STUDY GROUP
ON THE
EUROPEAN CONSTITUTIONAL PROCESS

Working Group II
Sovereignty and constituent power

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I. WHAT IS SOVEREIGNTY

1 The concept of sovereignty, referred to the State, indicates the original nature of a legal system, i.e. the fact that it does not derive its validity from any superordinate legal system, but is in turn the source of the validity of the legal systems derived and included within it. It appears in the Sixteenth century, with the work of Jean Bodin, with the aim of strengthening the power of the French monarchy against that of the feudal lords.[1]

2 However, sovereignty should not be confused with power. Rather, it identifies a specific power, namely that of guaranteeing the effectiveness of a legal system. The material foundation of sovereignty confers the character of irresistibility to the power to impose the observance of a juridical order. The irresistibility of state power is the indispensable condition for the realization of social peace and the possibility of promoting all the other values that govern human relationships. The State is therefore not only the ambit in which the struggle for power takes place, but above all the instrument for the realization of the common good. From this point of view the State represents the condition for the primacy, according to Meinecke, of the *ethos* with respect to the *kratos*.[2]

3 Considered under the point of view of effectiveness, and not under that of validity (according to Kelsen's well-known dichotomy), the legal order no longer resolves itself into an abstract system of rules, but into a set of behaviors that converge towards the aim of ensuring the peaceful civil coexistence of a human community, resolving the conflicts that arise in it through the issuing and application of general rules by the various bodies assigned to specific functions.

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1 The drafting of this contribution owes much to the work of Francesco Rossolillo, and in particular: “Popular sovereignty and the federal people as its subject”, in *Senso della storia e azione politica* (Bologna: Il Mulino, 2009), pp.721-64; id., “Notes on Sovereignty”, in ibid. pp.805-42; id., “What is sovereignty”, ibid. pp.499-510.

2 Bertrand de Jouvenel, *De la souveraineté. A la recherche du well politique*, (Paris, 1955).

4 The effectiveness of a legal system therefore depends on the existence of a specific institutional arrangement endowed with the power to impose compliance with the rules that compose it. This institutional arrangement is represented by the State. Sovereignty is the power, which belongs exclusively to the state, to ultimately guarantee the efficacy of a legal order.

5 Referred instead to the people, the concept of sovereignty appears in the work of Thomas Hobbes, Baruch Spinoza, John Locke and in that of Jean-Jacques Rousseau, and finds its first political expression in the American declaration of independence of 1776, and subsequently in the French Revolution.[3]

6 Sovereignty is identified, according to Rousseau, in the general will, which is by definition incoercible and at the same time creator of norms destined to last over time.

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3 Hobbes based the principle of legitimization of sovereignty on the fundamental pact with which an anonymous mass of individuals exits the state of nature and operates in the interest of the common good. This authority is the state, which can take different forms, but which is identical in its foundation. Its raison d'être consists in the fact that it is the fundamental instrument that allows citizens to resolve their conflicts by peaceful and constitutional means. The bond that binds citizens to the state is based on the principle of representation, which makes the exercise of power legitimate and irresistible, and individuals equals. As equals, they have chosen to leave the state of nature and enter the realm of law, and as equals submit themselves to the rule of law. If the basis of sovereignty lies in the self-constitution of individuals as a people, its legitimacy depends, according to Hobbes, on the fact that the exercise of power is (or is not) carried out in the interests and welfare of the people as a whole. Thomas Hobbes, *Leviathan* (London: Penguin Classics, 1982). For Spinoza, the legitimacy of sovereignty lies in natural law, because only within the state do individuals succeed in protecting their fundamental natural rights, namely self-preservation and the affirmation of their freedom. If the true end of the state is freedom, the form of state that appears more rational because it is more appropriate to realize the vocation of man is the democratic one. Moreover, for Spinoza it is also "more natural" because within it no one irrevocably gives up their natural right of self-government. Spinoza has gone so far as to identify in democracy the "absolute form of government," since, based on the principle of collegiality and shared responsibility, it is the one that best favours the self-preservation of the individual and the community as a whole. The duty of submission by the citizen to the coercive power of the state ceases as soon as the state acts against natural rights and therefore against reason, or operates arbitrary restrictions on liberty or self-preservation Spinoza, *Trattato teologico-politico* (Turin: Einaudi, 1962), 482, 382. With John Locke, the father of liberal constitutionalism, for the first time in the British political tradition the concept of the commonwealth was formulated, inspired by the res publica of the Roman tradition. By commonwealth, Locke means a political community that emerges from an agreement originating from the majority of individuals who voluntarily chose to leave the state of nature and enter the rule of law (the state), and always voluntarily delegate to a supreme authority (the government) the protection of the individual's fundamental rights (life, liberty, goods). Being the majority, and not the totality of individuals, founding and legitimizing the constitutive act of the political community – the Constitution, which sets precise limits to both legislative and executive power – it is always up to the majority to exercise, through a fiduciary authority, the functions of government. The legitimacy of the exercise of power is therefore based on a mandate, revocable by the majority, if the trust relationship is missing. In Locke is a theoretical legitimation of the constitutive principles of the doctrine of representation, namely that of popular sovereignty, of the government of the majority, and above all of the primacy of the Constitution on every legislative and governmental act, on the basis of which the English constitutional monarchy could be realized. John Locke, *Il secondo trattato sul governo* (Milan: Rizzoli, 1998), 237.

