

# The Constituent Power and the Foundation of the European Federation

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## Introduction

- 1 Who is the holder of the European constituent power? The European people (who as a single entity will be able to found the Federation with a unilateral act of constituent will) or the European peoples (whose desire to unite in a Federation has to manifest itself into a Pact)?<sup>1</sup>
- 2 The European constituent process is characterized by the transfer of the competences of sovereignty, and has a duration. Sovereignty, as defined by Bodin, is indivisible, and its sole holder is the people.<sup>2</sup> However, in the scholarly discussion on the European integration process it is highly controversial whether defining sovereignty as indivisible makes sense.<sup>3</sup> Alike the concept of the 'people', sovereignty may be conceived not as an atemporal abstract entity, but as subject to evolution in history. Moreover, taking the basic principles of democratic governance seriously, sovereignty may need to be entirely re-conceptualised.<sup>4</sup> If sovereignty were divisible, the European Federation could be created gradually, through progressive transfers of sovereignty from the States to a supranational entity destined to be formed

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1 The same dilemma manifested itself in the first phase of the constitutional life of the United States. While the founding fathers (and in particular Hamilton) had based their action on the belief that a people of the United States existed, the supporters of the defense of States' rights (which would find its most rigorous theoretical expression in the first decades of the nineteenth century in the writings of John Calhoun) believed that the subjects to whom constituent power belonged were the peoples of the individual States (John Calhoun, *A Discourse on the Constitution and Government, in Union and Liberty. The Political Philosophy of John Calhoun*, ed. Ross M. Lence (Indianapolis, Liberty Fund, 1992s.)).

2 The element of duration in constitutional transformations was highlighted by Mario Albertini with the theory of constitutional gradualism, *Il federalismo. Antologiae definizione* (Bologna: Il Mulino, 1998).

3 Divisibility is posited e.g. by Stefan Oeter, *ZaöRV* 55 (1995), 659, 667ss.; see also Dimitris Tsatsos, *EuGRZ* 1995, 287, 289; for an overview see Stefan Haack, *Verlust der Staatlichkeit*, Tübingen 2007, p. 10.

4 See Peter Schiffauer, *Towards Democratic Sovereignty*, DTIEV-Online 1/2024, <https://www.fernuni-hagen.de/dtiev/docs/dtiev-online-schiffauer-2024.pdf>

through a continuous process, without crises and shocks. Under the assumption that sovereignty must belong entirely to the national States or the Federation, the process cannot fail to go through a phase, or rather a constituent moment, in which the transfer from the States to the Federation takes place. This is the moment in which the European federal people become aware of itself as a new historical subject, and replaces the national peoples as holders of an outdated legitimacy.

- 3 The recognition of the processual nature of the people allows us to recognize the existence of a European people in the making and identify the confluence of individual national peoples in this process. To the birth of the European people as a new historical subject would thus correspond the contemporary dissolution of national peoples, in the same way in which national peoples were formed through the progressive integration of older peoples that had evolved in human history. Similarly, democratic sovereignty may be conceived as spread out and exercised in non- hierarchical and multi-level-structures.

**I. The European constitutional process**

- 4 The present European Union does not constitute a real State. It is in fact an embryonic form of State, and nothing is as difficult as creating a new State on an area already covered by many States. At any moment, until its final achievement, such an undertaking can fail.

- 5 The fact that the EU does not depend, as Kalypso Nicolaïdis first pointed out, on the existence of a single European demos, but on a plurality of demoi which voluntarily agreed to jointly exercise part of their sovereign powers through common legislative, executive and judiciary institutions, characterizes the EU as a democracy in the making. It could also be seen as a constituent power in progress. In fact, the process of democratization of EU institutions had the effect of establishing horizontal relationships between citizens, organizations and institutions from the different demoi on issues of their collective governance.

- 6 An example of such horizontal relationship is the EU's system of legislating, involving federal institutions such as the European Commission and the European Parliament as well as institutions representing the single demoi such as national governments and parliaments. Other examples of EU's

democratic mechanism are the interaction between EU agencies and their national counterparts, and the so-called 'yellow card' or Early Warning Mechanism introduced by the Lisbon Treaty, which provides an institutionalized network which enables many demoi to deliberate together on substantive EU legislation.

7 The European institutions offer the most advanced example of functional supranational constitutionalism, or of a supranational constitutional authority founded on a plurality of national constitutional identities. In the process of European integration, constitutionalism and democracy as empirical ideas and normative ideals have become synonymous with legitimate governance.

8 Since the Treaties of Rome, the European Court of Justice played an important role in the constitutionalizing of the European Community/Union, transforming the perception of the existing treaties into that of a 'material' Constitution. By creating individual rights of common market/European Union citizens this process directly favoured transborder integration, the effectiveness of European norms, institutional expansion, the awareness and the defence of the borders of the Union, and the pursuit of social solidarity. However, this process took place through the back door, with the progressive creation of a supranational legal order *ex proprio vigore* (i.e. a coherent and systematic corpus of legal rules with autonomous validity, coinciding with a territorially limited social and political entity), initially intended to support the creation of a common economic free-trade area.<sup>5</sup>

9 The question of European constitutionalism cannot be reduced however to the mere question of political mechanisms. It is rather anchored in the fundamental question, namely how a transition from national societies based on the values of centralization/devolution and nationalism, to a multi/supranational society based on democratic practices, community values, and cosmopolitanism can be brought about. The European Constitutional process constitutes the first concrete case of constitutional pluralism.

