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Europe and the constitutional legal model in the light of Political Law[1]

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Introduction.

There are not many ways to describe the Political Power from a democratic point of view. In fact since the 18th century, it seems that only one "model of interpretation" has been proposed and discussed. This model that we can call "constitutional legal model" has been created by an old fashionable science named *Political Law* (or *Political Economy*[2]) in France, Great Britain and in the United States during the Enlightenment. Its content has been accepted partly by all modern constitutional lawyers, even by the partisans of a positivist or realist science of law[3]. Surely, Rousseau gives us one of the best constructions of this model. That's why the famous *Contrat social* will be our main reference.
According to this model, any organization of the Political Power implies the existence of a Sovereign (identified as a nation or a people), a fundamental or supreme statute (the constitution identified as an expression of the Sovereign's will), a State's power (giving strength to the will of the Sovereign and applying it).

Let's define the features of this model according to the old *Political Law*. Of course, these features may raise many objections by those who don't accept its metaphysical nature[4].
- First, the model is logical and consistent. For example: we should not imagine a Sovereign without a constitution, a constitution without a State's power and so on. If we combine all these elements, we can notice the existence of a complex identity. The Sovereign = the State = the nation. These three legal entities have the same will, but not the same function. In the

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[2] See Rousseau, *Discours sur l'économie politique,* published in 1755 as an article of the *Great Encyclopaedia*.

[3] For instance in France M. Troper who belongs to the realist school has adopted the « old doctrine of Sovereignty ». See his article: 'L'Europe politique et le concept de souveraineté' in O. Beaud, A. Lechevalier, I. Pernice and S. Strudel, ed., *L'Europe en voie de constitution* (Bruxelles, Bruylant, 2005), pp. 117 -137.

[4] The notion of "metaphysical nature" means here that law is not just the result or the expression of lawyer's will. In fact, law can be built only if we obey some ontological principles.

language of modern logic, we can say that this identity is not analytic.
- Second, the concepts are not necessary technical ones. For example, the will of the Sovereign is qualified as "general Will" that is a metaphysical concept (Rousseau). So it cannot be translated in a positivist language.
- Third, this model is also universal. It has to do with general principles, not invented but, discovered. As pointed by E. Cassirer, the writers of the Great Encyclopaedia and the fathers of American Democracy, men like D'Alembert, Diderot and Jefferson "were convinced that their ideas were in a sense as old as the world. They were regarded as something that has been always, everywhere and believed by all. *Quod semper, quod ubique, quod ad omnibus*"[5]. But the universality of these principles does not exclude that they were also considered as an expression of a particular popular sentiment. We can see that, at that period, it was possible to conciliate the universal and the national aspects of the principles of law; a task that seems almost impossible today.

There is no doubt that this model is still alive even if we have to question it again and again. The building of European law gives us a good opportunity to see if this model is still pertinent or we need to escape from it[6]. As a matter of fact, the attempt to create a constitutional European legal order shows us that "juridical Europe" cannot imagine its democratic future without creating a State and adapting the traditional constitutional mechanisms invented in the 18th century (for example political responsibility, right of petition…). By another way, just consider how, in 2001, the European Convention tried with perseverance, maybe naivety, to interpret the draft Treaty as a constitution (although it is in reality an international treaty). Let's remember also that the authors of the so-called "European constitution" implicitly compared themselves with the American delegates meeting in the Independence Hall (Philadelphia) in 1787. But, it is quite clear that the European Convention was not founding a pure federation (consequently a European State). Anyway, this attitude [quite ideological[7]] proves that the old model is still attractive.

That's why we need to take it seriously and accept to return one more time to our old *Political Law* (Rousseau, Sieyès…) in order to understand the crisis of European constitutional legal order. A crisis whose manifestations are the deficit of European law's legitimacy, the obscurity of the People's role who live under the European legal order and *the ambiguity of the relation between national and European institutions.*

But, first of all, we need to explore the nature of the classic constitutional legal model. It implies, as we will see that we focus on its absolutist (or theological) aspect. Secondly, with the help of this analysis, we will show how the contradictions of the constitutional model explain partly the *lacunae* of our European legal order.

I The nature of the constitutional legal model.

