whole and, as servants of the collective body, their task would be to adopt decisions that would benefit the overall consociation, not the senators as individual members.

The reason behind highlighting this procedure is that it is clear that Althusius not only places the good of the whole at the forefront of the decision-making procedure, but also that the decision making-procedure is as a result of continual negotiations between 'learned' men who are not tied down to any particular party rule and ideology and so can be expected to be much more amenable to finding common ground, as opposed to party politicians that increasingly either focus on the negatives

of the opposition or on presenting an 'alternative' way. The result of this is that one group (potentially a majority of the population) will always 'lose', as their views will not be represented at all.

The Issue of Equality

One final (contentious) point of *Politica* will be discussed here, and that is the interesting perspective of Althusian constitutionalism on the notion of equality. Althusius spends little time on this specific point; there is one paragraph towards the end of his discussion on 'the city' that has potentially significant ramifications. Althusius argues that:

> Concord is fostered and protected by fairness (*aequabilitas*) when right, liberty, and honour are extended to each citizen according to the order and distinction of his worth and status. For it behoves the citizen to live by fair and suitable right with his neighbour, displaying neither arrogance nor servility, and thus to will whatever is tranquil and honest in the city. Contrary to this fairness is equality (*aequalitas*), by which individual citizens are levelled among...From this arises the most certain disorder and disturbance of matters (*Politica*: 49-50).

The problem stems from the translation of the terms *aequabilitas* and *aequalitas*. For Hueglin, the terms translate respectively as 'absolute equality' and 'adequate and fair degree of equality' (1999: 164), and refer to the process of communication of that which is necessary for consociational life within the city. In this regards, Hueglin argues that the distinction focuses on the relationship between the guilds and colleges that constitute the city. Absolute equality would lead to social disorder, while relative equality would foster concord between the different consociations (Ibid).

The fact that Althusius notes that people should be treated fairly, rather than equally, represents an interesting alternative to the current liberal notion of equality. To what extent this distinction can be transferred onto the current social order is questionable.

However, if it is remembered that not only did Althusius see a strong social order[57], but also that 'God distributed his gifts unevenly among men' (*Politica*: 23), then it is feasible that this distinction between fairness and equality *could* be applied to the Althusian social order,[58] but the applicability of this to the present day secular order remains an issue for debate.

The problem here stems both from the original translation of Carney, and also from the subsequent normative interpretation of Althusius' work by subsequent scholars. Not only do both Carney and Hueglin interpret the terms used by Althusius in a significantly different manner, but also there has been no subsequent work on Althusius in relation to this particular point, as it is merely a minor passage with *Politica*.[59]

Conclusion

To sum up, the three fundamental differences (lack of parliamentary representation, decision-making and equality) between Althusius and the *societas* canon mirror the argument of Chapter One, namely that the political and constitutional system described in *Politica* differs in such fundamental ways from the *societas* canon, that it is counter-productive to take aspects of it out of context. This idea is further supported by means of a single example. The fact that there are no political parties within the Althusian system may lead to criticisms of 'unrepresentativeness': how can the 'people' be represented if not through an elected representative? What *Politica* shows is that there are alternative representative methods to parliamentary democracy,

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[57] Althusius argues: "The secular order of the province is assigned, with the consent of the provincial members, the responsibility for the body, food, clothing, and other things that pertain to this life. It observes whether there is any need for remedy, aid, or amendment in political matters relating to the second table of the Decalogue. It does this in order that advantages to the province may be provided, and disadvantages to the provincial members avoided.
This secular and political order is twofold. It includes the nobility (*ordo nobilitatis*) and the commons (*ordo plebeius*), the latter of which embraces the inhabitants both of cities and of country villages. Whence there are three secular estates: the nobility (*status nobilitatis*), the burghers *(status civitatum)*, and the agrarians (*status agrariorum*)" (*Politica*: 60).
[58] It must also be remembered that Althusius promoted equality among consociations, such as guilds (Hueglin 1999: 64).
[59] There is however, an interesting connection in this regard to the work of Immanuel Kant. Reiss argues in relation to the work of Kant that: "A ruler should give everyone his due, but human beings are not equal. Therefore, the principle of merit, and not of equality, must be applied" (1999: 245).

which do not rely on direct elections or the representation of the 'general will' of constituencies. In addition to this, *Politica* offers a system in which interests can be addressed due to the nature of power being held within the simple consociations. In many ways, this point is repeated in Titoist constitutionalism, as discussed in the Chapter One. In 1953, Yugoslav officials Milovan Đilas and Aleš Bebler attended the conference of Asian Socialists and noted of the speech of British Labour Leader Clement Atlee:

> Atlee, too, gave a short speech on matters of principle; the point of it – that only the parliamentary system was worthy of humanity – left Bebler and me resentful. Though we no longer denied the value of the parliamentary system, especially its historic value, I thought Atlee's assumption old-fashioned and dogmatic. *The majority of humanity is not "parliamentary" and seeks different, nonparliamentary, paths* (Đilas 1985: 311. Emphasis mine).

In final conclusion, we have argued in this chapter that the Althusian constitutional system offers a fundamental alternative to the constitutional model of the *societas* canon in relation to the foundation and organisation of the political association. The difference between the two constitutional models is so important however that, in order to avoid the 'problems of translation' highlighted by Neil Walker in the introduction, it is essential to address *Politica* as a holistic theory of constitutionalism. Thus in the following chapter we explore a second key aspect of constitutionalism, sovereignty, which is treated by Althusius in a manner similarly distinct from the *societas* canon. The argument of the chapter is that Althusius' version of sovereignty represents a remarkably 'modern' understanding of the term. What is meant by this claim, is that the basic features of the present day understanding of sovereignty can be found in *Politica*, but with a subtle distinction that has the potential to further our understanding of *sui generic* constitutionalism. Thus, a secondary claim of the chapter is that the initial *societas* discussion on sovereignty by Jean Bodin and Thomas Hobbes represents a regression in lineage of political thought, as it was not until 1762 and Jean-Jacques Rousseau's *the Social Contract* that the *societas* canon laid the foundation for the present day understanding of sovereignty, advocating a theory of sovereignty that mirrored much, but not all, of Althusius' argument, some 160 years prior.

Chapter 4: The *Societas* canon, *Politica* and Sovereignty

Viewed from a wider angle, it is the applicability of statist concepts like sovereignty to the post-national reality which is thrown into doubt and it [this applicability] reveals the necessity to translate those concepts into conceptions that do not constrain the new reality...

Samantha Besson 2004: 3

If states were not sovereign political life would have to rest on a different normative foundation, such as suverainty or empire or theocracy as was the case prior to the revolution of sovereignty.

Robert Jackson 1999: 432

Famously, Voltaire argued that if God did not exist, it would be necessary for man to invent him; much the same can be said for the concept of sovereignty. Authors such as Jean Bodin initially devised sovereignty as a justification for the centralisation of the state under the authority of the Monarch, and so became a 'by-product' of the creation of the modern state. Indeed, the early *societas* authors, who greatly influenced modern state incarnation as we saw in the previous Chapter, saw the state as a prerequisite for the existence of sovereignty. The relationship between the state and sovereignty has become so interdependent that F.H. Hinsley argued that 'sovereignty will not be found in societies in which there is no state' (1966: 22). Furthermore: "Sovereignty is quintessentially an expression of a political relationship and, from a juristic perspective, sovereignty constitutes the essence of the modern state" (Loughlin 2003: 69).

Given these definitions the study of sovereignty in a *sui generic* setting, thus appears problematic. It must be remembered, however, that sovereignty existed prior to the Treaty of Westphalia in 1648, which marked the beginning of the sovereign state. Indeed, an initial discussion of sovereignty that occurred from 1576 to 1614 between Bodin and Althusius, which will be discussed below, occurred some 30 years before the Treaty was signed.

Despite Hinsley's assertion, the issue of sovereignty in the Westphalian *societas* system is problematic. This results from the fact that in the work of writers such as Bodin and Hobbes, sovereignty had a definite meaning; due to the continual evolution of the *societas* canon, however, sovereignty came to lose its original meaning in Bodinian-Hobbesian sense of the work. In this respect, a problem surrounding sovereignty is that there no concrete definition of the term. Subsequently, sovereignty has increasingly become a 'catch-all' phrase encompassing notions such as consent, self-governance, legitimacy and even the very notion of nationhood itself. Indeed, reflecting this, Newman lists the different variants of the word 'sovereignty': *state sovereignty*; *legal sovereignty*; *popular sovereignty*; *popular state sovereignty*; *popular state sovereignty in combination with various forms of 'totalitarian' claims*; *national sovereignty*; *divided sovereignty* and *shared sovereignty* (1996: 8-9. Emphasis in original). Furthermore, Newman adds the proviso that 'if someone refers to 'sovereignty', *without further clarification*, we cannot be sure what s/he is talking about' (Ibid: 9. Emphasis mine).

In many respects, sovereignty no longer exists, which is fitting, given it symbiotic relationship to the state. Indeed, some have concluded that:

> As a political concept, sovereignty has long been since emptied of substance. The character of the state and relations between states have changed so much that the conceptual coherence of sovereignty has be shattered. Sovereignty is neither final nor absolute; it is simply irrelevant. Bodin has effectively been superseded...today it much more acute to refer to the 'autonomy' of the modern state – its capacity to determine itself – than it is to speak of what is now outmoded sovereignty (Burgess 2000: 15).

This progression beyond sovereignty in its current form characterised much of the early EU constitutional debate on the subject. However, in the later debates, much of this debate focused on attempts to 'recondition' or 'reconceptualise' (Walker 2003: 10) sovereignty in order for it to be of relevance to *sui generic* associations.

In order to be able to explore these issues, this chapter will firstly explore a 'forgotten' initial dialogue on sovereignty that occurred in the Reformation era: between the years 1576 and 1614, the theoretical debate on sovereignty produced

definitions of sovereignty, which included many current characteristics. Second, after the analysis of this "initial discussion", the chapter will move onto the 'other' discussion on sovereignty; that is the evolution of the term in the *societas* canon, since it is important to understand the distinct changes to the idea of sovereignty and how they affect the concept in its present form. Third, the influence of Rousseau on sovereignty will also be explored in relation to the French Revolution, as this represents a 'watershed' for sovereignty, in which much of the political theory became political practice. Fourth, after this discussion, the chapter will discuss the theoretical problems of sovereignty, which result largely from the natural evolution of the *societas* canon. Fifth, the discussion will then place the problems identified thus far in the context of the *sui generic* EU. Here we will note two broadly different approaches to the subject in relation to the EU; one theoretical approach that focuses on "reconditioning" sovereignty in order for it to be of relevance to the EU constitutional discussion; and a political discussion, which explores the EU as an alternative model for Member States to exercise their state sovereignty. Sixth, the discussion will then explore the Althusian variant of sovereignty, focusing both on a critical comparison between sovereignty as found in *Politica* and *The Social Contract*; and finally, on the possible theoretical relevance of Althusian Sovereignty to the two EU 'camps'.

The 'initial discussion' of sovereignty 1576-1614: Bodin v. Althusius

Most discussions of sovereignty take as their theoretical starting point the work of Jean Bodin (1529/30-1596), immediately followed by that of Thomas Hobbes (1588-1679). While this lineage is almost forced on any discussion due, in particular, to Hobbes' relationship to the modern state, it does reject a key dialogue on sovereignty that occurred in the late 1500s and early 1600s. The importance of this discussion for our argument is that it occurred in the brief period immediately before the dominance of the modern state, in which both Bodinian and Althusian theories of sovereignty coexisted (Elazar 2001: 35); and subsequently allows us to explore a time when popular sovereignty existed *prior* to the state in its Westphalian form.

The origin of this dialogue was Jean Bodin's *Six Books of the Commonwealth*, (*Commonwealth*) (1576), in which Bodin advocated that sovereignty should be vested in a Prince who would restore and maintain order. For Bodin, peace was to be ensured through the 'absolutism of the Prince', but the Prince was not created via a social contract between individuals, as was to become the case in the *Leviathan*. Rather than adopting the 'scientific approach' of the later *societas* authors, Bodin's argument was shaped by the Reformation era in which he wrote, his belief (or not[60]) in Aristotelianism and, to many extents, his religious beliefs. In this way, while it is essential to recognise that Bodin 'gave form to the state as an intimate union of ruler and ruled' this remained a 'half-way concept' between two ages (Shennan 1974:76), and so remained 'a theory waiting for an equivalent view of man and equivalent sociology' (McClelland 1998: 284) in order for it to be fully realised.

For Bodin, the aim of *Commonwealth* was to demonstrate how the sovereign, who was established by God to be one of His lieutenants to rule over men, could restore peace in an already existing state. In this manner Bodin recognised a quasi-medieval commonwealth based on the Aristotelian notion of the family, and that the individual becomes a citizen upon leaving the family *as long as* they recognised the sovereignty of the Prince (McClelland 1996: 282). Furthermore, Bodin recognised that sovereignty was *absolute, indivisible,* that is located in one central position, and *interconnected,* that is all aspects of sovereignty are connected. This idea did not mean that Bodin is simply an earlier version of Hobbes. In addition to the difference on the nature and creation of the state, Bodin also recognised three types of laws, which each affected the ruler in a different manner. First, the Prince had to recognise the law of *God* (or *natural* law), but could not be forced by any human office to obey it; second, he had to recognise *fundamental* law (which could be equated with a modern constitution (de Benoist 2000b: 104); and, third, he had only to be tolerant of *customary* laws, and could amend or abolish these without consent.

Taking these features into account, we can see that Bodin's sovereignty is an early form of 'ruler' sovereignty, but one that is not formulated in the same scientific manner as that one adopted by Thomas Hobbes: indeed, Bodin's understanding of the

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[60] Of Bodin's Aristotelian beliefs McClelland notes: "Bodin thinks he is a follower of Aristotle, but if he is, he is the follower of the wrong Aristotle..." (1996: 281).

commonwealth is closer to Althusius than Hobbes; but, the key feature with Bodin is that he is the first political theorist to offer a 'modern' version of sovereignty vested in a single ruler, and his relationship to the state.

While our argument presents Bodin and Althusius as engaged in a theoretical discussion, this argument has been achieved retrospectively, as Bodin in fact died seven years before Althusius' wrote *Politica*. The 'discussion' between the two authors is thus focused on Althusius' constant reference to Bodin's work in *Politica*. Often Althusius was critical of Bodin, but, in many respects, the two authors share more similarities than they do differences. Not only were both these writers rationalists, in the sense that they regarded political science as a discipline distinct from theology, but they also believed that the hallmark of the state or commonwealth was sovereignty (Forsyth 1981: 74). In any case, as Hueglin rightly argues, Althusius 'could not ignore Bodin's epochal definition of sovereignty...since it had already begun to reorganise the modern world of territorial centralisation' (1999: 114).

While Althusius was in disagreement with Bodin's contention of the location of sovereignty in the Prince, he concurs with Bodin on the issue of sovereignty being 'indivisible, incommunicable, and interconnected, so that whoever holds one holds them all.' (*Politica*: 71). In addition, not only is Althusius in agreement with Bodin that the sovereignty is the "bond, soul and vital spirit of the commonwealth, without which it is degenerated and disintegrated", (*Politica*: 65) but Althusius continually re-iterates Bodin's distinction that 'a superior entity can have no equal or greater superior' (*Politica*: 71).

The important distinction between Althusius and Bodin, however, is the nature and location of sovereignty and the nature of the "state". For Althusius, the "state" was not a specific form of rule *over* human beings that created unity through the possession of sovereign power; rather, it was a specific form of association, namely one that was all embracing:

> It was, more specifically, an association of associations, marked off from the lesser associations...by its comprehensiveness, its self-sufficiency, its universality, its capacity to fulfil, not this or that particular end, but all the various needs of man both spiritual and material (Forsyth 1981: 77).

Bodin did differentiate between the form of the state and its government: however, the nature of the state was radically from that of Althusius. While the precedence of the sovereign power in one, a few or many defined the form of state as monarchy, aristocracy or democracy, any of these forms may have characteristics of the others because of the sovereign's decision regarding the type of government (Salmon 1996: 502). Resulting from this potential mixture, this led to the conclusion that sovereign authority *could* delegate offices and the mere exercise of some of its powers in more complex communities, but Bodin always favoured monarchical due to its concentrated source of sovereignty (Hinsley 1966: 123). Indeed, Bodin did emphasis the importance of corporations within a community, but he did not confer on them *fictitious legal personalities* in the same way as Althusius did[61] (Salmon 1996: 502. Emphasis mine). Instead, local autonomy is allowed *as long as* it does not constrain the sovereign (de Benoist 2000b: 102). For Althusius, this is where Bodin 'greatly errs'. By attributing 'absolute and all-encompassing' power to the King of France (i.e. the Prince) and hardly recognising the 'optimates' (*Politica*: 105) or the political restraints that naturally exist on the Prince, Bodin places both the Prince and the optimates in an unworkable position.[62]

In response, Althusius argued that sovereignty is located in the collective members as a whole (whom Althusius refers to as 'the people'); he also differentiates between the *jus regni* or the *jus majestatis* and the *posestas regni* – namely, the right of the realm or the right of sovereignty, and the power of the realm.[63] While the former is located

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[61] Any position in the commonwealth would have to have created or authorised by the sovereign. A key part of Bodin's discussion is that he argued sovereignty consisted of five 'marques' or 'prerogatives', the third of which states that it is the prerogative of the sovereign to 'establish the principle offers of the state' (*Commonwealth*: 64). After which Bodin discussed the manner in which the individual offers are constituted, one of which is election by the people. The key point to this prerogative is that right of sovereignty is not in the election of the officers, by either the sovereign or by election – rather the right of sovereignty is in the creation, confirmation and conferment of the office (*Commonwealth*: 66).

[62] Although Bodin did emphasise the importance of corporations within a community, he did not confer on them fictitious legal personalities in the same way as Althusius did (Salmon 1996: 502). Instead, local autonomy is allowed *as long as* it does not constrain the sovereign (de Benoist 2000b: 102). Althusius also is critical of Bodin's position that the sovereign was above the law, for 'to liberate civil law is to release it to a certain degree from the bonds of natural and civil law' (*Politica*: 72).