It is the expression of a process, in the course of which a historical people marks the stages through which the people as such becomes what it is. However, the general will only acts in the great turning phases of the history of human emancipation, and modifies a historically given constitutional arrangement when it has proved inadequate to respond to the needs of civil life and the material conditions exist for a reformulation of the social pact.[4]

7 Referred to the international legal system, it instead indicates the full international legal capacity of a State. Even if it is an embryonic form of recognition of a general interest beyond the borders of the States, the effectiveness of its rules ultimately depends on the willingness of those to which they are addressed to respect them. Since there is not a State above the States, relations between sovereign States are therefore not governed by law, but by power politics.

8 Sovereignty is therefore at the same time the guarantee of the maintenance of peace within the State and the cause of war in relations between States. In fact, since the State is the foundation of law, and since there is no international State, relations between States are subtracted from law and based on force, the only law that ultimately regulates relations between them.

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4 Rousseau identifies the foundation of democratic legitimacy in the direct exercise of sovereignty by the people. Being indivisible, sovereignty "cannot be represented, for the same reason that it cannot be alienated," Rousseau argued, that is to say "the deputies of the people cannot be its representatives, but only its commissioners." Having defined the basis of the legitimacy of sovereignty, Rousseau addressed the question of its exercise, overcoming the traditional category of the will of all (of the majority), and introducing that of the general will, namely the result of the process of identification and achievement of the common good. Since the knowledge of the common good depends on the ability of the people to recognize it rationally, and to free itself from material and cultural constraints in pursuing it, Rousseau attributes to the figure of the "legislator" the power to replace the people, while working in the name of the people, to guide the historical process towards the achievement of the common good. The contradictions of Rousseau's thought were immediately seized by Henri Benjamin Constant, who denied the theoretical possibility that the representatives of the general will could act autonomously, on behalf of the people as such, since in doing so they would come to exercise a dictatorial power, limiting the civil liberties and thus denying the very source of the principle of sovereignty. Without a constitutional limitation on the exercise of sovereignty, in the name of democracy the political predominance of the aristocratic and bourgeois elites on the rest of society would be legitimized, having them already acquired social and economic dominance within society. Unlike Athens, where the people, by directly exercising sovereignty, benefited a collective liberty – because the people's freedom actually coincided with that of the community as a whole, and accepted submission to the general will – the national states guaranteed individual freedom, that is a limited exercise of sovereignty through the mechanism of representation, with which the protection of both particular and collective interests was delegated to an authority with limited powers. Respect for the rights of minorities and non-interference with the private sphere of existence were the two limits placed by Constant in the exercise of sovereignty by the state. Jean-Jacques Rousseau, Scritti politici (Rome-Bari: Laterza, 1971), vol. II, 163, 93, 140. Benjamin Constant, Princìpi di politica, Umberto Cerroni ed., (Rome: Samonà e Savelli, 1965).