[5] E. Cassirer, *The Myth of the State* (New Haven and London, Yale University Press, 1974) p. 177.
[6] Some Post-Positivist authors try implicitly to escape this constitutional legal model, explaining that a new Democratic Era has just begun. But these authors didn't propose a real theory of the future new democratic law. See some elements in A. Negri, *Reflections on Empire* trans. E. Emery (Cambridge, Polity Press, 2008).
[7] Maybe this « ideological » attitude explains partly the rejection of the so-called constitutional project by electorates in France and the Netherlands in 2005.

In order to explore the signification of the constitutional legal model, we need to restore its theological meaning. From a metaphysical point of view, this meaning seems obvious. Why? Because constitutional main concepts have to do with the idea of *absolute* or supremacy. We can admit it if we consider for example the usual description of the Sovereign and the constitution made by constitutional lawyers.

- The Sovereign is an absolute because it is defined as a being (or an entity) who is completely independent, not depending on another being because its will cannot be limited. From a normative point of view, they say that the Sovereign is free and does not depend on any external norms. Concerning this last point, we must notice that a few scholars have admitted that the Sovereign can even violate, break its own norms. In other words, the Sovereign would not be bound by his own acts (with the risk that sovereignty could be identified with arbitrariness). The Sovereign can create law *ex nihilo* and therefore magically transform fact into law. They say also that the Sovereign is an "unconditional power".
- The constitution as a norm is an absolute because very often we admit that it is a supreme norm, founded by itself.

The major philosophers in law (in the 20th century), for example H. Kelsen or C. Schmitt have admitted the theological nature of these concepts. H. Arendt has implicitly accepted this thesis in his book *On revolution*[8]. But she tries to make a distinction between the American and the European way to cope with the theological aspect of Democratic constitutional law. She explains that the American Founders have managed to create a type of constitution (called by H. Arendt *Constitutio libertatis*) without the concept of Sovereign avoiding the danger of absolutism. In practice, it implies that the American People would be only an "organized multitude whose power was exerted in accordance with laws and limited by them"[9]. According to H. Arendt, "(…) perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same"[10]. On the contrary, the French Revolution would have maintained the notion of Absolute. The French revolutionary constitutions would have undermined the Constituted Powers by imagining that "Both power and law were anchored in the nation, or rather in the will of the nation, which itself remained outside and above all governments and all laws"[11]. H. Arendt adopts a theological language when she describes the French conception of nation and its genesis. She speaks about a "deification of the people in the French Revolution" which finds its origin during the *ancient régime*: "the claim of absolute kingship to rest on 'divine rights' had construed secular rulership in the image of a god who is both omnipotent and legislator of the universe that is, in the image of the God whose Will *is* Law"[12].

We may doubt that American constitutional law has managed to give us a

[8] H. Arendt, *On Revolution* (New York, Penguin Books Classics, 2006).
[9] *ibid.,* p. 157.
[10] *ibid.,* p. 144.
[11] *ibid.,* p. 154.
[12] *ibid.,* p. 175. In the end, it seems, according to H. Arendt, that French constitutional law is based on the principle of *potestas* (identified as absolute sovereignty) and has forgotten the principle of *auctoritas* (personified by the Supreme Court in the USA) that enables to limit, even censor any power.

constitutional model that can avoid any risk of absolutism. Logically, it is difficult to imagine that we can get rid of the idea of sovereign. In practice, we know that in any positive constitutional system, it exists at least one power acting in the name of the Sovereign, having the right to modify the constitution and playing the role of a constituent power. We also know that the constitution cannot limit this organ. In fact, any constitutional clause limiting this organ can always be eliminated by him. Finally, even a Supreme Court will never stop this organ (because the competences of a Supreme Court derive from the constitution)[13]. The problem of the absolute is still there.

If we accept the idea that fundamental constitutional concepts have a theological nature (or an absolutist meaning), we must be wary of the paradoxes that result from this theological nature. These paradoxes that the positivist science of law has never managed to solve are well-known. If we concentrate on the problem of Sovereignty, we can ask a few simple questions that have no answer. For example: how is it possible that the Sovereign creates law *ex nihilo* (without legal basis)? How is it possible for the Sovereign to create a constitution if the Sovereign is justified and described by the same constitution? How is it possible that the Sovereign is still the Sovereign when he delegates his own powers or limits its will?
A quick analysis of these difficulties shows us that they occur for a main reason: because we try to integrate a juridical absolute (for instance the notion of sovereignty) in a juridical system of norms. At this moment, a contradiction appears inevitably.