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5 As mentioned by the ECJ for the first time in case C 157/21, "the values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order" (February 2022, Poland against EP and Council, para 145).

## II. The constituent power

- 10 It therefore appears arbitrary to support the thesis according to which the European people is the sole holder of the constituent power. The empirical fact of a European people in formation and national peoples in dissolution implies that the European constituent process is the result of the manifestation of a joint will of the former and the latter. If we accept the fact that the European people is in formation and the national peoples in dissolution are represented by specific institutions, and that these are respectively the Parliament and the Council, the subjects of constituent power have thus been identified. The great turning points in the process of European unification were achieved when the European people in the making was able to recognize itself in great national leaders such as Robert Schuman, Alcide de Gasperi and Konrad Adenauer or Valery Giscard d'Estaing and Helmut Schmidt who, in crucial phases, took the lead in creating the European Community or its Monetary Union. This will be even more true for the actual phase. The process of institutional transformation in Europe has so far been carried out by the old state-centred order in an attempt to control and to channel into forms compatible with the existing balance of power the newly emerging forces which are taking shape beneath the surface of a European society which at the surface is still fractured in nations while it is gradually re-gaining the consciousness of its unity that was lost under the suffering of religious wars, the Westphalian compromise and its abuse to construe absolute monarchism.
- 11 Within the European Union, the Council (together with the national parliaments) embodies the confederal principle, while the Parliament (together with the Commission) embodies the federal one. In fact, the European Parliament historically played the role of pushing forward the democratic transformation of the Union, developing the tendency to affirm a new principle of legitimacy, transnational democracy, together with the old legitimacy, which is based on established sovereign powers. In this regard, it is possible to compare the process of democratization of the European Union to the historical transition from absolute monarchy to parliamentary and constitutional monarchy, which took place in Europe from the Eighteenth to the Nineteenth century. The basic idea promoted by Altiero Spinelli within the European Parliament was precisely that of balancing the powers between the

Council and Parliament. The day a constitutional treaty will provide for full co-decision between the Council and Parliament and within the Council all decisions will be taken by majority, the European Federation will have made an important step forward. Regardless of the number and 'weight' of the competences that will be transferred to it. Once a permanent institutional framework has been defined, that allows the Union to deliver on the competences attributed to it, its completion through additional, both exclusive and concurring competences can be achieved progressively.

- 12 The European people in formation and the national peoples in dissolution are in reality two historical figures of the same entity: the people as such before and above the Constitution, who is the holder of the constituent power. As an entity in the making, which takes on different figures in the course of its historical realization, in the phases of transition from one figure to the other, it can manifest itself simultaneously in the form of both. The creation of the European Federation will therefore not be the result of the expression of the constituent will of just a new subject, nor that of the stipulation of a contract between pre-existing subjects, but of an Act which will have both the characteristics of a Constitution and that of a Treaty.<sup>6</sup>
- 13 In the process of realization of the universal people in historical figures, the process of European unification marks the transition from the figure of the national people to that of the federal people. Europe is therefore the laboratory in which mankind is attempting to develop the institutional response to the crisis of national sovereignty. However, the specificity of the constituent practice being experienced in Europe, highlights its incomplete character, as a simple stage, albeit decisive, of a process that transcends it. This specificity consists in the fact that the European Federation will not have a legitimacy other than the purely negative one of overcoming the national legitimacy: a profoundly contradictory legitimacy since the European federal people, whatever its size, is destined to be a people among others, and will therefore maintain an historically determined connotation.

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6 The process of founding the European federation has a meaning that goes beyond that of the foundation of other historical federations, which effectively created new national peoples. With the overcoming of the nation in the historical site of its birth, the European federation is also destined to initiate the process of formation of the supranational federal people.

14 The European people will complete the process of its formation only after the European Federation will be established. Its process of formation will develop only after having expressed its constituent will and within new institutions. The progressive disappearance of national peoples will not, however, suppress nations, but will overcome them, that is, it will deny the claim to unlimited national sovereignty, preserving their original identity. The European federal people will be a pluralistic people, whose distinctive characteristic will be the multiplicity of loyalties of the citizens, who will have as terms of reference both the common belonging to the Federation and to the States from whose union the Federation will be born, as well as to increasingly restricted communities, which will re-emerge thanks to the overcoming of the exclusive character of national loyalty. Thus, the exclusivity of belonging to a single state will also be overcome, allowing to change or to hold multiple nationalities having regard to cultural affinities that evolve in a citizen's lifetime.<sup>7</sup>