[63] As noted by Thomas Hueglin, there is an inconsistency in Althusius' work with regard to the terms used in translation. While in Frederick Carney's abridged version the terms *jus regni, jus majestatis* and *posestas regni* appear, in Hueglin's book he translates the *potestas regni* as *potestas imperandi universalis*. Despite this, as Hueglin himself comments, 'the central point, the separation of the ownership of sovereignty from its delegated exercise, remains clear throughout' (1999: fn 43). The negation, by the *societas* canon, of the differentiation between sovereignty and the right of sovereignty is a criticism that is also made by Daniel Deudney in his study on Philadelphian sovereignty. "Statists

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within the consent and concord of the 'people', the latter is located in the 'administrators of power' who recognise that they are not in control of the supreme power (*Politica*: 71). Consequently, although the rights of sovereignty and of the realm (*jus majestatis et regni*) are indivisible, incommunicable and interconnected: "These rights can, however, be *lawfully delegated*, so that in their *administration someone other than the owner may perform* the duties of the supreme magistrate" (Politica: 71. Emphasis mine).

Thus in this view, ruling institutions could not 'possess' (or even be the source of) sovereignty but could only 'administer the rights' of sovereignty on behalf of the sovereign people (Forsyth 1981: 78), and this represents a form of 'popular' sovereignty, as opposed to Bodin's 'ruler' sovereignty.

This 'disagreement' between Bodin and Althusius that can be identified in *Politica* represents the beginning and the end of this "initial discussion". The majority of writers who subsequently became involved in this debate were strongly influenced by the Bodinian variant of sovereignty. Indeed, *Politica* itself can be seen as a direct response to William Barclay's Bodinian *The Kingdom and Regal Power*[64] (1600); in turn, Henning Arnisaeus's *De Jure Majestatis Libri Tres* (1610), which supported the idea of sovereignty being located within a single ruler, can be seen as a major attack on Althusius. Only Bartholomaeus Keckerman (1607) attempted to find any kind of middle ground between the Althusian and the Bodinian sides.

What this Bodinian prominence reflects is the nature of political Europe during this period. The process of state building that was largely consolidated in the Treaty of Westphalia was growing in both emphasis and influence so much so that the Althusian version of 'popular' sovereignty was overwhelmed by 'ruler' sovereignty. More importantly for the ongoing discussion, the former was not really discussed again until the work of Jean-Jacques Rousseau in 1762. This claim that Althusius

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do not distinguish sufficiently between authority and sovereignty, and tend to leap from the definitional impossibility of divided sovereignty to the mistake of thinking a system of multiple authorities that are not hierarchically arranged is impossible or inconsistent with sovereignty" (1996: 196).

[64] In discussing Barclay's views on the subject of Ephors, Althusius writes 'I will repeat his [Barclay's] arguments, and refute them in a few words...' (*Politica*: 109). The connection between Althusius and Arnisaeus is less compelling. In the 1995 edition of *Politica*, Arnisaeus is mentioned once in relation to the topic of tyranny, but Althusius merely states that Arnisaeus 'has a different viewpoint from mine concerning the marks of tyranny' (*Politica*: 198). In a translation footnote to this, Carney adds 'Althusius neither elaborates nor responds to Arnisaeus' viewpoint' (Ibid: fn25).

represents the first attempt to popular sovereignty is supported by Thomas Hueglin who argued that: "by grafting the principle of sovereignty upon the organised body of the people rather than a state somehow representing individual citizens, he [Althusius] may indeed deserve to be regarded as one of the first early modern theorists of popular sovereignty (Hueglin 1999: 115).

The 'other' discussion on sovereignty: The *societas* canon 1651-1762

Despite its predominance, the Bodinian variant of ruler sovereignty presents a paradox, as it no longer complies with a modern understanding of the concept. Present day sovereignty in a democratic sovereign state is not based in a single ruler, but in the people as a whole who enable their sovereign rights to be exercised through elected representatives. This does not mean that Bodin has no relevance to the discussion of sovereignty, as the basic features of Bodin's theory; namely, its *absolute, indivisible* and *interconnected* still serve as the basis of the current understanding of the term. This leads us to ask the question, why did Bodin's theory of sovereignty gain importance over the Althusian model, and how did the Bodinian model evolve into the model we know today?

The answer to the first part of the question asked above revolves around two key historical events in the 16th and 17th Century. In 1572, the French King Charles IX, under the influence of his mother Catherine De Medici, ordered the murder of the French Calvinists, or Huguenots, who had visited Paris to attend the wedding of Charles' sister, Princess Marguerite to the Calvinist Henri, Prince of Navarre. The St. Bartholomew's Day Massacre, as the event became known, inaugurated a period of religious unrest in France.

This unrest formed the background to the argument in Bodin's *Six Books*, and while Bodin agreed with the Huguenot claims of Innocent Gentille's *Anti-Machiavel* (1576) that the massacre had been caused by Tyrannical acts of the Crown caused by the influence of Machiavellianism (Bonney 1991: 308), a right to resist the Prince meant that the people were superior and this appeared to Bodin to a 'recipe of anarchy'

(Franklin 1992: xxiii). Thus, Bodin has been cited as leading the strong reaction against both Protestant and Catholic resistance theory (Bonney 1991: 312).

Similarly, the political unrest that preceded the Civil War in England, led Thomas Hobbes to call for the strong leadership of the King. Even during the Civil War, Hobbes' basic argument remained that strong leadership, either in the form of the King or Cromwell, was needed to end the fear of being afraid, as Hobbes, like Bodin, saw the need for strong leadership to restore and/or maintain peace. In this sense, Bodin's theory of sovereignty 'won out' against that of Althusius because its basic principle, the location of sovereignty in the Prince promised, theoretically at least, to restore order to the largest states at that time: France and England. In retrospect, Althusius' location of sovereignty in the 'people' and exercised through representatives could be perceived by 16th and 17th Century French and English political theorists as either being utopian or unworkable, but more importantly, unable to restore peace, and therefore prosperity.

The answer to this second part of the question, 'how did Bodin's theory of sovereignty evolve into the model we know today?' represents what is called here 'the other discussion on sovereignty'; that of the *societas* canon. The premise behind this argument is that the Althusian version of sovereignty was ahead of its time by several decades, if not centuries. For example, one hundred and sixty years before Rousseau, Althusius had differentiated between the *jus regni* and the *posestas regni*, and allotted each its own specific role within the political system. Subsequently, the people in Althusius' system, while remaining the source of sovereignty, were able 'to delegate the exercise of sovereign power to different bodies as they please (according to their sovereign will)' (Elazar 1995a: xli). Even though Althusius had presented a coherent discussion concerning this division, his argument lost out to the *societas*-influenced state, largely due to the historical situation outlined above. Indeed, it was not until Rousseau's *The Social Contract* that the idea of the people as the sovereign, or 'popular' sovereignty began to re-emerge; but by this time Rousseau's work was largely seen as abstract utopianism and it took the actual revolutions of the United States and France for the notion of the people as sovereign to become practically accepted.

Theoretically, in this respect, the whole of the *societas* canon (including Rousseau) can be seen as representing a regression of political thought; and, in addition to the political context, the main reason why the idea of ruler sovereignty became theoretically dominant was the influence of Thomas Hobbes on political thought.

Sovereignty and Hobbes

Hobbes attempted to use a scientifically methodological approach to explore the problem of the state; as a result, the issues of religion that bound Bodin did not concern him. Indeed, while Bodin wished to endow the sovereign with God's qualities (van Creveld 1999: 177), Hobbes' conception of the sovereign is naturalistic and utterly remote from Christian ideas (de Jouvenel 1957: 233). However, Hobbes did not deny the existence of God. Instead he stoutly maintained the existence of God, but he denied that the church had any rights against the state (Bernstein 1930 189-190); for Hobbes, the church and the Commonwealth are two aspects of the same institution. Therefore, unless there was one governor (the *Leviathan*) over both state and church there would be civil war between the church and the state, between 'the sword of justice and the shield of faith' (Murray 1929: 213).

With regards to absolutism, Hobbes proved as ruthless as Niccolo Machiavelli and far more centralist than Bodin (King 1974: 54). For Hobbes, the issue of what law, if any, binds the sovereign was irrelevant. In this fashion, Hobbes was able to avoid the problems of Bodin, that is what laws, if any, can bind the Prince, by virtue of the fact that there is no 'fundamental law' that can bind the sovereign, and so the subsequent problem of who decides whether the sovereign has breached a law is non-existent. Indeed, the right of the people not to be bound by a sovereign's law, was for Hobbes, 'logically absurd'. In this respect, the decision was not between differing degrees of 'Soveraignty' but between civil government and the state of war (Fukuda 1997: 53). For Hobbes, absolute state-power, absolute sovereignty, was the necessary condition for stable politics and indeed for human safety (MacCormick 1999: 123).

Despite its absolutism, *Leviathan* does contain a typically modern concept, namely, the emphasis on consent and contract with words such as 'justly' or 'authority'

appearing in the relationship between sovereign and subjects. While the fact that the *Leviathan* was formed via a 'consensual' and secular social contract is a progression from Bodin's 'God on earth', the *Leviathan* fuses Althusius' distinction. In this respect, both sovereignty and the right of sovereignty are vested in the same place – the *Leviathan*. For, Althusius this represents a negative position for the entire state since: 'the less the power of those who rule, the more secure and stable the imperium remains' (*Politica*: 121). Indeed, for Althusius the whole scientific approach of Hobbes was false: "...there is no instance in which a people has conferred upon a prince the unrestrained license to bring about its own ruin. For a people when questioned could have doubtlessly responded that it had granted no power to accomplish its own ruin. ..." (*Politica*: 124)

Subsequently, Althusius offers four reasons why 'absolute power, or what is called the plenitude of power, cannot be given to the supreme magistrate' (*Politica*: 121).

> For first, he who employs a plenitude of power breaks through the restraints by which human society has been contained; Secondly, by absolute power justice is destroyed, and when justice is taken away realms become bands of robbers, as Augustine says;

> Thirdly such absolute power regards not the utility and welfare of subjects, but private pleasure. Power, however, is established for the utility of those who are ruled, not of those who rule, and the utility of the people or subjects does not in the least require unlimited power. Adequate provision has been made for them by laws;

> Finally, absolute power is wicked and prohibited. For we cannot do what can only be done injuriously. Thus even almighty God is said not to be able to do what is evil and contrary to his nature. The precepts of natural law (*jus naturale*) are to "live honorably, injure no one, and render to each his due (*Politica*: 121-122).

Despite this, the influence and importance of *Leviathan* cannot be understated. The *Leviathan* offered the basic premises of the liberal debate, such as the centralised nature of the state, the indivisibility of sovereignty and the social contract between

individuals that generated further discussion, most notably in Locke, and this influence is evident in the whole of the *societas* canon.

Spinoza, Harrington, Locke and Rousseau

Writing at the same time as Hobbes, Benedict de Spinoza echoed many Hobbesian characteristics, so much so that Spinoza has been described as 'a more consistent Hobbist than Hobbes'[65] (McShea 1968: 138). This should come as no surprise as not only were both Spinoza and Hobbes scientists, 'they [also] believed in the science of politics, and both men seek to construct it by means of psychology, seeking out the facts of human nature that concern them' (Murray 1929: 217). Although the influence Hobbes had on Spinoza is recognised, scholars have emphasised that Spinoza also differs fundamentally in certain aspects. For example, Spinoza's insistence on keeping natural right intact, that is evident within the state of nature, actually demolished the basic concept of Hobbes' political theory (Wernham 1958: 35).

Despite this, Spinoza shares the fundamental Hobbesian position that the state is 'an artificial arrangement for the betterment of the lot of individual men and they agree it cannot be too powerful if it is to achieve this end' (McShea 1968: 149). Consequently, and more importantly in relation to sovereignty, both Hobbes and Spinoza agree in favouring absolute sovereignty (Ibid).

Similarly, while agreeing with Hobbes, James Harrington, after asking fundamental questions of *Leviathan*, believed that absolute sovereignty was achieved via a system of stable and mixed government. While Hobbes saw the need for individuals to accept the will of the sovereign as essential to avoid anarchy, Harrington believed that this was not essential; instead what was required was the need to eradicate resistance (Fukuda 1997: 93). Harrington considered that to achieve a stable government it must consist of a bicameral chamber consisting of an equal 'senate' and a 'popular assembly' (Fukuda 1997: 96). In this way, although "both Harrington and Hobbes consider a government has absolute sovereignty when there is no resistance to it,

[65] McShea clarifies this point; "In what may be considered its preliminary passages, it is more than similar, it is identical, but identical not so much with what Hobbes actually said as with what he should have said had he been consistent" (1968: 137-138).

Harrington's man *will not* resist because his interests are satisfied by the government. Hobbes' man *cannot* resist because the government has the common power to suppress him" (Fukuda 1997: 125).

The fundamental difference between the two authors is, to summarise, that Hobbes believed power could prevent anarchy. Yet, this could not explain the military coup against the English Rump Parliament in 1653. In order to prevent the possibility of anarchy despite the presence of power, and by attempting to reconcile the differing forces within a commonwealth, Harrington was able to transform the notion of 'power' found within *Leviathan* to one of 'authority'. In this way, Hobbes prevented anarchy by not allowing the individuals to rebel against the *Leviathan*, while Harrington attempted to prevent anarchy by not giving the individuals a reason to rebel.

Regarding sovereignty, Harrington represents the beginning of a shift in emphasis, from the *Leviathan* (in either its singular or group form), to a more recognisable bicameral political structure; but the indivisible and absolute nature of sovereignty remains unchanged. In this manner, Harrington offers the first significant signs of the evolution of the status of sovereignty in the *societas* canon, a shift emphasised by John Locke.

As discussed in Chapter Three, much of Locke's *Treatise* can be seen as a rebuttal of Hobbes' *Leviathan*, and this is certainly true of Locke's discussion of sovereignty. Unlike the other authors of the *societas* canon, Locke has no theory on sovereignty: his true sovereign is the sovereign individual (Murray 1929: 225). Unlike Hobbes, where the state and government are needed to further man's individual aspirations in an arena of security, in the Lockean state of nature, man instinctively knew the laws of nature; thus the creation of the state, via the social contract, merely represented a more efficient manner in which to exercise these laws. To this end, the purpose of the state and of government is the protection of property of the individual, and in order for this to be achieved, a legislature is needed to which the sovereign individuals can delegate power in order for their common interests to be protected. Very much as a result of Locke's discussion with Robert Filmer on the patriarchal nature of government, the legislative once formed *cannot* transfer power, as the power they hold is delegated from the sovereign individuals, and thus they do not *own* it (Murray

1929: 226). So, rather than an all-powerful *Leviathan*, Locke argues that the government should be both minimal and separated: "Locke [can] be seen as one of the originators of the separation of powers, which was a device deliberately designed to prevent the accumulation of absolute power in the hands of any one branch of Government" (Gough 1958: 36).

Despite having no strict theory on sovereignty per se, but being individualist to the core (Murray 1929: 225), Locke's 'sovereignty' displays a deliberate shift from the uncontrolled 'tyranny'[66] of the state sovereignty of the *Leviathan* to a more popular sovereignty with a separated and minimalist government, which is dependent on the sovereign individual.[67]

Just as Locke was influenced by, but was critical of Hobbes, Locke was a potent influence on Rousseau, but the 'disciple is never as good as the master' (Murray 1929: 224). Rousseau, in many respects, completes the circle of sovereignty that originated with Hobbes. For Rousseau, as for Hobbes, sovereignty was indivisible, but the cyclical nature of the discussion meant that rather than the indivisible sovereignty being vested in the singular *Leviathan*, in Rousseau it is vested in the people's 'general will'. This similarity, yet fundamental difference between the two authors, has led commentators to note that:

> In fact, it is only necessary to substitute "absolute sovereignty of the people"
> for absolute sovereign or absolute assembly" and *Leviathan* becomes a
> "revolutionist's handbook" (Bernstein 1980: 192)

The Influence of the French Revolution on Sovereignty

Unlike *Leviathan* and *Treatise*, which were post-event works[68], *Social Contract* played a significant role in the ideology that inspired the French Revolution. The direct link that Rousseau's theory had on French revolution practice is palpable.

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[66] The word 'tyranny' is used in this context in opposition to the sovereignty found within Locke's thought. Although Hobbes makes it perfectly clear that *Leviathan* is formed by consent, and so any subsequent actions are legitimate, if this is superimposed onto a Lockean premise, these actions could be justly called tyrannical.

[67] The reason why Rousseau, rather than Locke, is taken as representing the first theory of *societas* popular sovereignty, is the elitist and inclusive nature of Locke's version of the 'people'.

[68] Both Hobbes' *Leviathan* and Locke's *Treatise* were *published* after the English Civil War and the Glorious Revolution respectively.

Wokler, supported by Russell (1979: 674), has even gone as far as to describe Rousseau as the 'French Revolution's Moses whose *Contrat Social* comprised its Ten Commandments (1998: 306-307).

The French Revolution also highlighted negative aspects of the notion of 'popular' sovereignty, and these criticisms can also be seen as a weakness of the *societas* version of popular sovereignty in general. If the people, as a collective of individuals, are construed as the 'nation', then the outcome of this scenario is that sovereignty is a representation of the Rousseaunian 'general will' – that is, the state is nothing more than the general will of the people. In the example of the French Revolution, this lead to the argument that due to Rousseau's claim that that the General Will was indivisible (*Contract*: 27-28), popular sovereignty required centralisation and uniformity to be realised; the Jacobin principle of unity' (Keating 2001: 14), which allowed for no variation of interest. This uniformity was continued in the institutions of the Republic:

> ...on account of the Jacobin framework...the primary emphasis remained on the principle of unity. The sovereign people were one and indivisible. The institutions of the republic were framed in such a manner as to underline this unity (Kitromilides: 2003: 472).