II. THE STATE AND THE QUESTION OF LEGITIMACY

9 If we accept the notion of sovereignty as the power to decide in the last instance, we can agree that the highest form of power is represented by the State, within which social peace is achieved through the imposition of law.[5]

10 The State is an entity which is not legitimized by any higher order, but which itself legitimizes any other order. The question of legitimacy is reflected in the awareness, by the members of a community, that beyond the particular interests which oppose each other in the civil society, there is a general interest, and that the State is its expression. The legitimacy therefore constitutes the foundation of the consent by the citizens (or at least of their vast majority) towards the State and its institutions, i.e. the acceptance by citizens of the bond that unites them in a single community of destiny, of the principles that underlie their coexistence, and of the rules that discipline the political struggle.

11 Since the French Revolution, the foundation of the legitimacy of the State has been identified in the people. With the overcoming of the conflict of legitimacy (which is equivalent to the lack of legitimacy) of the medieval age, and of the imposition of a single secular authority in the name of divine right, it is the people who offers for the first time in constitutional history a concrete content to the idea of general interest, or common good. Indeed, it was no coincidence that the absolute monarchy prospered in France, where it was born, as long as it enjoyed popular consent to combat the feudal resistance of the nobility, and fell just when it entered into conflict with the general interest.[6]

12 Only the attribution of sovereignty to the people allows us to get out of the antinomy that otherwise vitiates any theory of sovereignty: that between the need to base the legitimacy of the constitutional order on the irresistible power of the holder of sovereignty (*non veritas sed auctoritas ease legem*) and the opposite one of founding the power of the holder of sovereignty on some form of legitimacy, i.e. on the observance of certain principles endowed with intrinsic validity (*non auctoritas sed veritas facit legem*), without which the door would open to legitimizing any abuse.[7]

13 There are two classic conceptions of the State which, for opposite reasons, do not recognize the crucial role of the idea of legitimacy. The first, which is common to

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5 Hans J. Morgenthau, *Politics among Nations. The Struggle for Power and Peace* (New York, 1993).

6 Joyce Lee Malcolm, *The Struggle for Sovereignty*, (Indianapolis, 1999).

7 This is the concern that drives Bodin and other 16th and 17th century theorists to argue that the absolute monarch, holder of sovereignty, is in any case required to observe the *lois du royaume*.

the Marxist tradition and to a good extent to political science, identify in the State the pure superstructural manifestation of a specific way of producing, and of the social stratification that derives from it, or one of the many configurations that can assume the relations of power among men, or among groups with which men organize themselves. From this conception it follows that the Constitution of the State lacks autonomy, since its content does not represent the general will but that of the the classes and dominant groups of power.

14 The second is the juspositivist conception of the State, which had its most rigorous interpreter in Kelsen. According to this conception, the State is identified in a system of norms which establish the legality of the domestic legal order, founded in turn by norms of a higher order (those of international law), in a pyramid which culminates in the *Grundnorm*, or fundamental norm.[8]

15 The reduction of the State to an expression of pure historically defined power relations or to abstract norms does not, however, allow us to make the distinction between material Constitution and formal Constitution. The formal Constitution is a set of norms that stand out from the rest of the legal order, since they require a more strict procedure in order to be approved, modified or suppressed. The material Constitution is, instead, the totality of the principles, the norms and the institutions in which it is expressed the legitimacy of the State. Their description normally constitutes integral part part of the formal Constitution, but their existence is independent from it, which may even not exist, as it is the case of the Great Britain.[9]

16 If we drop the idea of the people as the foundation of legitimacy and holder of constituent power because it is ideological and functional to the power interests of the elites from whose confrontation and clash the forms of the State are born and are modified, we suppress a priori the question of the legitimacy of power and its exercise, basing it on the category of arbitrariness. Power would thus come to be based on the pure fact of one's own existence.