**III. What is the process of European unification? A methodological question**

15 If world history prior to 1945 is understandable and interpretable according to traditional historiographical categories – that is, the point of view of the nation State and its relations with other States in the exercise of power politics on a global scale – the following period requires the use of new interpretative categories, since the nation State, in its classical form, no longer exists. This is due, amongst others, to the factual implications of the concept of sovereignty, to the globalisation of the economies and their impacts, and to the development of hegemonic power blocks such as NATO, Warsaw Pact, China. It is therefore quite evident that it is impossible to understand the historical novelty of the process of European unification by applying old historiographical categories.<sup>8</sup>

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7 The notion of 'federal people' was theorised by Mario Albertini (L'Europe des Etats, l'Europe du Marché commun et l'Europe du Peuple fédéral européen, in «Le Fédéraliste», IV (1962), n. 2; Vers une théorie positive du fédéralisme, ibidem, V (1963), n. 4. Before the precise formulation of this concept, the awareness that the institutions of a federal State can only exist if supported by a pluralistic people had been expressed by authors such as A.V. Dicey, *The Law of the Constitution*, (Liberty Classics, Indianapolis, 1982, pp. 75-6), and K.C. Whe are, *Federal Government*, (Oxford, Oxford University Press, 1963, pp. 35).

8 For an analysis of how the employment of nation-state dominated discourses have caused a re-imagination of the past, and how the past has been re-constructed to accord with nationalist agendas, see Claire Norton ed., *Nationalism, Historiography and the (Re)Construction of the Past* (Washington, DC: New Academia Publishing, 2007). For a study on the relationship between history writing and the construction of national identities in modern Europe, see Stefan Berger, *Writing the Nation: A Global Perspective* (London: Palgrave

- 16 However, the process of European unification has not yet ended with the creation of a European Federation. This means that the process of transfer of sovereignty – lost at the end of the Second World War by European States – from the hegemonic power within the Atlantic System, the USA, to the existing European institutions has not yet been completed. The fact is that we are not yet able to define the character of the future European State, and also that we do not have absolute certainty that the process will end with the creation of a new State in the current meaning of this term.<sup>9</sup>
- 17 For the study of an open process – as for contemporary history – it is therefore necessary to formulate interpretative hypotheses on the basis of postulates. From the traditional federalist viewpoint, there are, in this regard, only two plausible hypotheses: that the ongoing process will end with the creation of a European State of a federal nature, or the failure of the project, as according to Kant it is necessary “to presuppose an ultimate goal in the world in relation to which the observation of the world in its turn has a purpose.”<sup>10</sup>
- 18 It is also possible to hypothesize – purely theoretically, because in fact every historical process has a conclusion – that the process of European unification will remain forever open, that is to say it will not end with the creation of a State or even with its failure. The stall hypothesis foresees a process that feeds itself indefinitely without producing significant advances, based on intergovernmental negotiations. According to this hypothesis, the process of European integration has saved or rescued the nation State, which would thus continue to exist and resist indefinitely.<sup>11</sup>

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Macmillan, 2007); id., *The Past as History: National Identity and Historical Consciousness in Modern Europe* (London: Palgrave Macmillan, 2014).

9 In the formulation and application of a theoretical model – the Weberian ideal-type – the interpretation of historical facts requires knowledge of the conclusion of a given process or historical period. It is in fact the conclusion of a process that makes it possible to develop a unitarian and non-contradictory interpretative model of its phases of development. The knowledge of a process still in progress cannot therefore exceed the character of a conjecture, and its scientific validity consists in its heuristic potential, that is to say its ability to interpret in a unitarian and non-contradictory manner facts where otherwise it would be very difficult – if not impossible – to lead back to rationality, and therefore to make sense of them.

10 Quoted in Rossolillo, *Senso della storia e azione politica* (Bologna: Il Mulino, 2009), 71. For a study on the plurality of interpretations on the process of European unification, see Hanna Ojanen, *The Plurality of Truth: A Critique of Research on the State and European Integration* (London: Routledge, 2019).

11 Alan Milward, *The European Rescue of the Nation State* (London: Routledge, 1999); id., *Politics and Economics in the History of the European Union* (London: Routledge, 2005). For an analysis of Milward's contribution, see Fernando Guirao, Frances Lynch and Sigfrido M. Change (London: Routledge, 2012). Ramirez Perez, eds., *Alan S. Milward and a Century of European*

- 19 This hypothesis excludes a priori the possibility of completing the process of transferring sovereignty from the hegemonic power within the Atlantic System to the European institutions. Sovereignty is the exercise of power by the citizen, who delegates its exercise to representative and constitutional institutions for a limited and renewable period of time. Sovereignty can therefore be transferred only to a State, and precisely because there is not yet a European State it is still predominantly exercised – on strategic matters as monetary, financial, foreign and defence policies – by the hegemonic State within the System. If it were transferred to individual European States, this would mean both the failure of the process of European unification – with the restoration of national sovereignty by individual European States, a fundamental cause of European civil wars – and the collapse of the Atlantic System, and with it the return to a situation of international anarchy.
- 20 In the light of the Kantian quote above, both explained hypotheses would assume that the ‘State’ in its current form appears as an ultimate goal. However, such an ultimate goal would be quite in contradiction to another Kantian quote, that posits freedom as the precondition of reason.<sup>12</sup> For that reason a third hypothesis is developed from a starting point, that puts into question the political form of the state that has emerged in the aftermath of the Westphalian order and is substantially upheld by international law based on that order. This hypothesis doubts that the political form of the state is, as some moving in Hegelian footprints may believe, the climax and final achievement of human culture, manifestation of ‘Weltgeist’ and ‘end of history’. The Kantian vision of a reign of universal peace, that is governed by reason flowing from freedom, is calling for the development of a political form that abandons the hierarchical principle of statehood. It would instead be based on a multi-level institutional set-up, an embryonic form of which has ‘spontaneously’ developed in the EU institutional system, since its egalitarian representative structures allow for free communication amongst each other.