Bertrand Russell argues that Rousseau's work suffered the fate of most bibles in that, 'it was not carefully read and was still less understood by many of its disciples' (1979: 674). The Rousseaunian General Will existed as a theoretical foundation for the French Revolution, but the event manipulated Rousseau's abstract discussion to suit a particular need: Jacobin centralisation.

A second negative aspect of *societas* popular sovereignty concerns the relationship between sovereignty and representation. Indeed, as the basic principles of liberalism inherent in the *societas* canon were now dominant, the state was the result of an agreement between individuals and the natural groupings, such as the family or geographical groupings, although still in existence, did not figure in this relationship. Instead, the people as an *abstract entity* became sovereign without 'any presupposition of them being composed of particular communities and distinct entities' (de Benoist 2000b: 107-108. Emphasis mine). The result of this was that

sovereignty was 'given' to the people, but due to the individualism of liberalism, there was not the sufficient framework for the sovereign people actively to become involved, other than through voting for parliamentary representation, and this negativity was discussed in the 'abstract nature' of parliamentary representation in Chapter Three.

Despite this criticism, other authors argue that the French Revolution represented a watershed in both political theory and practice. Indeed, for Collignon, individualism is the very 'normative foundation of modernity':

> Autonomous individuals are kept together by contracts, which are based on the norms of freedom and equality and also on rights; individuals recognise their collective interests in the social contract, rather than in a hierarchically structure whole (2003: 64).

Collignon elaborates when he argues that: "the French Revolution of 1789 *emancipated* the individual from its communitarian subjection by proclaiming free and equal citizens as sovereign" (Collignon 2003: 64. Emphasis mine).

Thus while Hobbes initiated individualism in political theory, it was the Rousseaunian inspired French Revolution in which individualism found its practical realisation. In this respect the French Revolution can be seen as a 'watershed' in the practical existence of the modern state.[69] Despite its subsequent disturbances, the French Republic not only commenced the start of the modern European experiment with popular sovereignty, but its thinkers also went to great lengths to end the *societas* v. *universitas* debate in favour of the former, which represented an opportunity to apply the *societas*-liberal theories of Locke and Rousseau.

Whilst Althusius' popular sovereignty shares characteristics with the contemporary theory, due to the historical conditions of France and England outlined above, it was the ideology of the *societas* canon that became dominant and it was not until 1762 and Rousseau's *Social Contract* that the *societas* canon readopted many of the most basic

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[69] Although the French Revolution started the 'modern' European experiment with sovereignty, it must be remembered that the United Kingdom's model of sovereignty pre-dated that of the French, but represented a different interpretation. As a result of the Glorious Revolution of 1688, when William of Orange was invited to take the throne from James II, British sovereignty passed from the Monarch to Parliament.

characteristics of Althusian sovereignty, namely located on the 'people' and exercised in representatives. However, this was done so within the confines of the *societas* state.

Reflecting this evolutionary nature of sovereignty within the *societas* canon, coupled with the attempt to practically apply popular sovereignty in both the French and American Revolutions has meant that sovereignty has emerged as a quintessentially 'statal' concept and as such represents a barrier to the study of sovereignty within *sui generic* constitutionalism.

Firstly, as we saw above, there is the issue of misinterpretation and misunderstandings of classic texts on the subject.[70] As demonstrated above, both Bodin and Hobbes explored 'absolute' sovereignty, but they adopted very different approaches and placed the 'absolutism' in very different scenarios; yet, Bodin and Hobbes are both labelled as occupying the same 'absolutist' camp. In addition, there is generally an insufficient distinction made between the different ideas on sovereignty within the *societas* canon. It must be remembered, that while Bodin influenced Hobbes, Locke, Spinoza and Rousseau, the latter three of these addressed many of the weaknesses of the *Leviathan*, and subsequently the notion of sovereignty evolved.

The second source of the misunderstanding of sovereignty arises from the failure to make a distinction between sovereignty and power or authority, or using Michael Keating's terminology, the legal conception of sovereignty (*de jure*) and the substantive power to act (*de facto*) (Keating 2001: 120). For Hobbes and Bodin, power and sovereignty were indistinguishable; however starting with Locke[71] and further elaborated by Rousseau, 'sovereignty' was vested in the people, but power or the capacity to act was mandated to elected representatives. In this way, sovereignty, while staying indivisible (a point Rousseau famously makes) was separated from, but legitimated by the power or the capacity to act.[72] Both de Benoist and Collignon echo

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[70] In this I am not attempting to discredit the arguments of many established academics, but the distinction between sovereignty and the right of sovereignty appears, as yet, not to have thoroughly discussed.

[71] I argue the process started with Locke, but was fully realised within Rousseau, due to Locke's selective notion of who constituted the 'people'.

[72] The point about the *legitimation* of power is essential. 'Sovereignty, even at its most monarchical or dictatorial, is never a matter of mere power. Even Hobbes' *Leviathan* only has total power because the people have completely relinquished to him their natural but vulnerable rights, legitimising his legislative capacity' (Keohane 1995: 167).

this differentiation in the work. de Benoist, after defining sovereignty as 'one of the most complex [concepts] in political science, with many definitions, some totally contradictory' (2000b: 99), distinguishes between the definition of sovereignty as the *supreme public power* and the second definition as the *holder of this legitimate power*. (Ibid. Emphasis mine.)

Sovereignty, in many respects, has been elevated to a 'biblical pedestal' and consequently, for a significant period of time, it was not questioned, nor a concrete definition sought – it simply existed. This situation was challenged not only by the collapse of the bipolarity of the Cold War under which states were relatively secure, but also by the increasing politicisation of *sui generic* associations, such as the European Union. Largely as a result of these events, the issue of sovereignty and its relationship to the state has been increasingly scrutinised and compared to other aspects of the state such as democracy.

In many respects, sovereignty as a concept has either been unable to evolve to meet these new challenges, or has been found to be in conflict with other 'staple' features of the state, such as democracy (Hoffman 1997, 1998 & Camilerri & Falk 1992).

Sovereignty and the European Union

Taking the specific case of the EU, there appear to be two distinct conceptual approaches to the issue of sovereignty. The *theoretical* argument appears to deem sovereignty as an outdated concept; for it to be of relevance to *sui generic* structures, it needs to be 're-conditioned'. Conversely, the *political* camp appears to accept the relationship between Member State sovereignty and the EU as being unproblematic; not only this, they see the EU acts as a magnifier for the sovereignty of the member states. This is because EU membership offers all Member States, especially the smaller ones, a better and grander platform on which to exercise their sovereignty, not only in European, but also in world affairs. This view regards the EU as an 'association of states' with each retaining full *external* sovereignty, but willing to pool it in order to co-ordinate their actions, and potentially increase their influence (Bellamy & Castiglione 1997: 438-9). In many ways this latter argument is typified

by the presence of the veto in the Council of Ministers. When unanimity is required both Germany and Malta, despite their massive demographic, geographical and economic differences are equal, as both are *sovereign* states.

Theories of EU Sovereignty

For Lynch, the indivisibility of traditional sovereignty leads to a 'zero-sum' approach, and as such represents a barrier to understanding (1997: 57) the concept of sovereignty relating to the EU. The symbiotic relationship between sovereignty and the state needs to be unpicked, as this relationship is problematic within a *sui generic* setting. For de Benoist it is a grave error, indeed even an barrier to study, to assume that sovereignty is only possible within the framework of the classic type of state (2000b: 100). As a result, the traditional unitary and indivisible nature of sovereignty as held by the *societas* influenced authors, has led authors to attempt to find an alternative definition of sovereignty that specifically holds for the EU. In this way, certain parts of the discussion are attempting to develop a theory of sovereignty that is 'EU-specific', very much in the same way that modern sovereignty originated as a result of the state.

Post-Sovereignty

The first conceptual model to be discussed here is that sovereignty in its present form, and due to evolving political practice, is out-dated; this is the issue of 'post-sovereignty'. Although, authors such as Keating (2001) and Hoffman (1997,1998) recognise the limited relevance of sovereignty to the modern discussion, they take two distinct courses of action. For Keating, in many ways echoing Hoffman, this new understanding of sovereignty within the European context attempts to recognise the 'end of state monopoly of ultimate authority' (Keating 2001: 27), and equate the notion of 'sovereignty' with self-determination:

> In this way it might be possible to delink sovereignty from the state in an altogether more radical manner, by formulating it as a right of self-

determination. Here an entity, whether it be a people or a territorial unit, may be sovereign where it has right to determine its own future. The practicalities of the World, together with their own aspirations, may mean that this does not take the form of a state...but this would not affect sovereignty itself (Keating 2001: 15).

The second path of action also argues that sovereignty has become outdated, and thus is incompatible with the modern world; MacCormick argues that as there 'are no remaining sovereign states in the [European] Community', we are 'beyond the sovereign state' (1993: 16, 18). Furthermore, the very notion of post-sovereignty itself appears to be a 'very welcome development in diminishing the probability of recurrence to the barbarisms of time recently passed'. (1999: 142)

Stepping out of the neat state/sovereignty dichotomy, MacCormick proposes a lateral approach to understanding sovereignty within a post-sovereign setting:

> Do politics or law always have to resolve distributions of power in favour ultimately of some absolute and final centralised authority on everything, subject to doubt only on the number of power centres there are to be? (Ibid: 17)

The argument here is that why should the result of politics or law be a neat distribution of power to a single centralised political source? Why must A 'losing' sovereignty, result in B gaining it? Why must politics and law always be binary? The essence of the concept of post-sovereignty, in both forms, is that sovereignty, in our present understanding is an outdated concept, and thus has limited use in either statal or *sui generic* situations. The need therefore is to "recondition" or "rethink" sovereignty, by removing it from theoretical discussions of the constitutionalism. Post-sovereignty is not without its critics, however; Besson, for example, argues that post-sovereignty fails to manage or substitute the 'epistemic and normative role of sovereignty' (2004: 17), such as the flag, an army or the head of the Queen on a banknote, etc. (Collignon 2003:63).

Late Sovereignty

The second conceptual model of sovereignty recognises two stages in the evolution of the concept itself. According to Walker, the first, or Westphalian, refers to an international order of sovereign states, which was complemented by two frameworks of law; internally by constitutional law and externally by international law (2003: 9). This initial stage has, for Walker, been superseded by a post-Westphalian stage, which was 'ushered in by the pressures of globalisation on the one hand and the multi-dimensionality of constitutional pluralism on the other' (Ibid: 10). The question for Walker is 'how to retreat from the (flawed) assumptions of post-sovereignty without returning to the oxymorons of disaggregations or the myopia of the unitary approach'? (Ibid: 18) The answer for Walker is a concept of 'late-sovereignty'. The prefix 'late' does not mean sovereignty should be removed from political discussions, rather it equates to an idea of sovereignty has the potential for continuity and adaptability; secondly, it suggests a distinctive phase in the discursive career of the sovereignty; thirdly, it suggests irreversibility, that is that there is no longer a possibility to return to a traditional definition of the term; finally, it represents 'transformative potential', in that sovereignty in its capacity to represent the world of political authority is being tested to the limit (Ibid.). For Walker, and this is a relevant point to the ongoing discussion about representation:

> The key difference in the claim made in the multi-dimensional post-Westphalian order is that the boundaries are no longer merely *territorial*, but, if in an increasingly permissive sense, also *functional* (Ibid. Emphasis in original).

The point on the 'irreversibility' of late sovereignty means that there cannot be a return to an 'early' or pre-Westphalian sovereignty for two main reasons. Firstly, the macro-political conditions of globalisation, the rise of non-state polities, global communications and the free movement of peoples has fundamentally altered the structure of politics and society; secondly, the 'the logic of sovereignty itself guarantees irreversibility' as the increasing formation of new sovereign entities involves severing the initial legal order in favour of a newer fragmented one (Ibid: 25).

The third model rejects the above distinction between 'sovereignty' and 'post-sovereignty' as being 'two sides of the same coin'; rather, this model focuses on the communicative nature of political association. Bellamy proposes the idea of 'pre-sovereignty' in which the basics of the state system, such as democracy and the rule of law, are brought together in a position in which there is neither legal nor political – including popular – sovereignty:

> Instead, citizens have to engage with each other as political equals and negotiate collective agreements that embody reciprocity and a willingness to 'hear the other side', neither ignoring nor overriding other people's concerns as long as they too embody mutual respect" (2003: 181).

With a similar emphasis on negotiation and communication, Besson argues for a 'co-operative sovereignty', in which the emphasis is not on static definitions or zero-sum solutions to constitutional conflicts and other clashes of sovereignty; rather 'the co-existence, competition and mutual adjustment of conflicting claims of sovereignty should be regarded as a normal and desirable political and legal condition' (Besson 2004: 4). The emphasis in the model is an emphasis on fluidity. Besson argues that: "Only when understood in this *cooperative* way, can sovereignty be the *reflexive* and *dynamic* concept it is, stimulating constant challenging of the allocation of power, thus putting into question other's sovereignty as well as one's own" (Ibid: 13).

Both pre-sovereignty and cooperative sovereignty contain characteristics of a pre-Westphalian model, in which different groups, but not necessarily states, were in a position, through continual negotiations, to decide common outcomes. This emphasis on pre-Westphalia is also evident in the fact that, as with Walker's 'late-sovereignty', the important aspect of co-operative sovereignty is that it is neither a retreat back to a quintessential Hobbesian definition, nor is it a rejection of sovereignty, nor a sign of sovereignty being surpassed as in Neil MacCormick's 'post-sovereignty'.

The Politics of Sovereignty in the European Union

Much of the discussion here is focused around the notion of 'pooling' of sovereignty, which is a common concept and practice of the EU, commencing with the Treaties of Rome. Here, the member state remains the 'owner' of sovereignty, but, in order to be able to exercise sovereignty in a more efficient manner, certain parts of sovereignty are 'pooled'. Under this scenario, the member states 'loan' their sovereignty to the EU[73] (Keating 2001: 13) and, through a 'reduction of a state's policymaking *authority* may simultaneously extend policy-making capacity' (Lynch 1997: 49). In this way, the EU may act as a 'magnifier of sovereignty' for member states. To Euro-Sceptic authors, this pooling of sovereignty nonetheless represents an erosion of Member State sovereignty in favour of a European Sovereign "superstate". In response to this accusation, those in favour of pooled sovereignty, such as member state governments, highlight the fact that this pooling does not limit or erode national sovereignty, but offers an alternative platform on which to exercise it. Even when national law is in conflict with the EU law and the former is forsaken, this for certain authors, still does not represent an erosion of sovereignty. Referring to the *Factorame* Case (1991) in which the European Court of Justice ruled a UK law to be in conflict with Community Law, Neil MacCormick argues that rulings such as this do not limit sovereignty, since the UK Parliament has consented to this legal arrangement. It is much in the same way that: "...the possible derogation from or invalidation of Acts of Parliament subsequent to 1972 does not weaken the view that Parliament remains a sovereign whose commands are the ultimate source of law, since *this is what Parliament has commanded*" (1993: 3).

A further example can be cited of those Member States that have adopted the Euro; they have merely decided to exercise their sovereignty *in that way*. This is a matter of *policy* and not of *sovereignty* (Jackson 1999: 453. Emphasis mine.).

Two conclusions can be drawn from these debates. Either, adopting the binary zero-sum approach, the EU represents a significant threat to the sovereignty of the Member State as the latter either "owns" sovereignty or the EU does and there can no middle-ground. Or, more constructively, the European Union can be seen as a tool to

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[73] Keating finishes the sentence by stating '...but they can always take it back' (2001: 13).

promote and serve state interests (Newman 1996: 17), by acting as an alternative method in which to exercise sovereignty. As was mentioned above, if there is a strong political desire to leave the EU, then there is the possibility to enact the exit clause enshrined under article I-59 of the Constitutional Treaty.[74] This must then equate both to the idea that the state remains sovereign and that it consents to being subject to EU law, as it is in its interests to do so. MacCormick here attempts to offer a new definition of the EU proposing the notion of the 'democratic Commonwealth' of the EU, whose member states have a 'common weal' or a common good[75] (1997: 339) and who increasingly co-operate in sustaining it. The problem with this approach is that while it can be used to explain the political and legal relationship of the sovereignty of the Member State to the EU, it is unable to account for the 'epistemic and normative role of sovereignty' (Besson 2004: 17), that is, this approach is unable to explain or account for the normative feeling that have been attached to sovereignty as a result of a member state's 'independent' or pre-membership history.

Althusius, Sovereignty the European Union

Having explored the theoretical problems of sovereignty and how EU scholars have attempted to surmount them, let us refer back to our "initial" discussion. Simultaneously, Althusius offers something and nothing to the debate. In one way, Althusian sovereignty can be viewed in the same way as the *societas* version of sovereignty; 'vested in the people or *jus regni*, the fundamental law of the realm, namely the constitution' (Elazar 1995a: xlii), and exercised through elected representatives. But we recall that the Althusian 'state' is not the product of unrelated individuals, but of the interaction between multi-layered consociations. This means that sovereignty, for Althusius, is a representation of the relationship between the different associations that comprise the universal association, *rather than* a collective of individuals. Before being able to explore fully the consequences of Althusian

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[74] The right for a Member State to leave the EU was written into EU law in the Constitutional Treaty and this was the first time such a course of action had been inscribed in Community law.

[75] MacCormick, however, does offer a word of caution to this definition: "the idea of a democratic commonwealth, especially one exhibiting the characteristics of the European Union, being a polyglot, multi-national and trans or supra-national commonwealth committed both to democracy and to subsidiarity, is a complex, not a simple one" (1997: 354-355).

sovereignty for *sui generic* constitutionalisation it is necessary to clarify the difference between Althusian sovereignty and Rousseaunian sovereignty, as the relation of Althusian to Rousseaunian concepts of sovereignty is crucial here.