17 The legitimacy of ever historical manifestation of the State is, however, only partial, for the fact that power and right, which should merge within the legitimacy, are, at the same time, inseparable and contradictory terms. In fact, legitimacy presents, together with its formal and therefore supra-historical aspect, a mutable aspect as it is inserted in the concrete historical reality. However, the history of

8 Hans Kelsen, *General Theory of Law and State*, (New York: 2007).

9 Carl Schmitt, *Die Diktatur*, (Berlin: Duncker & Humblot,1989); id., *Legalität und Legitimität*, (Berlin: Duncker & Humblot, 1989); Konrad Hesse, *Die normative Kraft der Verfassung*, (Tübingen: ICB Mohr, 1959).

the State is the history of the emergence of ever new forms of legitimacy, i.e. of ideological formulas by virtue of which the State attempts to justify its own existence from time to time and to establish the loyalty of its citizens.[10]

18 A contradiction that manifests itself most clearly in international relations.[11]

III. SOVEREIGNTY AND CONSTITUENT POWER

19 The historical evolution of the modern State towards more inclusive forms stems precisely from this contradiction. The subject of the creation of new forms of legitimacy in a new material Constitution is the people in its constituent capacity. This manifests itself in an act of will, better defined by Rousseau as general will, which finds its expression in the concept of sovereignty.

20 However, the difficulty of directly or indirectly exercising the constituent power by the people is partially overcome by the process of constitutionalisation of the norms, through which a constitutional revision is carried out gradually, by introducing into the existent constitutional order a new norm that modifies it partially.[12]

21 The constituent power as such implies instead a break from the formal continuity of the juridical order or its overcoming. In fact, the subject exercising the constituent power does not limit itself to modifying norms which are constitutional in the formal sense only, but which have lost their actual effectiveness (and as such can be changed in compliance with the letter and spirit of the Constitution in force), but transforms the same contents of legitimacy.[13]

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10 Legitimacy is a circular idea, as an expression of the two contradictory needs offounding the norm over the fact and the fact over the norm. Consider, for example, the unresolved contradiction between the need to guarantee the legality of coexistence thanks to the irresistible power of a sovereign *legibus solutus,* and that of limiting the possible arbitrary acts by the latter, prescribing the observance of higher legal norms (natural law, or le *lois du royaume* of Bodin).

11 The State's capacity to defend itself through the use of violence from threats from outside is the fundamental condition for earning the loyalty of its citizens, but at the same time it compromises the certainty of juridical relations within it.

12 The constitutionalization of sovereignty takes place by attributing to a constitutional body the power to suspend the existing constitutional guarantees and introduce provisional norms. As long as one remains within the ambit of the Constitution, the power to suspend constitutional guarantees must be subject to precise limits, which in turn are subject to scrutiny by other constitutional bodies. This makes the problem of identifying the ultimate decision-maker within the Constitution circular.

13 Carl Schmitt, *Politische Theology. Vier Kapitel zur Lehre der Souveränität*, (Berlin: Duncker & Humblot, 1990); id., *Verfassungslehre*, (Berlin: Duncker & Humblot, 1928); Ernst-Wolfgang Böckenförde, "Begriff und Probleme des Verfassungsstaates", in *Staat , Nation, Europa*, (Frankfurt: 1999). Schmitt himself, in the same work (p. 89), referring to W. Burckhardt, notes that, if the foundation of the legitimacy of a Constitution depended on the fact that it was approved according to the procedures established by the existing Constitution, no Constitution would be legitimate because, tracing the genealogy of successive constitutions back in time, one would in any case arrive, sooner or later, at an illegitimate Constitution, which would therefore transmit its illegitimacy to all subsequent ones.

22 In reality, no Constitution can legitimately dictate provisions for overcoming its crisis, since each Constitution considers its legitimacy foundations as permanent and unchangeable. The possibility of overcoming a situation of institutional difficulty by virtue of a constitutional provision assumes that the crisis does not involve the system as a whole and does not jeopardize the foundations of legitimacy, i.e. it is not a real crisis.