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12 Auf dieser Freiheit beruht sogar die Existenz der Vernunft.“ I. Kant, Kritik der reinen Vernunft, B 766.



The political form resulting from such a process rather than a federal state would be a polykephalous state.<sup>13</sup>

- 21 It is undeniable that the true and specific character of the Twentieth century is reflected in the three attempts to unify Europe. If the first two failed because they were realized through violence, and two world wars were necessary to defeat them, a third one is perhaps tried out today in the war brought by the Russian Federation. Another and substantially different attempt is currently undertaken with peaceful methods. The question of overcoming the political division of Europe into national States therefore appears as an objective factor of the Twentieth century historical process as a whole – together with other factors, such as the October Revolution and the advent of the Atlantic System – and understandable only by hypothesizing the start, from a specific moment, of the supranational course of history.<sup>14</sup>

#### **IV. The character of the European constitutional process**

- 22 The fundamental character of the European constitutional process is that it consumes its own institutions. First, it is nourished by the institutions of its member States, the institutions which divide Europe into national States. Secondly, during the transitional phase it produces some provisional and sui generis institutions, like those of the European Communities. Finally, it replaces both the national institutions and the provisional ones, and creates a new one, which, in the view of some, should be a Federal Government.<sup>15</sup> In the view of others, such government would exactly bring about the European Super-State that many are opposing. The political logic of a hierarchically superior government would inevitably lead it, as described by N. Elias,<sup>16</sup> into

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13 The characteristics of that new political form would need further elaboration. Its basic features were explained by Peter Schiffauer, *Versuch über die Transformation des Staates in der Europäischen Union*, in: Peter Häberle, Martin Morlok, Vassilios Skouris (ed.), *Festschrift für Dimitris Tsatsos*, Baden-Baden 2003.

14 The study of the objective factor – of all the forces that act deeply in the historical course characterizing it – is not however sufficient to understand its profound meaning. Only through the study of the subjective factor – that is to say, the examination of the contribution offered to the process of European and Atlantic integration by individual personalities and political movements – is it possible to establish a specific relationship between determinism and voluntarism, namely the historical dimension of human action. The study of the specific contribution offered by conscious and organized human intervention in changing the course of history, or in directing it towards a predetermined outcome, allows us to recognize in this single historical fact – in itself contradictory and unfinished – the meaning that binds it to its development and finally its realization as an accomplished fact.

15 Albertini, *Il federalismo*, 249.

16 Norbert Elias, *Über den Prozess der Zivilisation*, Bern, 1969.

entering into a power struggle with other super-states such as USA, China, India, Russia for global hegemony. In a state that is construed non-hierarchically, i.e. as a multi-level structure that is not subject to a superior government, the internal checks and balances would instead allow for the emergence of a genuinely democratic governance structure that is strong enough for resisting to any other power, but es prevented from competing for global hegemony. Thus, the model of a non-hierarchical structure similar to the one that has evolved in the European constitutional process, could act as a catalyst for the emergence of a non-violent and egalitarian multi-polar global system, as anticipated in Kant's essay on the eternal peace.

23 The process does not develop in a linear manner – since there is no autonomous (federal) political power to govern it, but common institutions which are formed and consolidated alongside a set of national powers – but in a dialectical form, as a result of the clash between the various national interests and the need to pursue common goals together. It is nevertheless a process, namely the pursuit of an end: the creation of a new political power increasingly independent from the national ones. It is just their own *raison d'état*, the necessity of survival, which forces the European States to solve together the problems that, while they cannot be circumvented, cannot also be resolved separately by each of them. This is the 'unitary trap'. This is why States, against their very nature, instead of following each one seemingly diverging national interests, march together.

24 The creation of a European context for taking decisions regarding defence, currency, and economic life had three important consequences. The first was that the final seat of power for the member States of the European Community moved from a national to a European context. The second was that, for this reason, it became necessary to have a European policy, conceived and exercised within the European context in cooperation with other countries, alongside national politics, conceived and exercised at the national level. The third is that the development of a European policy created a vacuum of power, which was only partially filled by the leadership of the hegemonic power within

the System. The history of European unification is the story of attempts to fill this void.<sup>17</sup>