Althusius' Relationship to Rousseau and 'Modern' Sovereignty

The similarity between Althusius and Rousseau has led academics to speculate about the relationship between the two authors. While there is direct evidence that Rousseau referred to Althusius by name[76] (Gierke 1958: 332 in Hueglin 1994b: 81), the context in which this occurs merely demonstrates that Rousseau was aware of Althusius; it does not prove that Rousseau read *Politica*. Furthermore, subsequent investigations into the relationship appear to argue against any Althusian influence on Rousseau. Searching for the main influences on Rousseau, C.E. Vaughan argues that while there is little doubt that 'the methodical treatise' of Althusius was 'well known to Rousseau' (1915: 9), this where the influence ends:

> What is the likelihood that the *Contrat Social* owed anything to a book so little known – and it must be added, so uninspiring – as *Politica*? (Ibid: 10).

While Vaughan notes that the doctrine of sovereignty and of contract are central themes of both *Politica* and the *Social Contract*, he also argues that it is highly probable that Rousseau's notion of sovereignty was inspired by the 'fine genius' of both *De Cive* and *Leviathan*, both of which Rousseau studied and knew well. It is 'more likely that the idea of sovereignty, if borrowed at all, was borrowed from *De Cive*, which is a work of genius, than from *Politica*, which is not' (1915: 10).

Additionally, Friedrich observes that 'Althusius does not know a *free will*. This separates him from Rousseau that all verbal similarities seem insignificant in

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[76] Rousseau referred to Althusius in the sixth letter in the "Lettres écrites des Montagne", which were a series of letters written between December, 1763 and June, 1764, in response to J. R. Tronchin's *Lettres de la Campagne*. 'Althusius, en Allemagne, s'attira des ennemis ; mais on ne s'avisa pas de le poursuivre criminellement'. The context in which this was written was Rousseau complaining of his legal persecution as a result of the publication of *the Social Contract*. He argues that Sidney was imprisoned for his political *actions* rather than his political *writings* and Althusius was not punished at all. While this does not prove (or disprove) that Rousseau had read *Politica*, Vaughan argues that 'it is hardly conceivable that the name [of Althusius] should have been known to him [Rousseau] unless through the treatise [*Politica*], by which alone the author's name is kept alive (1915: 87 fn12).

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comparison to it' (Friedrich 1932: lxix. Emphasis in original). There are three more likely differences between the Althusian notion of popular sovereignty and its Rousseaunian counterpart.

Three Key Differences Between Althusius and Rousseau

Firstly, sovereignty in Althusius' universal association refers to those issues that affect the universal association as a whole. As the universal association consists of smaller associations, this sovereignty does not affect the ability of each constituent association to act in its own internal affairs. Rather, the common will establishes authority over matters of joint interest among all members, which can be equated with the initial reasons for forming the universal association. Sovereignty in this sense cannot be understood as the "transubstantiation" of the will of all (*volonté de tous*) into a unitary common will (*volonté générale*) (Hueglin 1999: 182) as Rousseau understood it. Rather, for Althusius, popular sovereignty cannot be understood as the people speaking with one voice, but only as a multiple, well-organised system of co-operation between the *consociatios* and their ability to access power.

The second difference revolves around the predominance of the individual and the social contract discussed in Chapter Three. We have seen that the contemporary expression of popular sovereignty can be seen as the expression of a collective of individuals, which is then vested in directly elected representatives. In the Althusian equivalent, the social pact represents the progressive organisation of organic communities into larger associations, and so individuals have no direct part (de Benoist 2000a: 52), but they do participate as members of a community. Clearly, in the Althusian version, the *societas* theory of the individual and the social contract cannot apply, due to the fact that this relationship between individual and the sovereign state does not exist. Instead, Althusius' concept of sovereignty needs to be interpreted as the collective actions of consociations within the universal association, rather than the *societas*-inspired collective actions of its organised individual citizens.

The third difference refers to individual's *need* for the state. For Rousseau, the state, in opposition to the state of nature, is essential for the individual to realise his

faculties (Murray 1929: 254). This is in stark contrast to *Zoon Politikon* of Althusius, in which the differences between the pre-political state of nature and the political state of nature is not recognised, as we saw in Chapter Three.

Thus, although we have claimed that Rousseau read and possibly used *Politica* as a basis for the *Social Contract* (Hueglin 1994a: 81 & de Benoist 2000a: 50-51) it is clear that Rousseau, like Althusius, was a product of his time. Although both Rousseau and Althusius presented similar versions of popular sovereignty, the latter's definition of sovereignty is nevertheless fundamentally different, reflecting the medieval period in which he wrote (Hueglin 1994a: 81), and this is key for the understanding of Althusius in relation to in *sui generic* constitutionalism. Specifically, Althusian popular sovereignty was based on the *sui generic* rather than the modern *societas* state.

Subsidiarity and Althusius

As we saw in the above discussion on Althusian and Rousseaunian sovereignty, one of the key differences was Althusius' notion of the delegation of sovereignty from the 'people' to the respective level of consociation. Althusius was able to achieve this system of mandated delegation due to the idea of subsidiarity expounded in *Politica*. This presence is however, a retrospective interpretation of *Politica*, as Althusius himself, does not explicitly refer to the term (Hueglin 1999: 152): rather, recent analyses of Althusius have revealed a structural process similar to subsidiarity, as understood in its present day meaning.

In its most basic form, subsidiarity can be seen as an efficient allocation of roles and responsibilities within a polycentric political structure. As a result, the governments of the EU member states have embraced subsidiarity as a working principle of the EU; albeit for different reasons. For instance, the former German Chancellor Helmut Kohl, understood subsidiarity to mean:

> ...the Community only undertaking actions which can be *better achieved or attained* at supranational level, [whereas the British government of John

Major saw] that Community action should only be undertaken when it is *necessary or essential* to secure the objectives in question (Teasdale 1993: 190).

Despite this confusion, the increasing use of the term has resulted in it becoming a 'watchword' in the theoretical discussions on the constitutional processes of the European Union. For MacCormick, the increasing dispersal of powers within the community context 'opens the door to a conception of subsidiarity that could gradually acquire real teeth' (1997: 338). Besson argues that it implies a *test of efficiency* in power allocation (2004: 12. Emphasis in original). What also must be understood is that subsidiarity can be viewed either in a positive or negative manner:

> Negatively, the higher political order shall not assume or absorb responsibility for actions that can be achieved by the lower order. Positively, it has an obligation to take action when common objectives cannot be achieved individually (Hueglin 1999: 156).

Despite being in a position to offer a theory in which decision-making is kept as close to the base of the political structure as is efficiently needed, subsidiarity does not appear able to function effectively within the context of the European Union; indeed, Thomas Hueglin has noted that the principle of subsidiarity anchored in the Maastricht Treaty on the European Union is practically meaningless (1999: 158). One possible explanation for the apparent impotence of subsidiarity is the predominant position of the 'state' within the EU.

Here we should clearly distinguish between 'subsidiarity' and 'decentralisation', the key difference being the location of power within the political structure. In decentralisation a certain, usually limited, amount of power is transferred from a central authority to local authorities. Subsidiarity, on the other hand, revolves around lower levels delegating functional *responsibilities*, rather than *power*, to a higher level, and only those responsibilities that cannot be undertaken at the lower level.

Relating this to the EU, it appears that to a considerable extent, subsidiarity has been taken to equate to a panacea that will counter 'the tendency to over-centralise at the level of member-states, in the same way that it counters 'any over-centralisation

towards Brussels' (MacCormick 1999: 135). In actual fact, this distinction confuses the notion of 'subsidiarity' with that of 'decentralisation'. Within the different political relationships of the EU, subsidiarity can only occur between the Member State and the European institutions, and not between a region and the EU. The reason for this is that as the member states retain sovereignty within the EU, then subsidiarity can only occur between the Member States and the EU, through the process of the pooling of sovereignty. Clearly, domestic discussions on subsidiarity could occur in each Member State, but due to the centralised nature of power, this discussion would focus on the issue of 'decentralisation', as opposed to subsidiarity. As the constitution of the state establishes the central institutions of the state, which can then allocate power to any newly created institutions, for subsidiarity to occur, the people would have to be able to continually allocate functional responsibilities to whichever level of government deemed to be able to efficiently carry out the specific task.

Conclusion

The aim of the chapter was twofold; firstly, to bring to light a discussion on sovereignty that occurred between 1576 and 1614, that not only predated the now best-known discussions of the subject, but also one in which a variant of popular sovereignty, very close to the current understanding of the word, was developed. As a result of the predominance of the centralised state, however, this initial Althusian version of popular sovereignty was forgotten and not until 1762 did the *societas* canon produce their own coherent and thorough version of popular sovereignty.

The second aim of the chapter was to highlight the confusion that arises from the term "sovereignty" partially due to the misinterpretation of the classic texts of the *societas* canon. As a result of this, we saw a failure to distinguish between 'sovereignty' and the 'right of sovereignty', which for many of the initial *societas* authors were synonymous. Partially due to subsequent acknowledgement of this conceptual ambiguity, and partially as a result of a fragmenting political world, sovereignty as a political concept has come under increased scrutiny as to its relevance, not only in relation to the state, but also in the context of *sui generic* entities, such as the EU.

This confusion has led authors either to attempt to "recondition" or "reconceptualise" sovereignty in order for it to be of relevance in current discussions, or to locate alternative sources of sovereignty than the Westphalian state. One of the most interesting examples of the latter is Robert Jackson's *Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape* (1999). Jackson explores the struggle between the differing medieval models of sovereignty that existed before the Westphalian sovereign model, encapsulating the Hobbesian variant, became dominant. He concludes that the notion of the *Respublica Christiana* holds the key to the understanding of the polycentric and territorially overlapping medieval era (1999: 435), and that it offers a viable alternative to the understanding of the EU. Jackson argues that the EU represents an organisation in which:

> ...the member states have come together to form a European legal and political authority which is constitutionally distinct from those states and with regard to which the states have limited their sovereign rights and prerogatives in certain important aspects. *That is a fundamental change that moves Europe some distance beyond a* societas *of states and toward an emergent* universitas (1999: 450. Emphasis mine).

Despite Althusius representing the most holistic and thorough of these *universitas* authors, there is open hostility to *Politica* amongst certain authors. At the forefront of this group, Preston King's animosity is the most contemptuous. Speaking of the divide between 'individualists' and 'pluralists' corresponding to study of sovereignty, King notes:

> ...there are no individual 'pluralists' who will bear comparison with 'absolutists' like Hobbes (especially), Bodin, Spinoza, Rousseau, Kant, Hegel, and, indeed John Austin. Such men as these display analytical powers of the very first order. Men like Johannes Althusius and the Baron de Montesquieu are *quite out of their depth in such company* (although they *might* bear comparison with Bodin) (1974: 20. Emphasis mine).

The fact that Althusius offers an apparently simplistic model of sovereignty that is applicable to *Sui Generic* constitutionalism is ironic. Using a quasi-Bodinian, quasi-medieval notion, Althusius offers a 'traditional' *societas* notion of sovereignty, but by

differentiating between the sovereignty or the *jus symbotiucm* and the mandated power or capability to act of the magistrates (or the right of sovereignty) of the differing strata, Althusius is not only able to stop a division of sovereignty by keeping it located with the 'people', but also ensures that each level only receives *as much* power to act as is necessary for the role they were established to fulfil, thus ensuring subsidiarity.

The purpose of the discussion was to highlight the fact that Althusius had presented a 'popular' version of sovereignty in 1603, which retains significance 400 years later. The problem with this, and likewise for the other aspects of *Politica*, is that it was proposed in an era in which the modern Westphalian state was beginning to become the dominant mode of political association. As a result, it was the ruler sovereignty of Bodin and Hobbes that became dominant, and popular sovereignty was forgotten until it eventually re-emerged in a liberal form in the *societas* canon in 1762. Despite this, and while operating under similar principles, the popular sovereignty of Rousseau and Althusius are not the same and this reflects the mode of association in which both authors wrote: Rousseau within a liberal model, Althusius within the Empire.

Arguably, it is this difference that increases the relevance of the Althusian concept of popular sovereignty to *Sui Generic* constitutionalism. While Rousseau's version is dependent on the staple ideas of the state, the individual, the social contract, etc., Althusius offers a theory in which the sovereignty of the *Sui Generic* entity is found in the common agreement and action of the constituent members. More importantly, this can then be located in a written agreement or the "constitution". The right of sovereignty can then be exercised through the mandating of sovereignty to the different levels of the association. In this way, Althusius is able to offer a model of sovereignty to *Sui Generic* constitutionalism.

The following chapter will explore the third, and final, aspect; federalism. The argument of the chapter is that due to the presence of subsidiarity, Althusius' version of federalism represents a fundamentally different variant to the current understanding of federalism. The chapter argues that federal theory has undergone two distinct evolutionary changes, starting with the pre-modern federalism of *Politica*, to the international federalism of Pufendorf and Kant and finally to the modern statal federalism of the *Publius* authors, James Madison, Alexander Hamilton and John Jay.

Moreover, the chapter contends that while it is the pre-modern federalism of Althusius that offers greatest potential for understanding *sui generic* constitutionalism, it is the *societas* inspired modern statal federal model that is routinely applied to attempt to understand, with limited theoretical results, the structural processes of the EU.

Chapter 5: The *Societas* canon, *Politica* and Federalism

Pre-modern federalism had a strong tribal or corporatist foundation, one in which individuals were inevitably defined as members of permanent, multi-generational groups and whose rights and obligations derived entirely or principally from group membership. Modern federalism broke away from this model to emphasise polities built strictly or principally on the basis of individuals and their rights, allowing little or no space for recognition or legitimation of intergenerational groups.

Daniel Elazar 1991b: 19

Contemporary developments in...the European Union strongly suggest that political science itself should contemplate new models of federal union.

Michael Burgess 1993: 11

Traditionally, federalism as a political theory has found fertile ground in forms of political organisations in which there are several distinct centres of power, of which the EU is a prime example. However, the use of the term in the context of the EU is problematic, since under the influence of the *societas* canon, federalism as a constitutional theory refers to an internal system by which to organise a state. As the EU is a *sui generic* association and not a state, this comparison produces limited understanding. In order to overcome these theoretical weaknesses, the aim of this chapter is to explore federalism as a means of political association in relation to *sui generic* associations. The chapter will argue that the federal model of the United States, often used as a reference point in federal theory, merely represents the most recent evolutionary stage of federalism as political practice, and that there are other prior federal models that offer greater potential to the understanding of *sui generic* associations. Federalism, we will demonstrate, has undergone three distinct stages; pre-modern or polyvalent, international and modern statal, the latter two of these models influenced by the *societas* canon.

In the case of the secondary evolutionary stage or international federalism, authors such as Hugo Grotius and Samuel Pufendorf attempted to define 'irregular' entities such as the Holy Roman Empire. They were influenced by the *societas* nature of the state and were forced to view *sui generic* associations as a league of sovereign states.

Similarly, in the late 1770s, when this international model of federalism evolved into modern statal federalism, the influence of the *societas* authors such as James Harrington, Baron de Montesquieu and John Locke on the *Publius* authors are evident. Indeed, it will be argued later that the adherence of the *Publius* authors to Lockean liberalism actually enabled the landed gentry of America to gain power at the expense of the 'sovereign' people.

The central argument of this chapter is that the pre-modern model of federalism allows us to describe *sui generic* constitutionalism since it is not afflicted by the 'touch of stateness' that is evident in all subsequent constitutional models.

In order to be able to explore these issues, this chapter will proceed as follows. First, the vocabulary of federalism will be explored, as it is apparent that the term 'federal' has many variants, each relating to a different aspect of the political theory. The need for this discussion is to clarify the terms used by political theorists. Second, the evolution of federalism from its pre-modern to international form will be discussed, as this evolution coincides with the shift in Europe away from the Reformation era in which *sui generic* associations and states co-existed, to a Europe based in the *societas* state; here three differences will be put forward that differentiate the pre-modern from international federalism. Third, the chapter will proceed to explore the second evolution of international to modern statal federalism, a process that occurred in the late 1770s, with the emergence of the United States of America.

Fourth, and influenced by the work of authors such as Daniel Elazar (1998), the chapter will explore the possibility of European constitutional theory returning to itself, in the re-emergence of the concept of the confederation in current academic debate (Wind 2003). Related to this issue of the confederation, the chapter will explore the Swiss variant of federal constitutionalism, before elaborating on the pre-modern federal model and, more specifically, the structure of Althusian federalism and its consequences for our understanding of *Sui generic* associations.

Before this discussion can begin, a point on the term 'modern' used in the chapter needs to be clarified. In this context, the term 'modern' is being used to represent a late Reformation period beginning with the Treaty of Westphalia (1648). In this manner, 'pre-modern' federalism represents a theory of political organisation that

existed before the European state system was consolidated by the Treaty of Westphalia, and modern statal federalism is used to represent the federal theory enacted by the *Publius* authors in the United States, under the theoretical influence of the *societas* canon.

The Vocabulary of Federalism

One of the most comprehensive discussions of federal theory was Preston King's (1982) *Federalism and Federation*, in which he not only separately defined *federalism* and *federation*, but also further differentiated between different types of federalism. For King:

> ...'federalism' is often promoted as a political philosophy of diversity-in-unity...[a]ccordingly, 'federalism' is employed where the interest is primarily ideological, while 'federation' is applied to designate a more descriptive, institutional arrangement of fact, without particular regard to whether it is being supported or opposed (1982: 19-20).

Therefore, it is possible to identify *federalism* as an ideologically charged framework or process that is capable of accommodating political diversity, possibly within a unitary system; whereas *federation* can be seen as the practical realisation of the theory of federalism. King goes on to note that:

> Ideologically *federalism* (as distinct from institutional *federation*) reflects at least three different mobilisational orientations [or power relationships] – the first being *centralist*, the second *decentralist*, while the third involves an appeal to *balance* (1982: 21. Emphasis in original).