23 When the crisis of the institutions involves the system as a whole and its foundations of legitimacy, ultimately the decision-maker can only be identified *outside the Constitution*, and its power cannot be exercised by virtue of a pre-existing norm. It is therefore up to politics (a policy that does not limit itself to the struggle for power) to found or re-found the juridical order of the State.[14]

24 Here the question arises whether the holder of sovereignty and ultimate decision-maker is a subject located within or outside the Constitution. For this purpose, it is useful to adopt the distinction of Carl Scthmitt between the *people within the Constitution* and the *people before and above he Constitution*. The people within the Constitution are the association of citizens-voters of a State, of which it constitutes an organ, and which performs the function that the Constitution assigns to it through the procedures it determines (elections, referendum, popular initiatives). In this function the people are *constituted* from a pre-existing juridical order.[15]

14 The constituent power cannot be exercised by the judiciary, whose task is to apply the law in force and not to found the principles of a new legal order. In the history of the United States itself, which has also been profoundly marked by the decisions of the Supreme Court, these have never affected the fundamental principles of the Constitution, so much so that it seems reasonable to maintain that, after the foundation of the federation, this has known only three true constituent moments, in which the foundations of civil coexistence were radically questioned: the Civil War, the New Deal and the great battles for civil rights in the 1960s. The Supreme Court has certainly exercised a fundamental function throughout the history of the Union, but it has always been a function performed within the framework of a constitutional order whose foundations, despite the continuous flux of events and beyond the incessant transformation of political and social balances, have remained unchanged between each constituent fact and the next. All this does not mean that, in certain circumstances of profound crisis of power, politics can make use of the same judges to affirm its primacy, even if in perverse forms. These are the occasions in which, under the deceptive appearance of the prevalence of law over politics, lays the profoundly degenerative phenomenon of the politicization of law and the renunciation on the part of judges of rigorously and impartially exercising their function. Carl Schmitt, *Der Hüter der Verfassung*, (Berlin: Duncker & Humblot, 1985).

15 Schmitt, *Verfassungslehre*, cit.

25 According to this distinction, the people are the holders of constituent power once they place themselves before and above the Constitution, i.e. they constitute themselves the essential forms of the organization of power, to which the constitutional document (or some ordinary laws and practices, as in Great Britain) gives a legal form.[16]

IV. THE PEOPLE AS SUBJECT OF THE CONSTITUENT POWER

26 Although it is a reality whose nature is difficult to define in universal and non-contradictory terms, and which lends itself to ideological use, it is undeniable to identify the subject of the historical process in the first and last instance in the people.

27 However, the true essence of the people does not manifest itself *in the Constitution*, i.e. in its function as an electoral body, but *before and above the Constitution*, i.e. they are not represented just by elective assemblies, but by the *totality* of the organs, of the rules and of the procedures in the which it is articulated the material Constitution. The constituent power, or popular sovereignty, are thus something essentially different from the expression of suffrage which constitute the foundation of democracy.[17]

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16 "The nation exists first and foremost," according to Sieyès. It is the origin of everything: "Its will is always legal, it is the law by itself". "The national will ... needs just of its reality to always be legal, it is the origin of all legality. Not only is the nation not subject to any Constitution, but it *cannot* be, *must not* be", (*Qu'est -ce que le Tiers- Etat?* Chap.V). To clarify the difference between the two subjects with an example, it is enough to think of those cases of profound modification of the constitutional structures of the European States during the 19th century and at the beginning of the 20th, which were the enlargements of the suffrage first to all male citizens and then to women. Decisions of this type, even if they were taken with ordinary law, and therefore without any formal rupture of juridical continuity, in fact can only be interpreted as the exercise by the people of their constituent power. But these are acts of will whose subject was not the electorate as it was defined by the previous legal system (that is, before the enlargement of the suffrage), but an entity that expressed itself in the name of the new *electorate*. All the great extensions of suffrage in the history of democratic states have been the culmination of struggles carried out first and foremost by the excluded (in addition to the more advanced section of the classes to which suffrage was already recognized), therefore by those whom the previous system did not recognize as members of the sovereign people.