- 25 However, some are questioning whether this void should be filled in the logic of the Westphalian system of sovereign (nation-)states, simply replacing 30-40 European states by a single European state. That form of a hierarchically structured state governed by a supreme power is apt to no more than ringfencing the archaic phenomenon of power. Its evolution in the course of the past five centuries is a history of continuous conflict, war and foreign dominance. Making the European states subject to a classical single power in the form of a government would mean the continuation of that pattern of conflict on the global scale. To avoid that, the European construction should instead build on the best of the concepts of European enlightenment and humanism, remain faithful to its values and the constitutional principles that were worked out in the 70 years of its history, in particular the collective form of government, requiring for any major action the agreement of the representatives of its constituent parts, each of them having equal status. As soon as a generalised majority rule has made that form of government effectively work and the jointly adopted law is given priority and full enforcement, the necessary conditions are met for building up in Europe a power that has the strength to crack the power of sheer power without becoming itself a classical hegemonic power.
- 26 With the transfer of decisions from the national framework to the European one, a political process of ever-vital importance to the fate of European citizens is set in motion. A widespread view believes that this process occurs outside of democratic control because currently at the national level decisions are taken democratically while at the European Union level they cannot yet be taken democratically due to the lack of fully democratic institutions.<sup>18</sup> This

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17 For an examination of the theories on the unification process, see Ben Rosamond, *Theories of European Integration* (London: Palgrave Macmillan, 1999); Morten Kelstrup and Michael William, eds., *International Relations Theory and the Politics of European Integration: Power, Security and Community* (London: Routledge, 2000); Dimitris N Chrysochoou, *Theorizing European Integration* (Newcastle upon Tyne: SAGE, 2001); Antje Wiener, *European Integration Theory* (New York: Oxford University Press, 2010); Sabine Saurugger, *Theoretical Approaches to European Integration* (London: Red Globe Press, 2013); Hubert Zimmermann, ed., *Key Controversies in European Integration* (New York: Palgrave, 2016); Antje Wiener, Tanja A. Borzel and Thomas Risse, *European Integration Theory* (New York: Oxford University Press, 2019).

18 About the democratic deficit of the European Union, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (New York: Oxford University Press, 1999); Erik Oddvar Eriksen and John Erik Fossum, *Democracy*

would lead to the consequence that there are fewer and fewer important decisions to be made where there is democracy, while there is not yet full democracy where they must be taken. The completion of the process of European integration towards a democratic political union seems therefore to be no longer just one problem among many others, but the fundamental question of our time, on which depends the realization of democracy beyond the nation State or its defeat.

27 There was a broad consensus about the existence of a democratic deficit at the time when the Treaty of Maastricht was signed (1992). After the entry into force of the Treaty of Lisbon (2007) the institutional system of the European Union very largely meets the standards of representative democracy. According to the case-law of Constitutional Courts, democratic legitimacy of action by the European is flowing from the parliaments of the member states, jointly with the directly elected European Parliament. Much of the literature blaming a democratic deficit, dates from the time preceding the Lisbon Treaty. It is true that this treaty has not yet fully closed the gap. However, the authors of political science who still assume a substantial democratic deficit in the EU, seem to be generally hostile to the constitutional principle of representative democracy and insist on more direct involvement of citizens. Such a position marks a clear dividing line between competing conceptions of democracy. There is reasonable evidence to believe that at the higher levels of complex multi-level systems, due to the law of large numbers and the complexity of interest involved, democracy is only possible as a representative one.

28 Still, there is a real danger that the European Union risks being delegitimized by a democratic deficit. This is not the effect of the how democratic representation is ensured within the institutional mechanism of the Union, but rather due to a certain indifference and disinterestedness by national leaders, and politicians in general, towards the complexity of supranational constitutional practice. The Union has the institutions of a modern democracy,

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in the European Union: Integration Through Deliberation? (London: Routledge, 2000); Philippe C. Schmitter and Alexander H. Trechsel, eds., *The Future of Democracy in Europe. Trends, Analyses and Reforms* (Strasbourg: Éditions du Conseil de l'Europe, 2004); Michael Newman and Catherine Hoskyns, *Democratizing the European Union: Issues for the Twenty-First Century* (Piscataway, NJ: Transaction Publishers, 2007); A. Vauchez, *Democratizing Europe* (New York: Palgrave, 2015); Catherine Hoskyns, *Democratizing the European Union: Issues for the Twenty-first Century* (London: Routledge, 2018).

but the leaders frequently behave as if they were not part of it. Thus, the growth of supranational activities and decision-making processes at that level is also increasingly challenging the democratic legitimacy of the action by its member states.<sup>19</sup>

29 In periods of relative stability, when national governments seem able to successfully face economic, political and social problems, public opinion tends to support government policies. Mutatis mutandis, that phenomenon also applies to the European Union. When the performance of the overall governance system (consisting of EU- and national policies) in terms of general prosperity and security declines, the citizens' acceptance of European solutions tend to diminish, as was perceived in the period preceding Brexit. On the other hand, in times of acute crisis, when governments struggled to cope with the pressure of events, the public opinion welcomed supranational solutions marking the stages of the process towards closer union, such as in the financial crisis of 2008 or during the COVID-pandemia. Such crises are nevertheless inherent in the process of the decline of the nation State, which since 1945 has been able to maintain only some of its historical characteristics through intergovernmental actions.