King identifies examples of federalism to support this differentiation: for centralist, the USA[77] (Ibid: 29); for decentralist, the Federal Republic of Germany in the

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[77] In discussing the centralist nature of US federalism, King notes: "basically, the argument of *The Federalist* is a centralist argument. It is no way as dramatically centralist as the earlier arguments advanced by figures like Bodin, Hobbes, Grotius, Spinoza and Pufendorf in support of the doctrine of sovereignty...It does accord some importance to decentralism, *faute de mieux*, perhaps as a necessary evil, but not particularly in the form of an ideal to be achieved" (1982: 29).

immediate post-War period (Ibid: 39-55); for the federalist balance, King does not give an example *per se*, but it is possible from his definition to offer the EU as an example:

> Here federalism is regarded as a *foedus*, a pact (deriving from *fides* or trust) implying an agreement that is freely and mutually consented to, whereby each party surrenders a degree of autonomy in exchange for some compensating advantage (1982: 56).

Federalism Without Federation? A Description of the EU?

In this sense, it is clear that the EU best exemplifies King's "federal balance". However, if a second of King's definitions is explored, this also has significant potential for our understanding of the EU as a *sui generic* association. For King, 'although there may be federalism without federation, there can be no federation without some matching variety of federalism' (1982: 76); we shall see that this distinction goes to great lengths in de-mystifying federalism as a form of political association. For those Euro-Sceptic academics and practitioners, there is still an underlying assumption that federalism within the EU would mean a degradation of the state in favour of a European federation or federal state. What King's distinction shows, is that while there can be a federal arrangement between the EU and its member states, this does not automatically mean that the EU is a federation or federal state. The supremacy and direct effect of EU law on member states, the fact that any constitutional conflicts regarding membership are resolved in favour of EU law and the exclusive competences of the commission are all applicable to *federalism*, but this does not mean that the EU is a *federation*.

Indeed, many of the basic characters of EU federalism have been in place since the mid-1960s and so, when the most anti-federal member states, such as the UK and Denmark joined the EU, its federalism, that is the basic organisational structure enshrined in the Treaties of Rome, coupled with the 1963 "Van Gend en Loos" and the 1964 "Costa v. Enel" ECJ rulings discussed in the introduction, were already in

place. In this manner 'Britain has therefore been part of a 'federal' arrangement (in the looser sense) since 1973' (Fischer & Neff 1995: 906).

This should come as no surprise, given that the dominant ideology of the post-War politicians who were the driving force behind the ECSC and the European Economic Community (EEC) was federalism. Of the discussions over the structure of the ECSC, Monnet, in his *Memoirs* notes:

> Turning to Spierenburg[78], I reminded him that intergovernmental cooperation had never led anywhere...Remember we are here to build a European Community. The supranational Authority is not merely the best means for solving economic problems: it is also the first move towards a federation (Monnet 1978: 328).

It is increasingly becoming less contentious to discuss the EU using federal vocabulary, but this still does not disguise the fact that modern statal federalism as a political model is too simplistic or contentious for the EU. For Daniel Elazar, any successful political solution for Europe needs to be built on a more complex model than that of the United States, which has its limits in addressing the European experience (1995b: 442).

Federalism as a political theory is concerned with the allotting of powers between more than one level of government; traditionally, this has been realised in the separation between 'federal' or 'national', and 'state' government. While this simple dichotomy serves the federal 'state', in the case of the EU, this understanding has become obsolete. For Elazar, any model of federalism that is constructive for the EU must be able to accommodate the European reality of 'four or five arenas of territorial governance instead of the two or three, the accepted number in modern federations' (1995b: 444). In addition to this territorial distinction, a federal model for the EU must also be able to contend with non-territorial forms of representation, such as occupational or political groupings that have increasingly become involved in the constitutional discussion, such as the Regions, business groups and the Catholic Church. Elazar concludes that:

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[78] Dirk Spierenburg, a Dutch delegate to the ECSC negotiations and future member of the ECSC High Authority.

Such a model may indeed be available in the federal theory of Johannes Althusius, the first great European theorist of federalism who was one of those on the eve of the modern epoch who tried to foster federal as distinct from statist solutions on the Continent (1995b: 444).

What must be also recognised is that while this discussion has focused on one example of *sui generic* constitutionalism, namely the EU, the problems identified and the criteria proposed by Elazar for a more appropriate model could also be envisaged in other *sui generic* entities.

The Evolutionary Stages of Federalism: The Initial Evolution – Pre-Modern to International Federalism

Federalism as a theoretical concept, underwent a process of evolution from pre-modern to international federalism between 1614 and 1648: the start of the evolution, given here as 1614, represents the publication of the third edition of *Politica*, while 1648 represents the signing of the Treaty of Westphalia. As with the question of sovereignty, this is due to the growing influence and predominance of the *societas* canon's notion of the sovereign state, which resulted in the rejection of Althusius' pre-modern federal theory. This centralised notion of both state and sovereignty, coupled with the Treaty of Westphalia, helped cement the position of the state in its modern form and, as Althusianism had been rejected, a new description was sought to describe the 'irregular systems' within Europe.

The dominance of Bodinian/Hobbesian 'sovereignty-thinking' (Riley 1976: 9) meant that by definition a "federal state" could not exist, as this would entail two sovereign entities within the same grouping; *but* there were irregular systems that appeared to have some form of federal government, such as the Holy Roman Empire and the Swiss Confederation. Subsequently, authors such as Hugo Grotius and Samuel von Pufendorf explored federalism as the means of understanding the relationship between sovereign states within a league.

While Bodin directly influenced both Grotius and Hobbes, the latter two approached sovereignty in a different manner from Bodin: while Hobbes discussed sovereignty *within* the state; Grotius turned to an international setting, and in this way, Murray argues that it was Grotius who 'securely laid the foundations of international sovereignty' (Murray 1929: 186). Despite being a seminal tract in the seventeenth century (and predating Hobbes), only one passage from Grotius' *The Rights of War and Peace* is relevant here, as the focus of Grotius' book was to discover when, how, and by whom war may be justly conducted. Grotius, after observing that 'the common subject of sovereign power is the state' discusses the idea of states entering into a system or league, while at the same time retaining their characteristics of state:

> So it may happen, that many states may be connected together by the closest federal union, which Strabo, in more places than one calls a system, and yet each retain the condition of a perfect, individual state, which has been observed by Aristotle and others in different parts of their writings (*Rights of War*: 49).

The one condition Grotius attaches to this is that this league can only be entered into by states:

> ...who are not 'in a state of subjugation to another power...for those nations are not sovereign states of themselves, in the present acceptation of the word but are subordinate members of a great state, as slaves are members of a household (Ibid).

This idea of the state as the sovereign actor within a 'federal league' is pursued in the work of Pufendorf who, like many authors of his time, was greatly influenced by Thomas Hobbes, as is clear from his definition of sovereignty:

> *If sovereignty be lodg'd indivisibly in the Hands of the many together, then each of those many must necessarily hold some Part of it, out of the Collection of which Parts the whole Sovereignty must at length be constituted. But at the same time 'twill be likewise necessary that each of these Parts be Supreme: and thus in one State there will be more than one Supreme; which is absurd* (*Law of Nature*: 176. Emphasis in original).

The influence of Hobbes also extends to the terminology used by Pufendorf. Not only did Pufendorf use the terms of 'regular' and irregular', which originated in Hobbes, to define the state system, he emphasised 'state systems' or 'a system of states' as opposed to the Aristotelian theory used by Bodin (Schröder 1999: 968). Indeed, one of Pufendorf's greatest debts to Hobbes is the latter's methodological approach to understanding the state:

> In his book *Dissertation de Statu Hominum Naturali* (1675) he [Pufendorf] described the analytical method of modern political theory in terms drawn directly from Hobbes' account of his own method in the preface to *De Cive*: just as scientists took apart physical bodies to analyse them into their component parts, so too political theorists had analysed the state (Malcolm 2002: 524-525).

Despite the significant influence Hobbes had on Pufendorf, in many ways the latter used Hobbes as a convenient basis on which to further the understanding of the Holy Roman Empire; indeed, in this way there was a fundamental difference between the two. Pufendorf himself argued that his entire theory of natural law was fundamentally different from Hobbes', whose theory, as we have seen in Chapter Two, was founded on self-preservation; while Pufendorf's was founded on '*socialitas*' (sociality of sociability) (Malcolm 2002: 523); and this difference is evident in Pufendorf's discussion of the 'state of nature'. Both he and Hobbes recognised the theoretical existence of a 'state of nature', but Pufendorf, due to the presence of natural law, did not recognise the hostility and brutal nature of the Hobbesian state of nature, per se. Pufendorf did recognise 'negative' duties, but he also recognised positive duties to God, oneself or 'self preservation' and others or the 'preservation of society' (Tully 2003: xxvi & Boucher 2001: 564). This in turn led to an obligation to God to form political society in order to be able to 'fulfil our natures as social beings'; so placing Pufendorf closer to Locke (Boucher 2001: 565) than to Hobbes. Despite these differences between Hobbes and Pufendorf, the latter attempted to describe the Empire in a non-traditional manner; as for Pufendorf to employ the Aristotelian methodology of Bodin could not encapsulate the 'irregular' nature of the Empire (Schröder 1999: 967).

In his earlier work, *De Statu Imperii Germanici* (1667), Pufendorf argued against those authors who deemed the Empire to be a state. Instead, Pufendorf contended that the Empire was a gradual disintegration of a monarchical form of state into a body which came closest to a confederation of states. (Forsyth 1981: 80) In addition, the Imperial Diet was not the senate of an aristocratic state (Ibid.) as Bodin had claimed, as the sovereignty did not reside with the Diet, (Boucher 2001: 572); nor was the Imperial Diet reminiscent of Althusius' 'Ephors', as they did not act as a limitation on a monarchical form of state (Boucher 2001: 572). Instead, 'the only feature that prevented the Empire from being completely assimilated to a confederation was the lingering authority of the Emperor (Forsyth 1981: 80).[79]

While Pufendorf himself was never happy with his constitutional description of the Empire (Schröder 1999: 968) as an 'irregular form of simple state' (Ibid: 969), he could never fully describe the relationship between the Emperor and the *Reichsstände*. He did admit, however, that 'Germany would most naturally develop into a federation of states'[80] (Schröder 1999: 968), largely due to the fact that the Empire itself could not hold rights of supreme sovereignty on its own behalf, as the whole empire itself consisted of heterogeneous parts (Schröder 1999: 965).[81]

After *De Statu Imperii Germanici*, Pufendorf developed his theoretical exploration of a 'states system' or 'a system of states', which could be either 'close' or 'loose'; by the time of his *The Law of Nature and Nations*, however, the emphasis had become concentrated on the close relationship.[82] Bearing in mind Pufendorf's adherence to Hobbes, whether the federation was 'loose' or 'close' it could be:

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[79] Of the lingering nature of the presence of the Emperor, Peter Schröder notes: "It was in the interest of the foreign royal houses to establish the *Reichsstände* as independent and sovereign powers, given that at this time they were only associated in a somewhat loose congregation called the Empire. But the foreign perception of the Empire apparently underestimated the political necessity of, and loyalty of the *Reichsstände* to, the idea of the Empire itself" (1999: 977).

[80] The main issue was the sovereignty of the *Reichsstände* in relation to the Emperor. Indeed, in attempting to locate sovereignty, Pufendorf disagreed with both Bodin who defined it as a residing in the imperial Diet *and* Althusius who argued that the Diet acted as a limitation to monarchical state (Boucher 2001: 572).

[81] Many of the heterogeneous parts, or the *Reichsstände*, were monarchies within themselves and so attributing sovereignty to them was straightforward 'as long as they were considered in their own rights and not in connection with the Empire' (Schröder 1999: 965).

[82] The former type of association occurs when separate states are united, most commonly under marriage or inheritance, by sharing the same Monarch. An example of the former is this is the Union of England and Scotland, when James VI of Scotland, became James I of England after the death of Elizabeth I (Boucher 2001: 570-571).

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...no more than a permanent league of states united through a perpetual covenant, binding as international law, in which the constituent states delegated limited enumerated powers to a common governing council while retaining full rights of international sovereignty (Elazar 1991a: 140).

Although the fact that the exercising of certain parts of supreme sovereignty were exercised in the common council made the federation more than a normal alliance, it did not make it a state in its own right, due to the limited nature of the power that was pooled (Forsyth 1981: 82).

For Pufendorf, and despite the presence of leagues, the source of these leagues remained the state. Indeed, after identifying the 'chief Occasion' of the need for a league as 'each particular People loved to be their own Masters, and yet each was not strong enough to make Head against a Common Enemy' (*Law of Nature*: 186), Pufendorf went on to distinguish between state and league or confederation:

> For the Leagues to which there *Systems* owe their rise, seem distinguish'd from other (so frequent amongst different States,) chiefly by this Consideration; that in the latter each *confederate people determine themselves by their own judgment to certain mutual Performances*, yet so as that, in all other respects, they design not in the least to make the Exercise of that part of Sovereignty, whence those Performance proceed, dependent on the Consent of their Allies, *or to retrench any thing from their full and unlimited Power of governing their own States* (*Law of Nature*: 186. Emphasis mine).

That is to say, the sole aim of the league is to realise within the confederation those selected parts of sovereignty that were imperfect in the state. However, only that part of sovereignty that was identified as lying within the purpose of the league was to be placed in the common consent of their allies, and nothing was to be done that would restrain the 'unlimited power' of the league.

Although this 'pooling' of sovereignty appears to be against its indivisible nature, Pufendorf, building upon the distinctions made by Bodin, offers an explanation of both the indivisibility and the pooling. Just as Bodin argued that there were 'five marks of sovereignty', which although separate did not divide sovereignty, Pufendorf

made a sharper distinction between sovereignty and its 'various outer characteristics of sovereignty':[83]

> The latter for Pufendorf were 'parts' of the whole, but not in the additive sense that the whole was nothing more than the parts, but in a sense that the parts represented the relationship between the underlying unity and different facets of the world. The judicial power, the legislative power, the power of war and peace were all 'parts' of sovereignty in this sense. In a federal system – the power of war and peace – was clearly made dependent on the consent of all, but sovereignty in the ultimate simple and indivisible sense was not renounced (Forsyth 1981: 84).

Writing in the 1780s and 1790s, Immanuel Kant continued the discussion started by Pufendorf by discussing federalism as a manner in which to achieve international order and stability between sovereign states, as he most famously advanced in *Perpetual Peace* (1795). In the 'second definitive article for perpetual peace', Kant argues that 'the law of nations shall be founded on a federation of free states' (*Peace*: 16); and it is here that the influence of Hobbes becomes apparent. For just as Hobbes viewed man as either enduring of others in a state of nature or living under a social contract within a state, Kant superimposes this basic idea onto the state of nature:

> Peoples, as states, like individuals, may be judged to injure one another merely by their co-existence in the state of nature [i.e., while independent of external laws]. Each of them may and should for the sake of its own security demand that the others enter into a constitution similar to the civil constitution, for under such a constitution each can be secure in his own right (*Peace*: 16).

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[83] Pufendorf's understanding of sovereignty was more evolved and advanced than either that of Bodin or Hobbes. Although he still argued for the indivisibility of sovereignty, he also argued that the Supreme Authority 'tho' in its own Nature it be one individual thing, yet because it exerts itself in different Acts, according as it is employ'd about different Means. Necessary to the Preservation of the State, is general conceiv'd as consisting of many parts'. Pufendorf makes the analogy between sovereignty and the soul, although there is only one soul it 'exerciseth different Operations, in Proportion to the Difference of the Objects presented to it', but this does not entail that the soul itself is divided (*The Law of Nature*: 165-166). (For the full discussion on Pufendorf's 'Of the Parts of Sovereignty, and their natural Connection, see *The Law of Nature* book VII, chapter IV.)

The key difference here between Kant and Hobbes, is that the basic unit that Kant is discussing (that is the state), is the end product of Hobbes. As a result, within Kant's international 'state of nature' (as opposed to Hobbes') the 'constitution' between the states does not create a Leviathan:

> This league does not tend to any dominion over the power of the state but only to the maintenance and security of the freedom of the state itself and of other states in league with it, *without there being any need to submit to civil laws and their compulsion*, as men in a state of nature must submit (*Peace*: 18. Emphasis mine).

The common trend that is apparent in this particular discussion is the influence of Hobbes. The indivisibility of sovereignty *within* the state leads to a position in which any federal model must be an international agreement between sovereign states, with limited attributes being given to the superstate level. Subsequently, all continental federal theorists treated federalism as a means to achieve limited unification of sovereign states (Elazar 1991a: 141) within either a league or an agreement, *as opposed to* federalism as a type of internal government, which we will discuss in the modern statal federal theory.

Three Differences Between International and Pre-Modern Federalism

It follows from above that we can identify three characteristics of international federalism that theoretically differentiate it from pre-modern federalism, as typified by Althusius. First, certain aspects of sovereignty can be located in the supra-state level. It must be remembered here that Althusius, rather than viewing sovereignty as exercising itself in different acts, as for Pufendorf, recognised the difference between sovereignty and the right of sovereignty. This enabled him to be in a better position to explain the irregular systems of Europe: there, sovereignty was vested at the bottom with the people as a whole, rather than in a centralised state and so the mandating of the right of sovereignty *did not* detract from the power of a centralised state, as one did not exist.

The second assumption that can be drawn from international federalism is that the aim of any league is peace between states. This, we saw, was famously exemplified by Kant, but can also be found in Pufendorf's work, which 'realised the importance of the Imperial constitution to provide peace and security for its members'[84] (Schröder 1999: 972). Although Althusius would agree with this, this statement would offer only a narrow and simplistic interpretation of *Politica*. This assumption appears to reduce political life to a dichotomy – there is either mistrust or trust, and the difference is the presence of a league. For Althusius, who rejects this individualism, any league or association entered into is done so as a natural progression in order for consociations to further fulfil the aspects of life that they alone could not fill, rather than as a result of mistrust.

The final assumption is that the state is the predominant actor within international federalism; hardly surprising since international federalism was developed *after* the state became the predominant form of political association. It is interesting again to note the influence of Hobbes in this assumption. Part of Kant's argument appears to recite Hobbes' idea of a state of nature, but in an international setting – that is, states enter into a league in order to secure peace. Althusius' disagreement with Hobbes' individualism has been explored in Chapter Four from which we remember that in contrast, in *Politica* it is possible for different associations through knowledge of each other, to live side by side, without there being friction.