This contradiction has been analyzed (but not from a legal point of view) especially by Heidegger in his comment of Schelling's *Treatise on the Essence of Human Freedom (*Schelling*, Über das Wesen der menschlichen Freiheit, 1809)*[14]. Let us try to give a legal interpretation of this contradiction.
The idea of system of law supposes that any norm, any legal decision should be founded; its validity depends on the validity of other norms, acts and so on. More generally speaking, Heidegger explains that any system (for instance a causal one) implies that any element should be founded (have a *Grund*).

This proposition is quite universal. But we must admit according to Heidegger an exception: the Greek thinkers (Plato, Aristotle) didn't imagine a system of knowledge. Nevertheless they used the term of system. This term had to do with the idea of ordering, composing - by reaching an aim, according to a project -. For example, the Greek thinkers could use this term

[13] We must admit that in some cases, a Supreme Court has been able to stop the constituent power. For instance, in India, the Supreme Court, since 1973, has struck down some Amendments as being in violation of the "Basic Structure of the constitution" (interpreting article 268 of the constitution). [Decision *His Holiness Kesavananda Bharati v. The State of Kerala and Others* (AIR 1973 SC 1461)]. The Supreme Court of India has also admitted that any attempt to liberate the Parliament from the limitations implied by the Basic Structure would be unconstitutional because it would violate the Basic Structure itself. [Decision *Minerva Mills Ltd. v. Union of India* (AIR 1980 SC 1789)]. See M. Saint-Hubert, « La Cour Suprême de l'Inde, garante de la structure fondamentale de la Constitution », *Revue internationale de droit comparé*, 2000, vol. 52, N°3, pp. 631-643. But it is not sure that a Supreme Court could stop the constituent power speaking in the name of the Sovereign if he wants to modify the competences of the Supreme Court itself in the aim to change a doctrine like the doctrine of the "Basic Structure of the Constitution". We must remember that the Supreme Court of the USA has been unable to resist pressure made by the American Executive in the name of the People during the Great Depression. And so, during the Hughes, Stone and Vinson Courts (1930–1953), she radically changed its interpretation of the constitution to facilitate Franklin Roosevelt's New Deal.
[14] M. Heidegger, *Schelling's Treatise on the Essence of Human Freedom* trans. by Joan Stambaugh (Athens, Ohio University Press, 1985).

in a biological sense. Even today, we talk about a digestive system. From a legal point of view, we should remember that in the 18th century, the word constitution had first a physiological meaning[15]. Now, constitutional law still uses a biological vocabulary (or the old metaphor of the human body): for example the notions of organs, head of State…

On the contrary, the idea of sovereignty (or unlimited freedom) implies the idea of a cause without foundation (*Grundlos*). In this sense, sovereignty is definitely linked with the idea of Absolute.

Many thinkers like Kant, since the 18th century, have tried to overcome such a contradiction. Kant for example tried to show that this contradiction was only apparent and should be understood as an antinomy[16].

It seems that this contradiction in fact exists and its consequences can be shown in the field of law. It appears that constitutional law (and *a fortiori* the coming European constitutional legal order) is implicitly trying to conciliate the notions of system and Sovereign in order to create a "system of freedom" (an impossible concept). It implies that in any system of constitutional law, the constitution always attempts to domesticate the Sovereign by giving him a "*Grund*" (condition the unconditional) or more radically tries to push it away, if not ignore it.

Before developing this point, we have to explain the origin of the theological meaning of our fundamental constitutional concepts. A superficial explanation would be a religious one. Of course, we cannot eliminate the idea that some religious needs explain partly why we use absolute notions. For example, religious needs can help to understand why we try to enact, even in a pure secular State, a supreme and rigid constitution (which is like an eternal republican dogma). Maybe, it explains why a constitution worship exists in the USA.

Let us also remember too that in the 18th century, Rousseau compared the 'general Will' with the voice of God (a "celestial voice") although he refused any theological foundation of the *Contrat social* and consequently any religious norms[17].

This explanation is not false but may be superficial. It implies that parts of our legal constitutional order of western States would be simply the *result* of a process of secularization (mainly of Christian theology). It is obvious that a few Christian concepts have been secularized in the field of law. C. Schmitt in his book *Political Theology*[18] has shown for example that the importation of the notion of miracle in constitutional law can explain why the Sovereign is not bound by his acts and can disobey the legal system. And,

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[15] For instance, in France, according to the *Historical Dictionary of French Language (*Paris, Le Robert, 1998), the word constitution had a physiological meaning since 1765. It had taken a political meaning ten years after.