30 What was defined as the European rescue of the nation State is then just a temporary phenomenon, which is only valid for the period of transition to the creation of the European State. In spite of crises, setbacks, and attempts to recover lost sovereignty at the national level, the history of the process of European integration shows a progressive deepening. The negotiations that defined the European agenda, creating new competences and common institutions, have effectively transformed national interests into a common

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19 On the process of democratization of the European Union's institutions, see Philippe C. Schmitter, *How to Democratize the European Union and Why Bother?* (Lanham, MD: Rowman & Littlefield, 2000); Arthur Benz and Ioannis Papadopoulos, eds., *Governance and Democracy: Comparing National, European and International Experiences* (London: Routledge, 2006); Ronald Holzhaecker and Erik Albaek, eds., *Democratic Governance and European Integration: Linking Societal and State Processes of Democracy* (Cheltenham: Edward Elgar, 2007); Jean-Michel Eymeri- Douzans and Pierre Jon, eds., *Administrative Reforms and Democratic Governance* (London: Routledge, 2011); Christian Joerges and Carola Glinski, eds., *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Oxford: Hart Publishing, 2014).

European policy. Brexit and the various attempts to negotiate a national opt-out have actually come to reinforce the integration process.<sup>20</sup>

31 During this kind of crisis, the ‘moderate’ school, headed by Jean Monnet, adopted a functionalist approach, while the ‘radical’ school, headed by Spinelli, fought to give the birth to a constitutional democratic process, in which the ultimate responsibility to define the nature of the new supranational institutions falls into the representatives of the nascent European people. Spinelli’s and Monnet’s strategies – which represent the subjective factor in the process – developed in an objective context that saw national governments as its protagonists, playing the double and contradictory role of instruments and obstacles to the process at the same time. They were its instruments because the European context is necessary for the survival of the national State, and obstacles because, in the last instance, national governments are the defenders of national sovereignty.

32 Since there is no theoretical model for the transition from a system of States with limited sovereignty to a federal system, the functional method was employed to set in motion and feed the process of European integration, even if the constituent method is necessary to bring it to completion. Spinelli’s strategy was to exploit the possibilities of functionalism – theorized by David Mitrany and Ernst Haas – to achieve constitutionalism, and in two occasions he almost succeeded.<sup>21</sup>

33 The first attempt to build a European constitutional union matured in the early 1950s, in connection with initiatives to create a European alternative (the

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20 For an examination of the institutional and social transformations of the member- States as an effect of the integration process, see Fabrizio Capogrosso, *Shared Sovereignty and Denationalisation of Statehood in the European Union: Has Governance Eclipsed Government?* (Munich: GRIN Verlag, 2009); M. Wind, *Sovereignty and European Integration: Towards a Post-Hobbesian Order* (New York: Palgrave, 2001); Christoph Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge: Cambridge University Press, 2001); Klaus H. Goetz and Simon Hix, eds., *Europeanised Politics?: European Integration and National Political Systems* (London: Routledge, 2012); Rebecca Adler-Nissen, *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration* (Cambridge: Cambridge University Press, 2014); S. Börner and M. Eigmüller, eds., *European Integration, Processes of Change and the National Experience* (London: Palgrave Macmillan, 2015); Rainer Arnold, *Limitations of National Sovereignty through European Integration* (Berlin: Springer, 2016); Paolo Dardanelli, *Restructuring the European State: European Integration and State Reform* (Montreal: McGill-Queen’s University Press, 2017).

21 On the strategies of Spinelli and Monnet see Merry and Serge Bromberger, *Jean Monnet and the United States of Europe* (New York: Coward-McCann, 1969); Francois Fontaine, *Le Comité d’Action pour les Etats-Unis d’Europe de Jean Monnet* (Lausanne: Fondation Jean Monnet Pour l’Europe, 1974); Ernst B. Haas, *Beyond the Nation-State: Functionalism and International Relations* (Palo Alto, CA: Stanford University Press, 1964); Piero Gagliola, Altiero Spinelli (Bologna: Il Mulino, 2009).

ECSC and the EDC) to the industrial reconstruction and the remilitarization of Germany. The action by Spinelli set in motion a constituent process in which the ad hoc Assembly (the enlarged ECSC Assembly) was given the mandate to elaborate the Statute of the European Political Community, the political body responsible for the European army. Spinelli's second attempt was accomplished in the early 1980s by the European Parliament, which with the Draft Treaty of 1984 played a constituent role, becoming in fact the federator of Europe. Since then, the European Parliament has progressively reduced its decision-making imbalance in front of the Council, and this has certainly not been the case for a royal concession by the Council, but for the political struggle engaged by the elected members of Parliament within their respective political parties and by statesmen committed to the aim of a political union. The Parliament has since not only progressively increased its powers but has also provided a basis of democratic legitimacy to the treaties that followed.<sup>22</sup>

**V. A constituent moment**

34 The creation of the constitutional organs characteristic of a federation cannot therefore be achieved – as the functionalists and the theologians of spill over imagined – by means of a gradual transfer of competences from the States to the Union, but by a constituent moment. The functionalist strategy of promoting spill overs from one economic sector to another has failed to achieve a steady progress towards a federal union, as Jean Monnet and other functionalists had hoped. On the other hand, the unanticipated results of 'integration through law' have produced too detailed regulation, and an institutional framework which is too rigid to re-orientate policies in accordance with the will expressed by the electorate. Thus, integration by spill overs has