The Second Evolution: International to Modern Statal Federalism

The exact point at which federalism evolved from international federalism into modern statal federalism, depends very much on normative interpretation. While the Treaty of Westphalia represented a reasonably clear line of demarcation between pre-modern and international federalism, no such event occurred to highlight the evolution of international into modern statal federalism. In geographical terms, this most recent version of federalism evolved and developed in the American continent, while the international federal model remained in Europe. Furthermore, despite gradually adopting state-like features, the Holy Roman and Hapsburg Empires existed

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[84] In a similar manner to the aim of the EU.

for some time after the Treaty of Westphalia; thus, international federalism did not simply vanish after the Treaty was signed, but the Treaty did signal its death knoll in its traditional form. In this respect there was an overlap between international and modern statal federalism in that both co-existed in different parts of the World, but it was evident that the entities that were described by international federalism were increasingly become 'Westphalianised'.

Modern Statal Federalism, Sovereignty and the Modern State

What will be discussed here is the process the '*étatisation*'[85] that occurred in the American variant of federal theory; that is, under the writings of the *Publius* authors, federal theory increasingly adopted 'state-like' features. The significance of this is that by definition, federalism is in opposition to a centralised notion of power, at the expense of territorial autonomy. In this way, federalism can be seen as a doctrine of anti-sovereignty, as discussed by Grotius, Pufendorf and Kant. Yet, in the US version of federalism:

> ...at the same time that they oppose sovereignty, they [the *Publius* authors] ascribe it to themselves and that is source of the oddity of federal theory (Riley 1976: 18).

It is here that an important differentiation needs to be made. Sovereignty, in this particular guise, refers to external sovereignty, that is the sovereign's ability to act in relation to third parties, as opposed to internal sovereignty, that is the sovereign's ability to act internally within the boundaries of the state. As long as external sovereignty remained indivisible – that is in relation to third parties – internal sovereignty could be located in the people and exercised in different locations and this was evident in the process of *étatisation*.

Under the strong influence of Locke, and partially in fear of individual human actions, James Madison and Alexander Hamilton aimed to create a federal government based

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[85] This term is adapted from John Lampe's term 'de-étatisation' (1996: 280), which he uses to describe the political process that occurred in Yugoslavia in the mid 1960s, in which the central state increasingly 'lost' competencies to Republic and Communal level associations. In this context, it is used to mean the reverse: the state like features attributed to federal theory by the *Publius* authors.

on democratic republicanism (Miller 1998: 104): namely, a system in which the landed gentry are recognised as enjoying a predominant role in both the political system; translated to the political system, this entails government striving to achieve goals agreeable to this class of citizen, of which they are a part. Coupled with this, and again influenced by the liberalism of Locke, Madison and Hamilton saw sovereignty as residing in the people as a collection of abstract citizens, rather than in a collection of naturally occurring groups, such as villages, towns or other collectives. Indeed, as Miller argues, by locating popular sovereignty within the people as an abstract body, rather than in practical bodies such as local communities or within the states, Madison and Hamilton were able to render the notion of sovereignty harmless 'by invoking a fictitious people who could not possibly act together' (1988: 104). Due to these two factors, American popular sovereignty became a fiction that merely described a relationship between the people conceived as one body and the national government (Miller 1988: 107), rather than an actual working relationship, and as a result left the American government in a position of power applicable to that of any centralised European state government.

The (Re)Emergence of the Confederation

As a result of the shortcomings of the modern statal modern of federalism in the discussion of the EU, there is an increasing 'historical' confederal discussion (Elazar 1998, Friedrichs 2001, Wind 2003), which emphasises the weaker federations or leagues or city-states, that were dismissed by the theorists of both international and modern statal federalism. The predominance of the state within political theory has actually caused the need for such *pre*modern political vocabulary to be revived:

> Today, however, confederation and confederal arrangements are being revived
> as the postmodern form of federalism that seems to be particularly useful in
> connecting politically sovereign states that must accommodate themselves to
> the realities of new times (Elazar 1998: 40).

Elazar summarises the main conclusion of this anti-statal stance. Not only is it insufficient simply to analyse the EU in relation to existing federal models, but also it

is increasingly necessary to revive traditional federal or confederal models that were in existence *before* the state became the predominant model of association in order to understand the EU better.

Is European Constitutional Theory Returning to Itself?

Speaking of the relevance of pre-modern federal theory, Heinz Eulau notes that:

> A fact little appreciated by American political scientists is the relatively early emergence of federalism as a working concept of political theory in the Holy Roman Empire in the seventeenth century (1941: 643).

This did not mean that the early federalism in Europe could be uniformly applied to all *sui generic* associations. Eulau himself notes how the 'confederalism' of the Holy Roman Empire differed:

> ...not only from unitary states, but also from such permanent unions as the Achaean League, the United Provinces, or Helvetic Confederation. *By thus showing that the territories were subject to the whole in spite of their statehood*, while the members of these other federalistic systems were not really subject to any higher authority at all (Ibid: 652. Emphasis mine).

The importance of this claim to our argument is, first, the relationship between inter-statal units (that is the constituent parts) and, second, the relationship between the state level, and the federal. The confederal nature of the Empire has been echoed both in Elazar's definition of the Empire 'as a truly medieval confederal arrangement based on a medieval society whereby different groups were organised on a nonterritorial basis as permanent bodies, each with a different legal status accordingly'. (1998: 45); and Montesquieu's discussion of the United Provinces and the Empire:

> In the Republic of Holland one province cannot conclude an alliance without the consent of the others. This law, which is an excellent one, and even necessary in a confederate Republic, is wanting in the German constitution, where it would prevent the misfortunes that may happen to the whole of the

confederacy, through the imprudence, ambition, or avarice of a single member
(*The Spirit of Laws*: 128).

In relation to Althusius, this has interesting ramifications. In his role as Syndic of Emden, Althusius would come into close contact with the Dutch (Baker 1993: 34), and Althusius much admired the Provinces' resistance against the Spanish monarchy. As a result of its position, Emden can be taken as the divide between the medieval confederation and federation, or the Empire and the United Provinces, and as a result, *Politica* reflects aspects of both. While Eulau sees Althusius as attempting to explain the constitutional nature of the Empire, *Politica* can also be seen as an archetypal Calvinist tract on the right of resistance.

Indeed, there is confusion over the nature of Althusius' political theory. Writers have contested the position of Althusius' work in relation to other thinkers or canons, and they have attempted to classify Althusian thought. As we saw in Chapter One, Althusius has been accredited with being the originator of the Continental federal model (Burgess 2000); yet, Friedrich questions the use of the term 'federalism' in relation to Althusius' work as being misleading since 'Althusius never wearies of emphasising the unitary, collectivist nature of any symbiotic group' (1932: lxxxvii). Possibly because of this, Eulau describes Althusius as 'decentralist' (1941: 648).

In a similar manner, if the geographical location of Emden is considered then further confusion ensues – the 'federalism' of the United Provinces versus the 'confederalism' of the Empire. Further discussion has also arisen among scholars regarding Althusius' concept of federalism. Otto von Gierke, (1841-1921) the first scholar to try to 'revive' Althusius' work, saw him as essentially a medievalist seeking to reconstruct medieval corporatism for a postmedieval and changing time. On the other hand, as we saw in Chapter One, Carl Friedrich, the first important figure in the twentieth-century Althusian revival, viewed Althusius as being somewhere between medievalist, and a precursor of modern federalism (Elazar 1995a: xl). In addition to this discussion, there is also the question of Althusius' perspective on sovereignty. In agreement with Carl Friedrich's introduction to the 1932 edition of *Politica*, Murray Forsyth argues that:

Althusius' constitutionalism...had a genuinely federal element in it. Checks and balances existed not only at the centre of the state, but [also] between the centre and the regions. Nevertheless, as we have already stressed, his political theory was basically the theory of a single sovereign entity or state, and hence cannot be properly be termed a theory of federal union... (1981: 78)

Here, in relation to this aspect of Althusius' thought, and to further the idea of 'Europe returning to itself' we can explore the 'states' that existed in Althusius' era. To an extent, this has already been undertaken in relation to the United Provinces, with Arendt Lijphart's notion of 'confederal consociationalism' and the idea of the EU being 'a resurrection of the Holy Roman Empire' (Wind 2003: 118). The only political association that existed in both Althusian *and* the modern period is Switzerland; in the late 1980s, there was indeed increased interest in the applicability of the Swiss model for the EU. The initial question asked was, could the *confederatio Helvetica* be imitated?

Can the *confederatio Helvetica* be imitated?

The Swiss confederation existed prior to the period in which the state became the dominant form of political association. Although modern Switzerland has since adopted 'state-like' features, there are still basic elements that have remained. Switzerland, despite being a state, displays non-'state-like' characteristics in comparison to other states. Indeed, the *confederatio Helvetica* as a means of political association has remained extremely stable and avoided the majority of the turmoil that has periodically engulfed the rest of Europe, and in this way, the *confederatio Helvetica* existed largely unchanged in the medieval period and the modern period. Subsequently, although the confederation adopted more federal arrangements in 1848 to become more state-like, the fact that the *confederatio Helvetica* existed at the same time as the other great confederations of the medieval period, the fact that it did not undergo the same statal process as the rest of Europe and the fact that Switzerland had a direct influence on Althusius' thought make the *confederatio Helvetica* a interesting example of a *sui generic* association.

For Barber, the Swiss participatory political system offers both an alternative way of understanding democratic life, and an alternative model of nation-building under conditions of multi-ethnic and religious diversity (1988: 48). The Swiss participatory model is of particular interest in relation to Althusius' thought and to the Titoist variant of Althusianism practised in Yugoslavia, for two main reasons: the individual's relationship to the state, and the notion of representation.

Just as for Althusius, the individual in the Western understanding of the term does not exist:

> In Switzerland, there is no radically individualistic notion of the person either as a solitary agent of nature or as a fictionalised creature of the law. The binary figures of a central state and an isolated individual revolving around one another simply do not appear in a land where the state is perceived as an extension of the commune and the individual is understood primarily as a constituent member of a family, a church commune or a communal jurisdiction (1988: 32).

Subsequently, the Swiss can offer nothing to the understanding of the state as a contract between 'disassociated individuals who are defined by abstract 'human'[86] essentials such as passions and interests, rather than by their political membership' (Ibid: 32-33). Rather, the Swiss model has avoided the individualism of liberalism and instead focused on 'an understanding of individuals as socially embedded in families, religious communities, and above all, common citizenship' (Ibid: 34).

The second 'innovation' that Barber notes within the Swiss model (and this is also a staple characteristic of Althusius) is the idea of 'representation'. Indeed, Barber notes that just as political 'representation' has been placed on a pedestal in the Anglo-American system, in the Swiss model this is not the case, not because there are no representative institutions, 'but because it is not the crucial feature of democratic activity in the Swiss state' (1988: 36). Due to the fact that the majority of activity is undertaken at the communal level, there is 'no longer much direct participation at the federal level or the cantonal level' (Ibid: 38). Again, this is recognisable in the

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[86] The criticism of the notion of the abstract individual is also a reoccurring theme in the work of Edvard Kardelj, the main theoretician of Titoism. There is also a remarkable Althusian similarity in the fact that both Titoism and the Swiss model appear to politicise the whole of society.

Althusian notion of direct democracy only at the immediate levels of governance: "The representative principle, so crucial in preserving accountability in systems where there is otherwise little participation, is relatively less important in a system where considerable power is devolved on the cantons and communes..." (Ibid: 44)

Pre-Modern or Polyvalent federalism

In essence, Althusius' theory of federalism is relatively easy to explain: he does not have one. Whilst this may appear to reduce the usefulness of *Politica* to a discussion on federalism, this assertion is based on the fact that Althusius never used the word 'federal' in *Politica*.[87] Despite this lack of use, Daniel Elazar argues that *Politica* is 'federal through and through', largely due to the fact that universal association is constructed as a federation of communities (Elazar 1995a: xli). In addition, Hueglin (1999, 1979) discusses Althusius in relation to federalism, and *Politica* has also been linked to the discussion on *Polyvalent Federalism* that occurred in the 1970s.

Although having its origins in chemistry, the term 'polyvalent' refers to a body acting against or interacting with more than one kind of antigen, antibody, toxin, or microorganism. Politically, the term was first used in the early 1970s to describe the *sui generic* federal model of the Socialist Federal Republic of Yugoslavia. The theoretical basis of this theory was that human society was in a process of transition from "traditional (territorial and political) federalism to a "new federalism" that is social, functional, and participatory, recently referred to as "polyvalent federalism" (Đorđević 1975: 77). Moreover, Đorđević argued that this new model was unique within the political world, so much so that it was argued that:

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[87] Relating to the edition of *Politica* used, a proviso must be added here. If the abridged versions of either 1964 or 1995 are used, this statement that Althusius never mentioned the term 'federal' is correct. However, as Thomas Hueglin notes, 'Althusius did not use the term 'federal' except in a brief passage in which he mentions the possibility of unifying several existing political entities into a larger confederation (1999: 2), citing *Politica* ch. XVII, 24ff as a reference (1999b: 31). This reference appears in the edition used by Heuglin (a re-edited 3rd edition by Aalen, Scientia 1981) and in Friedrich's Latin version (1932: 128). The possible reason why it was omitted by Carney was that it was of insignificance to the overall discussion on types of confederation, as it is apparent from both the English and the Latin that Althusius' occupation is with *Plena consociatio & confederatio* and *non— plena confederatio & consociatio*.

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...Yugoslav constitutional law and political theory during the last quarter of this century may play the role American constitutional law and political theory played during the last quarter of the eighteenth century (Đorđević 1975: 79).

Polyvalent federalism as a model has never been explored in the depth that it possibly warrants. Indeed, the *Publius* article by Đorđević is probably the only reference, but Đorđević's article does offer an interesting insight. Polyvalent federalism:

> ...has some traits of the pre-nation-state era of the Middle Ages, as described in particular by the German Johannes Althusius, whose understanding of federalism is much deeper than that of Montesquieu, Madison, Hamilton and other thinkers too much concerned with legal-statist and power-ridden conceptions of federalist structure (1975: 78).

The key point in the discussion is the emphasis on the societal organisation of differing *consociatios*, rather than a simply being a manner in which to describe or organise the relationships between two or three political levels.

Althusian Federalism

It will be recalled that the basic structure of the Althusian commonwealth consists of different levels of consociation; from the simple and private family, to the universal and public universal association. As Frederick Carney notes in the preface to the 1964 edition of *Politica*:

> The key to this concept of federalism is that on all levels the union is composed of the units of the proceeding lower level. Thus, when we arrive at the top, the members of a state are neither individual persons nor families, but are the politically organised collectives, namely the provinces and the cities. This construction contrasts sharply with the later American concept of a federal union composed not only of states, but of individual citizens as well (1964: x).

As apparent from Carney's definition, Althusian federalism is based on principles of stratification and amalgamation. While both stratification and amalgamation have been discussed in the previous chapters, this has only been implied; it is the point of this discussion to make each point explicit.

Amalgamation was discussed in both Chapter Two and Chapter Three, where the social contract did not represent an agreement between individuals to form a state; but the universal association comprised of different levels of *consociatios*, each of which had been founded on a contract. Similarly, in Chapter Four, while sovereignty was vested in the relationship between the individual *consociatios*, the relevant amount of the right of sovereignty was given to each latter level of *consociatio* for it to fulfil the purpose for which it was intended.

In each of these discussions there is a strong federal element. The family is founded on a contract, but when with others, the paternal head forms a village or guild; this is done so on a contract. This in itself represents federalism: the family can only achieve a limited amount as a *consociatio*, and so necessity forces them to seek fellow *consociatios* to achieve those things they cannot achieve alone. Likewise, federalism is evident when each new *consociatio* is created: from family to guild or village; village to town; town to city; city to province; and province to 'state'.

The stratification of *Politica* also contains a strong federal element. It will be recalled that under the Althusian structure direct individual participation only occurs up to the level of the city (Carney 1995: xix). After this point, it is individual representatives of the city who composes the province and the 'state'. While this may appear 'undemocratic' from a *societas* viewpoint, it must be remembered that Althusian federalism *must* be viewed as a constituent part of a larger whole. In this manner, if the notion of sovereignty and the residual nature of the right of sovereignty are considered, the indirect participatory nature of the Althusian 'state' is explained: namely, why does the individual need a direct link to the state, when the responsibilities the government undertakes, has little or no connection to the individual's everyday life.

Indeed, these federal characteristics of *Politica* produce interesting results for the understanding of the federalism of a *sui generic* association. In relation to the EU, the

current Community structure is criticised, predominantly by the notion of the 'democratic deficit', for not reconciling the idea of the EU as a collection of states *and* citizens, with a direct accountability of the EU institutions to the citizens. Lindahl notes that whereas in US federalism, the constitution opens with the infamous lines "we the people", the Maastricht Treaty opens with the words "His Majesty the King of the Belgians; Her Majesty the Queen of the Netherlands, etc", which leaves in no doubt that the parties to the Treaty are sovereign states and not the 'Peoples of Europe' (2000: 249). This concern is echoed in the work of Stefan Collignon: "Europe's multilevel governance, on the contrary to republican federalism, is a mechanism to *exclude* citizens at the European policy level" (2003: 65. Emphasis in original).

Collignon's position relies on the three assumptions: firstly, that the modern statal federal model of the US is applicable to the EU and so subsequently the 'democratic deficit' will demonstrate the weaknesses of the Community method; secondly, the US model *is* based on the people; and finally the US model is the paramount federal model and so should be the basis for all comparative analyses. The contention here is that all the assumptions are false. As was discussed above, despite the fact that the US constitution opens with the words 'we the people...', this does not mean the sovereign people play an active role in the political process. In support of this claim, we can recall the argument of Joshua Miller that Madison and Hamilton *deliberately* supported Federal Republicanism in order to locate popular sovereignty artificially in 'We the people...' and thus exclude them from decision-making supports this claim. The second flawed assumption relies on the fact that both Lindahl and Collignon approach the EU with prior assumptions about why the EU is bad and how it can be made better, *without* actually challenging these views. For both authors, the very fact that the European Union is based on states and not a European 'people' demonstrates a democratic failing of the EU. *If* the authors had not been educated in statal traditions *or* if they had been more open to alternative suggestions[88] (it is clear that Collignon is both hostile to and dismissive of Althusian ideas) then they would have approached this specific problem in a different manner.