17 It is important to note that, in all the democratic regimes, some of these organs, rules and procedures have the specific function to guarantee the fundamental rights of citizens against the arbitrariness that can arise from the behavior of the majority of the electorate and the bodies that represent it. The customary consensus concerns both the regime, i.e. the set of institutions that express the values of civil coexistence in a specific spatial framework, and the community, i.e. the framework within which civil coexistence takes place, and which in turn is by no means neutral with respect to those values. This consensus continues to exist even when it is not manifested in concrete acts of will, but it can become active again when the principles that underlie the legitimacy of coexistence are called into question. In these cases, there is a regime crisis, or, when the political framework is called into in question, even a community crisis. Both can only lead to the opening of a new constituent phase, in which the people as a subject of the general will returns to distinguish

28 In the constituent phases the people cease to identify themselves with the existing institutions and organize themselves in specific forms with an act of will, thanks to which, according to the Kantian expression, a multitude becomes a people. The history of the people is therefore identified in the history of state formations produced by successive constituent acts. However, this is just a provisional and tendential identification, characterized by continuous overcoming of the political form that crystallizes that relationship. Every historically given constitutional form is in fact a specific form of organization of power, i.e. it defines a provisional relationship between the governed (a historical people) and the governors (the agents of the people in the exercise of power). Indeed, there is a contradiction Between the idea of people and its empirical manifestations.

29 The idea of people therefore does not dentify with a historically given people, but with its progressive development. As holder of the constituent power (or of the sovereignty), the idea of the peoplemanifests itself in the duration, i.e. in the deeds of collective volition long accrued, which mark the fundamental stages of the process of human emancipation.

30 The people in the history therefore must be thought as *ongoing project*, i.e. as an entity which contains in itself the idea of its own accomplished realization, and which progressively realizes in the course of the history the determinations that are inherent in its concept.

31 The concept of the people as *a project* refers to that of the people as *a constitutional process*, in the course of which subjectivity becomes what it is.[18]

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itself from an institutional arrangement which in fact has ceased to exist, or in a long process of political disorder and civil decay.

18 Values are defined historically, that is to say they are inscribed throughout history, which makes them progressively thinkable and concretely achievable from time to time. If one denies history a meaning, reducing it to pure materiality, or to mere fortuity, one ends up by relativizing and isolating the exercise of freedom – reducing it to subjective arbitrariness – and denying the manifestation of rationality – that which exists in itself and for itself – in history. To deny the immanence of reason in history means attributing the link between events to chance or fortune. If one is not able to think of history as a meaningful process, it is not possible to give political action a meaning that goes beyond the present. Only by accepting the idea of the historical course, of a beginning, a development, and an end, subjectivity finds its own task within it, the role of the continuator of a process where subjectivity and objectivity merge, and which has continuity of meaning. Conceived as a process in which man becomes,

in Hegelian terms, what he is, history makes sense only if the event carries with it the sign of its own insufficiency, as an incomplete manifestation of reason in its materialization. From this perspective, the historical process is seen in a dialectic relationship between the polarity of essence and existence, between the rational and the real, towards their progressive fusion. It was Kant who made the sphere of individual morality coincides with that of the course of history as the result of a design of nature, which using the 'sociable un-sociability' of individuals establishes a dialectic relationship between subjectivity – the ideas of reason, the sphere of morality, of the ends – and objectivity, that is to say, the course of history. Even in Max Weber, subjectivity and objectivity are two spheres that tend to coincide. Making a distinction between the ethics of intention – that is obedience to the command of consciousness in itself and for itself, regardless of its practical consequences – and the ethics of responsibility – the action aimed at achieving an end – Weber isolated, in the sphere of morality, two specific fields for the application of freedom: the field of pure witness and the field of politics. It is the separation between the doing (an action in itself) and the being able to do (using a situation of power) that makes political action the specific field of the ethics of responsibility.