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22 Luigi Vittorio Majocchi, *La difficile costruzione dell'unità europea* (Milan: Jaca, 1996), 161-79. For an analysis, see Daniela Preda, *Storia di una speranza. La battaglia per la CED e la federazione europea (1950-1952)* (Milan: Jaca, 1990); id., *Sulla soglia dell'Unione. La vicenda della Comunità politica europea (1952-1954)* (Milan: Jaca, 1994). About the federal character of the European Union, see Charlie Jeffery and Roland Sturm, eds., *Federalism, Unification and European Integration* (London: Routledge, 1993); Michael Burgess, *Federalism and the European Union: The Building of Europe, 1950-2000* (London: Routledge, 2000); David McKay, *Federalism and European Union: A Political Economy Perspective* (New York: Oxford University Press, 2000); Andreas Heinemann-Grüder, ed., *Federalism Doomed?: European Federalism between Integration and Separation* (New York: Berghahn Books, 2002); Alexander Trechsel, ed., *Towards a Federal Europe* (London: Routledge, 2006); Elke Cloots and Geert De Baere, eds., *Federalism in the European Union* (Oxford: Hart Publishing, 2012); Finn Laursen, *The EU and Federalism: Politics and Policies Compared* (London: Routledge, 2016); Bojan Kovacevic, *Europe's Hidden Federalism: Federal Experiences of European Integration* (London: Routledge, 2017).

produced sub-optimal policies, and a steady loss of credibility of the supranational institutions. Both the functionalist approach and the classic Community method have their limits. These methods risk not to deliver the public goods which European citizens expect to receive from their transnational representation.<sup>23</sup>

35 Even if politics within the European Union apparently has all the characteristics of a traditional democratic policy, a constitutional reflection seems necessary to start a public debate and a wide sharing of rules on which to base a democratic politics. The relevant European political and constitutional debates took place behind closed doors, and were predominantly characterized by a bargaining between the predominant national interests over issues of constitutional principle. It is true that public debates have been produced by national referendums, but there is certainly a need for something more if we are to achieve a definition of the European constitutional identity.<sup>24</sup>

36 We in Europe are facing today a critical period in the process of closer unification. The war in Ukraine and the growth of internal centrifugal forces put European peoples in front of difficult choices. The de facto creation of a common deficit and debt, the indirect military involvement into a war close to its borders, the call for the creation of a common defence, the financial commitment to the reconstruction of Ukraine after the war, the search for a new policy to tackle the question of illegal immigration, the quest by the European Parliament for rebalancing the decision-making process with the Council, pose serious challenges to the Union.

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23 On the spillover effects, and the loss of legitimacy by European institutions, see Marjolein C. J. Caniels, *Knowledge Spillovers and Economic Growth* (Cheltenham: Edward Elgar, 2000); Bas van Aarle and Klaus Weyerstrass, eds., *Economic Spillovers, Structural Reforms and Policy Coordination in the Euro Area* (Amsterdam: Physica, 2007); Sverker Gustavsson, Lars Oxelheim and Lars Pehrson, eds., *How Unified Is the European Union?: European Integration Between Visions and Popular Legitimacy* (Berlin: Springer, 2009); Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration* (New York: Oxford University Press, 2009); Jan Stejskal, Petr Hajek and Oto Hudec, eds., *Knowledge Spillovers in Regional Innovation Systems: A Case Study of CEE Regions* (Berlin: Springer, 2018).

24 About the development of the European constitutional debate after Lisbon, see Laurent Cohen-Tanugi, *Beyond Lisbon: A European Strategy for Globalisation* (Oxford: Peter Lang, 2008); Jan Wouters, Luc Verhey and Philipp Kiiver, eds., *European Constitutionalism Beyond Lisbon* (Cambridge: Intersentia, 2009); Hermann-Josef Blanke and Stelio Mangiameli, eds., *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Berlin: Springer, 2011); Dagmar Schiek, Ulrike Liebert and Hildegard Schneider, eds., *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011).



- 37 If the final goal of the European constitutional process is to create a new model of supranational democracy, including the progressive formation of a genuinely European demos, its achievement is not just a question of governance, which in itself could be autocratic or democratic *sui generis*. The question is how democracy can be extended beyond the borders of the nation-state (the fusion of nation with the State). The completion of the process of democratization of the European Union would mark the historical end of nationalism (the ideology of the nation-state), of the 'natural' political division of Europe in nation-States, and the beginning of the supranational course of European history. This process was inaugurated indeed in 1979 with the first elections of the European Parliament, which marked the right of self-determination – applied for the first time in European history not to divide existing political entities but to unite – by the nascent European demos to constitute itself as a new political subject.
- 38 For the first time in the process of European integration, it is possible today to notice discrepancies between the 'material' and the 'legal' Constitution. It seems plausible to argue for a revision of the treaties which make the current Constitution of Europe. This requires a new Convention, preceding the next Inter-Governmental Conference.
- 39 The paradox of constitutionalism is whether those who have the authority to formulate a Constitution – the so-called 'constituent' power – can do so without effectively yielding, with the constitutional form that they implement, that authority to the institutional sites of 'established' power. The question is whether the constituent power is to be exhausted in the single constitutive act, or maintained, coming to perform the function of critical control over the operation of the constitutional system put in place, and/or should be the existence of an external institutional authority to be called upon and brought into action in times of crisis.<sup>25</sup>