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[88] As Edvard Kardelj once argued 'Firstly, nothing that has been created should be so sacred to us that it cannot be transcended and superseded by something still freer, more progressive, and more humane (in Stanković 1981: 19).

This criticism results from a modern statal federal interpretation of the EU. *If* the EU were described using the Althusian federal model then different conclusions could be drawn. In this scenario, due to the practical nature of Althusian federalism logically building each level on the previous, the fact that the EU consists of states would not only be unproblematic, but also expected. Furthermore, the lack of the individual's direct involvement with the EU institutions would be explained as rather than attempting to locate the individual in direct relation to the state, the Althusian model practically locates the individual within naturally occurring (such as the family) or specifically formed associations, allowing them greater control and participation within the political life of the universal association.

The 'Federal Competencies' of the Supreme Magistrate

Despite the emphasis on the lower levels of consociation and the remoteness of the Supreme Magistrate from the individual's everyday life, Althusius does spend a significant portion of *Politica* discussing the roles of the Supreme Magistrate, as these are crucial for establishing the conditions that are needed for the realisation of the just life. In this respect, Althusius denotes a significant portion of *Politica* to discussing the roles that the supreme magistrate must undertake for the good of the universal association. The most relevant point of this debate occurs in the discussion of the 'special and secular right of sovereignty', which indicates 'the particular means for meeting the needs and wants of all symbiotes of this association, for promoting advantages for them, and for avoiding disadvantages'. The competencies identified in the first part are akin to a set of federal competencies in a current federal arrangement. For Althusius, this special right of the realm consists in (1) commercial regulations, (2) a monetary system, (3) a common language, (4) public duties in the realm, and (5) privileges and the conferring of titles of nobility (*Politica*: 84).

The main role of the supreme magistrate revolves around the creation of an economic framework in which the different associations can realise their specific aims. The reason for this is that there are certain aspects without which the individual cannot conveniently live a social life. Indeed, Althusius offers the example that 'just as the human body cannot be healthy without the mutual communication of offices

performed by its members, so the body of the commonwealth cannot be healthy without commerce' (*Politica*: 85).

The second competence of the universal association is very much related to the issue of commerce; the striking of money 'which is established in material publicly selected by the supreme magistrate with the approval of the people or realm'. This is essential as 'if there is no fixed valuation of gold, silver, and money among men and neighbouring peoples, commercial activity cannot be maintained. It follows that an uncertain monetary system throws everything into disorder, and makes intercourse and commerce with other peoples difficult' (Ibid.).

The third right is focused on the issue of language, for as the 'the use of speech is truly necessary for men in social life, for without it no society can endure, nor can the communion of right' (Ibid.). While the final two roles focus on the 'power and responsibility for assigning and distributing duties that arise in the universal association' and 'privileges and the conferring of titles of nobility', but it is clear from the first three roles, that the main roles of the supreme magistrates are focused on economic aspect of consociational life.

It is possible to hypothesise that the most prominent reasons for the creation of *sui generic* entities are twofold: either economic or military. Although Althusius does offer a discussion on defence in chapter XVI, it is the economic issue that is of most interest here. If the purposes for the creation of the *sui generic* model are economic, then the first two roles of the Supreme Magistrate discussed above are of direct relevance to this. In this way, the predominant role of the top echelons of the entity would be to ensure the multi-faceted issue of the commercial regulations of the whole and to instigate and maintain a common monetary system. If this is related back to the EU, then the Commission is responsible for much of the commercial activities of the EU, while the European Central Bank (ECB) is responsible for the management of the €uro. The interesting aspect of this comparison is the issue of language, which does not enjoy the prominence in the EU, as it does in Althusius. Indeed, in the three main EU institutions the common documents are published in all official languages.

Conclusion

As Althusius was able to set forward a political model based on his experience of the Empire, the United Provinces and the *confederatio Helvetica* it offers a genuine alternative to the Westphalian *societas* form of political association. As Althusius represents the initial stage of federalism, *Politica* is not afflicted by the defects, such as describing *sui generic* associations as a 'league of states', of the latter stages of the federal evolution, as we have portrayed them here.

By viewing sovereignty as residing within the interaction between the people, and recognising that the right of sovereignty could be mandated to different levels, *Politica* is able to offer a more comprehensive understanding of the *sui generic* associations that existed immediately prior to the Treaty of Westphalia. Indeed, the existence of the *societas* notion of sovereignty meant that the most apt definition of these entities that authors such as Pufendorf or Kant could offer was a 'league of states'.

Althusian federalism also enjoys an upper hand against modern statal federalism for two reasons. Firstly, as was discussed in Chapter Four, *Politica* attributes sovereignty to the relationship between the individual *consociatios*, or in Althusius' term, the people, with the right of sovereignty being given to the relevant level of *consociatio* to fulfil the purpose of its creation. Secondly, Althusian federalism represents an *organisational principle*, as opposed to the *governmental technique* of the *societas* canon.

Before this difference between these terms can be fully understood, , a point on the social origins of the respective authors needs to be understood. As explored above, an interpretation of American federalism was to ensure the continuation of the privileged position of the landed gentry, of which James Madison was a member, in relation to the majority of the population. Likewise, for the Aristocrat Montesquieu, the social separation of society played a significant role in his subsequent theory of the separation of powers. On the contrary, as Althusius was of 'peasant stock' his aim was not to protect an elite from popular encroachment, but rather he 'sought to secure the aspirations of a plurality of new political, economic, and cultural constituencies against the absolutist claims of ruling minorities' (Hueglin 1999: 112).

This social status is evident in Althusius' focus on federalism as the organising of the political structure. For both Madison and Montesquieu, federalism represents a *governmental technique* of keeping the interests of the different groups of the association in check (Ibid: 113). Rather, Althusius advocated federalism as an *organisational principle*:

> While legislative sovereignty is indivisibly assigned to the organised body of the entire people, a process of multilevel governance is organised among a plurality of consociations which are generically alike (Hueglin 1999: 112).

As Althusius himself argued, '[for] human society develops from private to public association by the definite steps and progressions of small societies' (*Politica*: 39), and so federalism was the manner in which the individual *consociatios*, through their desire to lead a common just life, organically joined together to form the different levels of the Universal Association. Recalling the discussion on the individual in Chapter Three, Althusius saw that after the creation of man, 'necessity forced men to build separate houses, villages, counties 'since we cannot assume that all men lived together for any length of time at one place or in one family' (Friedrich 1932: lxix). As a result, Althusius sees the state as 'natural phenomenon that leaves no choice to the individual' (Friedrich 1932: lxx).

In contrast to the organic nature of Althusius' theory, under the *societas* version, federalism is used a governmental technique to ensure the territorial boundaries of a sovereign state by ensuring that different groups, of often-hostile people, can live together in a single state: a good example of this is the federalism incorporated into the Iraqi constitution of 2005, or the Belgian constitution of 1994. In this account, federalism can be used to ensure the territorial integrity of a 'failed' state, by ensuring strong federal leadership, but giving sufficient autonomy to appease the hostile groups.

The main weakness in using Althusius as a model for understanding *sui generic* constitutionalism, relates back to Neil Walker's point in the second chapter on the problems of translation', namely that to gain the most from *Politica* it must be used as a holistic model. What is meant by this, is that it is advantageous to use *Politica* in order to understand *sui generic* entities, but in order to be in a position to make full

use of the work, the Althusian principles inherent in the Universal Association must also be applied to the individual states that form the *sui generic* entity. These methodological strengths and weaknesses of *Politica* as a tool for understanding *sui generic* entities will addressed fully in the conclusion.

Conclusions

Althusius' theory of the state enabled him to do greater justice to the complex
and puzzling structure of the Germanic Empire than Bodin.

Murray Forsyth 1981: 79

This thesis has sought to demonstrate that the complex nature of *Politica* offers a
better understanding of the constitutionalism of *sui generic* associations, than that
offered by the theories of the *societas* canon. The primary reason for the suitability of
Politica to the study of *sui generic* association is the absence of the 'state' as
understood in the *societas* manner. For the authors of the *societas* canon, political
theory was reduced to a means of understanding either certain aspects of the state or
of state behaviour. Yet, while the *societas* canon serves the climate for which it was
devised, namely state building, its weaknesses have been highlighted through its
problematical application to the *sui generic* EU. One key reason for this is that the
EU does not fit neatly into either of the two organisational categories of the canon;
either state or international association. Coupled with this is the apparent inability of
the *societas* canon to deal with the possibility of a third or fourth category of political
associational relationship, besides that of state and international organisation.

The aim of this chapter is to summarise and explore further the relevance of
Althusius' thought to *sui generic* constitutionalism, principally by addressing the
question posed in the introduction: How specifically does an Althusian perspective
aid our understanding of *sui generic* constitutionalism?

Before we can address this question, it has become evident from the discussion in the
preceding chapters that features of Althusius that are forwarded as aiding our
understanding of *sui generic* constitutionalism already exist in current political theory.
This observation leads to the questions that if there are Althusian characteristics
already in existence in political theory, why a) do we need such a detailed analysis of
Politica in relation to the understanding of *sui generic* association, and b) why do we
need to apply *Politica* at all, if the characteristics are already evident?

In many respects, the answers to the questions overlap. The answer to the first question centres on the methodological issues that arise from the alternative approach to constitutionalism presented by Althusius, and while it has already been explored in the Introduction, certain of these issues can now be revisited in light of the discussion so far. With regard to the language used in *Politica*, it has become apparent that the terms Althusius uses need exploration, as while some are in existence in current political vocabulary, such as 'city' or 'family', Althusius uses them in a different context to their current usage. In addition to these terms, there is also the issue of the Latin and Calvin influence on Althusius constitutional thought. In this manner, there are two categories of terms used by Althusius; those that also have a meaning in current usage, and those that need to explained, due to their specific background.

In addition to this issue of language, and to answer the second question, there is also the structural aspect of Althusius' thought that needs to be clarified. Chapters One and Two defined the constitutional structure of *Politica* in order to clarify its potential for our understanding of *sui generic* association. The holistic nature of this approach is necessary due to the fact that certain aspects of Althusius' thought, such as consociationalism are already in current political usage, and the weaknesses of this approach were discussed in Chapter One, and so it is necessary to present Althusius' version in its original context, in order to replicate these weaknesses.

Five Incidences of Althusius in Current Political Vocabulary

It is possible to identify five main occurrences of Althusian characteristics in current political associations. In addition, we note that these characteristics are not solely limited to *sui generic* associations, but can also be located in the state.

First, in many respects the ceding of competences of the member states to the European institutions represents an Althusian federal 'structural theory of efficiency'. In this instance, the governments of the EU member states have decided that certain competences that were previously carried out by the state, can now be more efficiently achieved, or the effect magnified, at the EU level. The most obvious example of this is the currency union, areas of the common market and 'transnational'

issues such as the environment and fisheries. Although this transfer is 'advanced' in the community framework, this notion is not solely unique to the EU. The basic principle, similar to the 'sovereignty magnifier' identified in Chapter Four, is also found in membership of specific 'sole-purpose' international organisations, such as NATO. While certain activities are promoted to a more efficient, higher level, the government of the member state retains the power to recall the power for these bodies to work and this is comparable to the Althusian relationship between sovereignty and the right of sovereignty.

The second characteristic is the notion of sovereignty vested in the people or in their fundamental agreement, such as the constitution. As was demonstrated in Chapter Four, both thanks to the writings of Jean-Jacques Rousseau and the events of the French Revolution, this is no longer limited to Althusian theory alone. The factor that differentiates Althusian sovereignty from 'modern' Rousseaunian sovereignty is the difference between the 'people' in each theory.

The third aspect was discussed in Chapter One and concerns the notion of 'consociation' or 'consociational democracy', which 'reappeared' in the late 1960s in the work of Gerhard Lehmbruch and Arendt Lijphart. Despite receiving a significant amount of criticism, and in addition to the four countries originally studied, which were The Netherlands, Belgium, Austria and Switzerland, the concept has been applied to other areas of conflict and fragmentation *as well as* refined as a tool to understand the EU. The main problem with the current application of 'consociationalism', and a criticism noted in Chapter One by Thomas Hueglin, is the 'loss of Althusius'; namely, that although originating specifically in *Politica*, the idea has been removed from this original setting, and applied to recent political problems, with little or no empathetic thought or consideration for the original context in which the term was used.

The fourth Althusian feature, and the second feature that displays a 'loss of Althusius', is the notion of subsidiarity. While Althusius never explicitly uses the term (Hueglin 1999: 12), the federal make-up of *Politica* ensures that the procedure and tasks in each level of association are allotted under the principle of subsidiarity. In a similar manner to the discussion on sovereignty, Althusius is able to offer a significant degree of clarity on the subject by stressing that for subsidiarity to function

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effectively in a political association, the structure must be multi-layered with a bottom-up nature of power.

Chapters One and Five looked at the fifth characteristic, which is that each level of association consists of an amalgam of the prior levels. In relation to the EU, this equates to the EU consisting of the member states, which in turn consist of either Lände, regions, which in turn consist of village and towns, etc. While this scenario existed in the EU until 1992, the creation of European citizenship in the Maastricht Treaty, has changed the situation, with the EU now consisting of both the member states *and* their citizens: but, this did not create a direct link between the European institutions and the citizens, as European citizenship is still dependent on national citizenship. This feature is not solely restricted to *sui generic* associations; as was shown in Chapter Five, the same features can be found in the Swiss confederation.

Two general principles can be drawn from the identification of these Althusian characteristics. First, Althusius' work is appropriate to the current discussion on constitutionalism, as similar principles to those found in Althusius have already been applied in both political theory and practice. Second, these characteristics reiterate the position adopted throughout this thesis, that Althusius enables an alternative understanding of the constitutionalisation of *sui generic* association: but, in order to realise its maximum potential as a descriptive tool, *Politica* needs to be applied as a whole to any cited example of *sui generic* association. Having identified these incidences, the chapter can now focus on the addressing the question asked in the Introduction.

How specifically does an Althusian perspective aid our understanding of *sui generic* constitutionalism?

As shown in the biographical note in Chapter One, Althusius' academic and political life coincided with a major crossroads in the history of the European continent. On the one hand, Althusius' early life was indirectly affected by the consequences of the St. Bartholomew's Day massacre (1572), while on the other Althusius died ten years

before the treaty of Westphalia (1648) that effectively ended the Empire in its *sui generic* form and started Europe on the path to statehood.

Althusius' early academic life was directly affected by the religious wars in France. While in Basel, Althusius met François Hotman (1524-1590), whose *Francogallia* (1573) initiated the genre of French Calvinist resistance – or "monarchomach" – literature, and while in Geneva Althusius studied under Dionysius Gothofredus (Denis Godefroy 1549-1622), one of the leading 'Reformed' (i.e. Calvinist) scholars of the day, who narrowly escaped the St. Bartholomew's Day massacre. Likewise Emden, the city Althusius was to serve for 34 years between 1604 and 1638, was likened to the 'Geneva of the North', due to the fact that as it was the first city to adopt the Reformed Faith openly, it became a centre for Calvinists seeking refuge from Catholic persecution in either France or the Spanish Netherlands.

The importance of this period in history for the thesis is that each 'rival' form of association, both state and empire, created their own distinct line of political thought and we have sought to demonstrate that these are best exemplified in Bodin's *Six Books* and Althusius' *Politica* respectively. While Thomas Hobbes' *Leviathan* built upon the former canon, the latter, 'Althusian', canon was initially disparaged as promoting either 'anti-statism' or 'anarchy', and as a result was gradually forgotten. Yet, and of importance to the thesis, *Politica*, or the ideas found in it were never completely absent from discussions on political theory. As Chapter One demonstrated, characteristics of *Politica* can be identified in subsequent authors, such as Leibniz or Proudhon, or in actual political associations, such as Titoist Yugoslavia.

Chapter Two enabled us to address the definitional problems that have plagued attempts to define *sui generic* associations using the traditional terms 'constitution' or 'treaty'. While it is possible to ascertain a working definition of the general features of both terms, this is very much dependent on the normative interpretation of the writer in question. Indeed, one fundamental constitutional question that cannot be resolved is the very nature of the 'constitution' itself. While it is unproblematic to argue that the constitution is the 'supreme' or 'basic law' of a state, on further inspection this vagueness reveals several inherent weaknesses. Leaving aside the question of the applicability of the term to non-state associations, and concentrating on the constitution within the confines of the state, several questions arise to which

there is no agreed answer; namely, should it be written? If so, who should write it? What should it contain? Who should amend it? While these questions remain unanswered, then there can be no definitive answer to the oft-asked question 'can the EU have a constitution?' Or even 'does it need one?'

Similarly, legal scholars have long sought to find an explicit definition for the term 'treaty'. While there are conventions on the law of treaties, and treaties remain the staple agreement for the conducting of inter-state relations, there is still no agreed definition of the term. If this confusion were carried into an attempt to describe *sui generic* associations, then the limitations are apparent. While the member states of the EU have all agreed on the fact that the original Treaties of Rome were indeed treaties, there appears to be confusion over the recent Treaty establishing a Constitution for Europe. Alas, legal theory appears to offer, at best, contradictory advice as to the nature of the document.

Furthermore, the discussion highlights a further weakness in the neat dichotomy between a constitution and a treaty. What of associations that do not fit into this neat division, whether through design or evolution? As this dichotomy is based on the activities of states (constitution=intra-state; treaty=inter-state), it can neither comprehend any activity outside of this divide, nor accommodate the increasing role played by non-state or sub-state actors in the politics.

The predominant section of *Politica* deals with the internal structure of the universal association. Althusius does entertain a brief discussion on confederations, when a universal association deems it necessary to join in with another, either partially or completely. While the idea of the confederation is available as an analytical term for *sui generic* associations, it is the conclusion of that chapter that it is the intra-associational, or constitutional, aspects of *Politica* that best offers a descriptive tool of the understanding of *sui generic* constitutionalism. The social contract, sovereignty and federalism, not only represent the three key aspects of Althusius' 'constitutional' theory, but also permit a direct comparison between Althusius and the *societas* canon, which employ the same concepts.

Chapter Three addressed the concepts of the state of nature and the social contract, two interconnected terms. In the *societas* canon the two terms offered a chronological progression, in that the social contract allowed the individuals to leave the state of nature and enter in civil society. While it is possible to criticise the likelihood of the existence of the state of nature of Hobbes, Locke or Rousseau, what must be remembered is that the state of nature can be viewed best as an analytical tool to describe the need for a civilised state, rather than a serious study of 'pre-civilised' societies. Despite offering a very different version of the state of nature, the essential focus of each author was the individual. For Hobbes, the individual could only lead a civilised life where there existed a centralised power to keep him 'in awe'. For Locke, due to the integral aspect of the law of nature, the individual profited from the 'free-market' of the state of nature and the creation of civil society merely allowed existing laws to be enacted in a more efficient manner. For Rousseau, the state of nature was a romantic historical period in which man existed as a primitive hunter-gatherer with limited contact with other individuals. This focus meant that the creation of the civil society could be equated to an agreement between individuals to form a collective in which they all would live, yet remain as free as before, and it is this emphasis on the individual that has evolved into one the key aspects of liberal democracy. While the direct relationship between the individual and the government in the confines of the state is relatively unproblematic, how is this relationship played out in a *sui generic* association? The assumption of the infamous 'democratic deficit' of the EU is based largely on the lack of a direct connection between the individual European citizen and the European institutions (with the exception of the European Parliament). Clearly in this example, the traditional concept of the individual in the political association has been applied, and as the relationship does not work or does not exist, then this equates to a problem with democracy.

Approaching this problem from an Althusian angle delivers interesting alternatives. While it is clear that both the individual and central government exist within *Politica*, the emphasis on their relationship is completely different. Rather than the individual legitimising the government, there is no direct connection between the supreme magistrate and the individual, after the level of the city. While it is a comparable situation that has proved problematic for the EU, in *Politica* it does not. The reason behind this is that the individual and his needs are better represented by *not* enjoying a

direct link to the supreme magistrate, and two key features ensure this. Firstly, the nature of power is such that the initial levels of consociation, such as the family, city and guild are designed in such a way as to take care of the individual's needs and desires. Secondly, the practical nature of each consociation means that they were purposefully formed to fulfil a certain role or task and whichever of these tasks could not be fulfilled at the initial level, were done so by uniting with other such associations. An example of this could be, while the guild may be able to take care of the needs of an the individual working members, their social needs would be better looked after by a town or a city. In this way, the individual's needs are better served by the immediate locality, than they could be by a centralised government.

A second point in this structure is that the individual is also better able to represent his views within the immediate consociations, than he would in a central parliament. Instead of individuals electing a representative, who then represents their own interpretation of some form of abstract 'general will', the multi-layered system of Althusius means that the key decisions are taken at the lowest possible consociation, in which all members can actively voice an opinion. As the competences move up the structure, they become less and less important to the everyday life of the individual.

Relocating this discussion to the EU provides an alternative explanation of the democratic deficit. In this scenario, the fact that individual citizens do not have a direct say in the composition of either the Council or the Commission does not equate with a democratic deficit: *if* the European Union consisted *solely* of the individual member states, which in turn are composite bodies of lower consociations, and there was a residual power relationship between each level. However, with the centralised nature of the sovereign state, and the inclusion of a direct connection between the individual and the European institutions, the EU now displays a curious hybrid of several different constitutional styles.

Chapter Four allowed us to focus on the issue of sovereignty, which, in recent years has probably become one of the most debated topics within all disciplines of political and international theory. Rather than approaching the subject from the overarching question of the relevance of sovereignty to the current multi-national and global world, the chapter focused on the confusion that exists in the *societas* canon surrounding sovereignty. This confusion was seen to stem from two key sources;

natural evolution, and a failure of political authors to distinguish properly between 'sovereignty' and 'the right or power of sovereignty'. The first area originates in the use of the term by different authors in different epochs. While the topic was first thoroughly addressed by Jean Bodin in 1576, the key discussion on the subject occurred in Thomas Hobbes' *Leviathan* in 1651 and these two books alone nicely highlight the confusion surrounding the subject. While both authors proposed 'ruler sovereignty' – that is, sovereignty in the Prince or the Leviathan – each author not only attached different provisos to this ruler sovereignty, but they also approached the subject from different angles; Bodin displayed a realistic approach, that is working around the political conditions that existed in 1562, while Hobbes' scientific background influenced the approach of *Leviathan*. A second key point of this discussion is that neither Bodin nor Hobbes differentiates between sovereignty and the power of sovereignty, but both claim it to be absolute, so when subsequent authors discussed the subject they bound themselves to the indivisibility and absolute nature of sovereignty.

The key shift in the *societas* canon occurred with the work of Rousseau and the French Revolution. In both, sovereignty transferred from the ruler (i.e. the prince) to the people as a collective. The problem here is that although there was a shift in the location of sovereignty, the internal framework was not sufficient to realise the task fully; that is, how can a collective of unrelated individual citizens, who share no common interest or political framework, enact sovereignty?

The second cause of confusion stemmed from the failure to differentiate between sovereignty and the right of sovereignty. For both Bodin and Hobbes, the two were not only synonymous, but also indivisible. This has the effect that in modern democracies there is a failure to distinguish between the people who are sovereign, and their elected representatives who make the political decisions; in the EU, the sovereignty discussion is even more of an essentially contested concept. In this setting, questions arise as to whether the EU can have sovereignty as it is not a state, and what precisely is the relationship between the sovereignty of the member states and the EU. Adopting an Althusian view of sovereignty does offer significant insights. In *Politica*, Althusius attributes sovereignty to 'the people', but it can better be described as the result of the active relationship between the different layers of

consociation. Furthermore, Althusius also differentiates between the *jus regni* or the *jus majestatis* and the *posestas regni*, and so while agreeing with Bodin and Hobbes as to the indivisibility of sovereignty, Althusius is able to avoid the subsequent problems by differentiating between sovereignty's two constituent parts. Sovereignty or *jus regni* is attributed to the people, who then give sufficient amounts of power or *posestas regni* for each consociation to fulfil the task for which it was intended. Transferring this back to the EU, then the discussion as to whether the EU can enjoy sovereignty or whether or not member state sovereignty is eroded or surrendered through membership is irrelevant. Rather, neither the EU nor the member state, can enjoy *sovereignty*, but each one does enjoy the specified amount of *power or right of sovereignty* attributed to it by the sovereign, or the interrelationship between the individual *consociatios* of the EU, which in turn remains indivisible.

Chapter Five explored the three 'evolutionary stages' stages of federalism as a form of political organisation; polyvalent or pre-modern, international and modern statal federalism. Similar to the inverse relationship identified between the 'state' and the 'international organisation' in the Introduction, the rise of the state played an integral part in the evolutionary nature of federalism, with the latest stage equating to the modern theory of federalism as a means by which to organise internally a politically or socially 'fragmented' polity'. The paradoxical aspect of this evolution is that it is this final stage of federalism that is routinely applied as a model to describe the constitutionalism of the European Union. The resultant outcome of this application is a limited understanding of any possible federal model of the EU, as one of the basic premises of modern statal federalism is that it occurs in a state, which the EU is not. Likewise, for the international federal model, highlighted by the work of authors such as Pufendorf, the state is the predominant feature. Indeed, under this evolutionary stage, the Empire, which was once described as an association in which the rights of sovereignty were exercised by the Emperor and the Ephors, became a league of states, as the emphasis shifted largely due to the Treaty of Westphalia, to underlining the role of the individual courts in relation to the Emperor. The point of this second stage of federal evolution was that *sui generic* associations that had been adequately described for centuries were now re-evaluated in the light of the theoretical dominance of the

centralism of both Bodin and Hobbes, and also the signing of the Treaty of Westphalia.

The problem that both final stages of federal evolution fail to surmount is the location of the state within constitutional theory, as both evidently centred on the relationships of the state. For international federalism, as the name suggests, federalism is a theory of association in which different sovereign states can be organised, while for the modern statal variant, federalism is a means in which *internal* state relations and structures can be organised. The key feature in both theories is that federalism is reduced to a descriptive tool to emphasise state activity, both internal and external. Relating this to the understanding of the EU, it is clear that the modern statal federal model is only of relevance *if* the aim of the EU is to become a state. While the answer to this question is open to normative interpretation, there is sufficient doubt surrounding this idea to consider that this will ever happen. Similarly, international federalism, while appearing more relevant to the understanding of the EU than modern statal federalism, still suffers from the predominance of certain state-centric assumptions. Firstly, federalism is a theory for describing certain aspects of state's external activity and secondly, the state is the only form of association that can legitimately participate in any form of external relation, as it is the only association in which sovereignty is vested. While it is apparent that the EU was founded by sovereign states, and so international federalism does have relevance, the increasing rise of sub- or non-state actors and the increasing role of the EU law are relevant factors, and the theory appears unable either to accommodate or to explain these.

Despite Althusius not using the term 'federal', this does not disqualify *Politica* from any discussion on the subject, as it is 'federally-orientated' in its entirety. In reality, an exploration of *Politica* highlights the main areas in which the discussion is applicable to the EU. In addition to the discussion on 'complete' and 'partial' confederations, which was dismissed in Chapter Two, the basic structure of *Politica* serves an essentially federal purpose; but it is also able to advance federal theory in the fact that *Politica* is not bound to justifying state existence or behaviour. There are two main reasons why Althusius is able to advance beyond the limitations of traditional federal theory: first, this emphasis on the practical nature of federalism as a

means of achieving an end, and second the possibility of non-territorial representation.

Traditional federal theory, in this case modern statal federalism, appears to offer a theory that allows different 'peoples' to live in the same single state. In this sense, federalism becomes a theory of association allowing different people to live in a comparable association to the homogenous state. In an Althusian understanding, federalism is not a top-down theory of association, but a 'bottom-up', practical manner in which individual groups can realise their allotted political and social aims; in this way, federalism becomes a 'structural theory of efficiency'. By keeping the majority of decisions as close to these groups as possible, subsequent levels merely allow the previous groups to realise an aim in a more efficient manner. While the supreme magistrate is allotted specific tasks by Althusius, these are limited to those areas that are necessary for the universal association as a whole to function, such as the monetary system.

What conclusions can be drawn from the application of this model of federalism to the EU? Another way to approach the question is to ask why do the traditional federal models fail competently to explain the EU's process of constitutionalisation? The main answer to this lies in the two points emphasised above. Firstly, modern statal federalism is a top-down theory of constitutionalism that occurs within the confines of a state; secondly, representation is based on geography. If it is supposed that the EU was created for a specific purpose or purposes and this was not the creation of a state, then the initial assumption of modern statal federalism falls down. Likewise, it is apparent that although geographical associations, or the member states, do play the predominant role in the EU, either through the states or regions, there are non-geographical groups which also have a vested interested in the EU, such as occupational, political or religious groups. From this it becomes increasingly apparent that an Althusian structural theory of efficiency is able to consider both the practical character of the EU and also the non-geographical nature of many of the interested parties.

Limitations of the Althusian Discourse

Our basic premise, that to understand *sui generic* constitutionalism what is needed is a political theory that is not dependent on the *societas* canon, could be tackled using several different approaches. To pit a minor individual author against an entire political canon of reputable authors represents the biggest venture of the entire thesis. Political theorists hold the work of Hobbes and Locke in such regard, that to not only directly challenge them, but also to dismiss them as representing a regression in political thought would necessitate that the 'new' theory to replace this canon be extraordinary. Although it is presented in the thesis that Althusius represents such a 'new' model of constitutionalism, one way in which this claim may be reinforced or consolidated is to link Althusius' work to comparable authors or political systems.

The most evident way in which this could be tackled is to elaborate upon Althusius' work by locating him in a specific political canon. While Chapter One identified the influences on and the influence of Althusius' work on subsequent authors, this was the extent to which this line of argument was pressed. If this argument were furthered it could represent a comparison between the *societas* canon and an Althusian canon, which could contain the likes of Grotius, Leibniz and Proudhon. While this canon *v.* canon view appears to be methodologically stronger and less bold than the one adopted in the thesis, it also raises its own set of questions. How are the two canons to be compared? Are specific authors to be identified as directly comparable, such as Althusius *v.* Hobbes, or is the comparison topic based, such as comparing authors who wrote on sovereignty? But the most fundamental question that needs to be asked, is how would this canon *v.* canon approach improve our understanding of Althusius as a tool for understanding *sui generic* constitutionalism?

A second way in which Althusius' work could be strengthened is by relating Althusius' work to a broader discussion such as the recent analysis of the liberal *v.* communitarian debate (i.e. Frankel Paul, Miller, & Paul 1996, Delaney 1994), as this would offer a more secure grounding in which to locate the two opposing schools of thought. While the liberal camp contained authors with direct links to the *societas* canon, namely Michael Oakeshott's connection to Thomas Hobbes (Oakeshott 1975c), this is not true of the communitarian camp. In addition to this lack of a direct link, although the communitarian camp and Althusius share similarities, could they be

viewed as representing the same theoretical views, given that the main antagonists in the communitarian no longer argue for the communitarian cause?

A third approach could be to explore *Politica's* connection to the functionalism of David Mitrany (1888-1975); namely, in what respect could Althusius be seen as a early exponent of functionalism? Whilst it is evident that Mitrany's work displayed several Althusian characteristics, such as the promotion of the "common good", as opposed to the elimination of national security and the prevention of war (Claude1965: 344); or that the appropriate administrative unit for any given function varies with the size of the problem (Ibid: 348), and that functionalism has been described as 'offering a distinct alternative to normal ways of thinking about a post-Westphalian international order' (Rosamond 2000: 39), this line of investigation alters the fundamental aim of the thesis, which was to offer an understanding of *sui generic* constitutionalism. Instead, an investigation of this sort shifts the focus away from using Althusius as a tool for understanding, and moves it towards an in-depth theoretical discussion of Althusius' theory of association *in relation* to that of Mitrany, but this could be the basis of further research into Althusius' political theory.

A fourth way in which Althusius' argument could be bolstered is to develop the exploration into the practical examples where Althusius was applied. In Chapter One, Titoist Yugoslavia was offered as the sole example of constitutionalism in which ideas from *Politica* were practically applied. While this practical interpretation *is* possible, on a methodological note any attempt to explore a practical constitutionalism must take into consideration significant external factors that can neither be controlled nor discounted. A final note of caution that must be added to this list is that it is also impossible to 'prove' that Althusius did or did not serve the intended purpose for which the Yugoslavs used them.

Rather than specifically bolstering the basis of the Althusian discussion with further theoretical or practical examples, an alternative approach that could be adopted is to supplement *Politica* with comparable constitutional models, and the specific example that could be cited here is the Iroquois Confederation (see for instance Lutz 1998, White 2000, Druke Becker 1998). In this way, the central claim that *Politica* offers a better constitutional theory for the understanding of *sui generic* constitutionalism remains, but it is supplemented by a parallel investigation into the Iroquois

constitutionalism. The reason why the Iroquois is cited in this example is that if the Holy Roman Empire is taken as being influential for Althusius, then the Empire and the Iroquois share many similarities not only with regards to constitutional structure, but also in the fact that both examples as workable models of constitutionalism were effectively ended through the involvement of states in their affairs; for the Empire, the Treaty of Westphalia and for the Iroquois, the American War of independence.

We have argued that Althusian constitutional theory displays a high degree of competency in accommodating and explaining the issues that appear to blight the constitutionalisation of the *sui generic* EU. Adopting an Althusian approach to the key issues explored in the chapters highlights that, despite its age, *Politica* still holds relevance to modern issues. Reading the closing remarks of Althusius, this conclusion should come as no surprise:

> For although political art is general, it always and everywhere agrees with and can be accommodated to every particular and special place, time, and people. This is so even though various and separate realms often use laws of their own differing from those of others in some matters (*Politica*: 208).

While the thesis does not promote either the removal of the state from the EU, or the creation of an EU Empire based on the Holy Roman Empire, it does argue for an alternative understanding of *sui generic* constitutionalism that allots a different degree of significance, importance and power to the different *consociatios* evident in *sui generic* constitutionalism. In relation to the EU, this would require increased roles for the different Regions within the Member States and occupational or political groups, in order to enable these groups to act as a more appropriate arena for specific issues and needs to be addressed. In order for these groups to be effective, this 'Althusianised' approach would also need to redress the power relationships within the EU, with the individual collectives entertaining sovereignty, with each subsequent level of association being sufficient right of sovereignty to fulfil the purpose for which it was created. Under the redistribution, issues such as subsidiarity or consociationalism, which have been so contentious or impotent in the current EU, would be allowed to naturally develop in the confines of the constitutional system.

As this conclusion is drawn from the theoretical potential of Althusius' work, the limitations placed on its applicability are set only by the normative interpretation of the author. Yet, as with all modern studies using historical material as a tool, a significant amount of empathy is required to fully utilise the potential of *Politica*; thus:

> Every system is a mosaic of elements taken from other systems. And yet, it is a great mistake to believe that an idea is necessarily the same when passing from one system to another. Quite apart from the pure misunderstanding, which is so important a factor in the growth of ideas, general concepts gain or lose in significance according to the place which they occupy in different systems. Besides, words abound in meanings. The systematic problem is largely that of developing the implications and limitations of certain general concepts by considering such concepts in ever new relations to the world of concrete data as well as to each other. *The careful and exact thinker, fully conscious of the multiplicity of meanings of which each word is capable, wages a never ending battle against this slippery, soft, evasive, medium* (Friedrich 1932: xlii. Emphasis mine).

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