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25 About the relationship between constituent power and the constitutional form, see Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (New York: Oxford University Press, 2008); Nicole Scicluna, *European Union Constitutionalism in Crisis* (London: Routledge, 2014); Kaarlo Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015); Jiří Přibáň, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* (London: Routledge, 2017); Richard Bellamy and Dario Castiglione, *From Maastricht to Brexit: Democracy, Constitutionalism and Citizenship in the EU* (London: ECPR Press, 2018); Sergio Verdugo, *Is it time to abandon the theory of constituent power?*, in "International Journal of Constitutional Law", Volume 21, Issue 1, January 2023, 14–79.

- 40 The composition of the future Convention is not a detail. The precedent of the 2002-3 Convention – which would have had seventeen months to complete a Draft Constitutional Treaty – could prevent us to run into the same mistakes. To the fifteen representatives from the member States were added thirteen representatives from the candidate countries to join the Union, in addition to the thirty representatives of the national parliaments and twenty-six of those of the candidate countries. To the two representatives of the Commission and twelve observatories, only sixteen delegates from the Parliament were added, which would therefore have been represented in the reason of sixteen percent of the members of the Convention. The federator would therefore have been overridden by the *raison d'état* of the member States and humiliated by the massive presence of the representatives (thirty-nine) of the candidate countries, very little acquainted – having belonged, in the vast majority, to the Soviet system – with the practice of constitutionalism and parliamentary democracy. Rightly, it has been observed that it was in reality a new Inter-Governmental Conference under the apparent form of a Constitutional convention.
- 41 The failure in the 1950ies of the EDC, and with it of the Political Community, showed all the limits of the attempt to form a federal government on the basis of functionalist and intergovernmental principles, without involving the representatives of the nascent European people in the constituent process on an equal basis with the representatives of the national peoples.
- 42 Only an equal representation of delegates of the European Parliament and of the member states as legitimate holders of the constituent power can offer the new Convention the possibility to design the institutional structure of the European Federation – or at least of a federal nucleus, formed by just a number of existing member States – on the basis of democratic legitimacy. The principle of equal representation within the Convention would thus mirror the principle of equal deliberative powers of the two legislative branches of the future Federation, that representing the European people, the Parliament, and that representing the States, the Senate. Such a balance of representation is not excluded by the provision of Article 49 (3) of the Treaty on European Union. However, in order to be more than a preparatory stage for a subsequent intergovernmental conference, a constituent mandate would need

to be given to such a convention. Under the premises made in this paper, such a mandate could be given in the form of a modification to the 1976 Electoral Act, upon a proposal by the European Parliament, approval by the Council and ratification by the member states. In this way, both branches of the emerging European constituent power acting jointly could stipulate the convening of a constitutional convention, half the members of which would be delegates from the European Parliament elected subsequently while the other half of its members would consist of delegates from the member states. Depending on the detail of the mandate laid down in the Electoral Act, the Constitution worked out by such a Convention could take the form of a treaty or a constitutional act, subject to the final approval of both the European and the national peoples and/or their elected representatives.

## ANNEX

*This paper was vividly discussed at a plenary meeting of the Study Group on 16 April 2024.*

- 1 *With the exception of a remark drawing the attention to the merits of the Pan-European movement founded by Coudenhove-Calergi, the contributions rather than raising doubts about the proposed theoretical approach, questioned the likeliness of relevant steps towards a more integrated Union in a foreseeable future.*
- 2 *The equilibrium between the institutions and the powers behind them was considered as currently quite stable. It would therefore be questionable who could benefit from reinforcing the federal aspects of the Union.*
- 3 *Since progress of the integration process was always driven by a bargain between the interests involved, one should rather ask what could be the next promising bargain. With reference to the writings by Dieter Grimm, reservations were made as to the question whether the European Union could ever be democratically legitimate. Rather than from popular will, its legitimacy could flow from the effective defense of its values, a task that currently is not sufficiently fulfilled. In reply, statements referred to the possibility that in a transnational context democratic legitimacy is flowing from a plurality of demoí's, to the existing interest in reaching a new budgetary bargain between the Member States as well as to the need of developing a common European defense.*
- 4 *Moreover, it is hardly conceivable that the Member States' compliance with the common values will be effectively monitored by the Union without reinforcing its federal powers and decision-making processes.*
- 5 *It may appear difficult to identify under the current circumstances the existence of a constitutional moment, but there are good arguments for a plea for taking advantage of the constitutional momentum caused by Russia's war in Ukraine and the connected perspective of the Union's enlargement to consolidate the Union's federal structures, so as to make them more effective and capable to act in the global context.*