[16] The contradiction between the ideas of system and Sovereignty is linked with the third antinomy in *The Critic of Pure Reason*. According to Kant, there is only an apparent contradiction between causality and freedom. Causality in accordance with the laws of nature seems to contradict the idea of freedom that supposes a "faculty to begin *by oneself* a state". The solution supposes that we do not give an absolute reality to phenomenon of nature and consider freedom as a transcendental idea. Consequently, the contradiction is solved. But the price is very high. The possibility and reality of freedom cannot be demonstrated and has nothing to do with the ordinary experience reduced to an empirical experience. See Kant, *Critique de la raison pure* trans by J. Barni and P. Archambault (Paris, Garnier-Flammarion, 1976). At some extent, the positivist science of law has adopted the same type of solution, refusing to give reality to Sovereignty and in the end rejecting it (H. Kelsen).

[17] According to H. Arendt, the "general Will" would be arbitrary because of its religious origin: « the 'general Will' of Rousseau or Robespierre is still this divine Will which needs only to will in order to produce a law". See H. Arendt, *op. cit.,* p. 175.

[18] C. Schmitt, *Théologie politique* trans and with an Introduction by J-L. Schlegel (Paris, Gallimard, 1988). See for the English translation: C. Schmitt, *Political Theology: Four Chapters On The Concept Of Sovereignty* trans. and with an Introduction by T. B. Strong (Chicago, University Of Chicago Press, 2006).

as we know, E. Kantorowicz has demonstrated that the theological concept "the King's two bodies" explains the genesis of a few major western constitutional concepts; for example, the concept of "continuity of monarchy" (today continuity of the State)[19].

But when we speak about a process of secularization, we do not realize that we still have to understand how this process has been possible. A solution could be this one: the metaphysic of our law is yet theological. Heidegger has defended this hypothesis. He explains that our general metaphysic is "onto-theological". Yet, Kant had made clear that metaphysic has a tendency to understand Being by referring to the idea of absolute Being as fundamental Being, Supreme Being[20] (For instance, the "Perfect" in Descartes thinking). All types of Beings would be only limitations, negations, derivations comparing with the absolute Being or God[21]. So probably the structure of our thinking has to do with a rational or natural theology. That is why the secularization of our religions has been possible. This hypothesis can explain why method and concepts of the traditional science of law (or jurisprudence) itself has to do with theology[22].

Today, even the post-modern theory of law is still using the idea of absolute (or God) in the field of constitutional law. For example, A. Negri describes the constituent power as a power who "comes from emptiness and constitutes everything" and has to do with an "absolute radicalism"[23]. It seems it is quite impossible to cut the link between metaphysics and theology[24]. And so, it seems also impossible to imagine a constitutional legal model without the idea of absolute (like fundamental norm, Sovereign…)[25].

Let us see now how European law deals with the contradictions proceeding from the constitutional legal model.

II European law facing the contradictions of the constitutional legal model.

It seems that in the field of European law, the lawyers have tried one more time to conciliate the idea of sovereignty (or absolute) and the idea of system of law. They have adopted a few solutions to reach this aim.

A classical solution supposes a simple "limitation of sovereignty" by an external power or law. It means that a State could be "half sovereign" or sovereign in certain fields because of a superior entity. This solution is often adopted when interpreting the power of Member States in a federation. For

[19] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, Princeton University Press, 1997).

[20] According to Kant, the idea of God or Absolute can have a rational function in the discourse of any science, even a science of law. Just consider the role of the "ideas of Reason" in Kant's *Critic of Pure Reason* and Kelsen's *Pure Theory of Law*. See footnote 24 in following pages.

[21] See J. Rivelaygue, *Leçons de métaphysique allemande* (Paris, Grasset, 1992), p. 213.

[22] G. W. Leibniz was one of the first philosophers who have noticed this analogy between jurisprudence and theology. See his *Nova methodus* (1667).

[23] A. Negri, *Le pouvoir constituant. Essai sur les alternatives de la modernité* trans. by E. Balibar and F. Matheron (Paris, Puf, 1997), p. 23. See for the English translation: A. Negri, *Insurgencies: Constituent Power and the Modern State* trans. by M. Boscagli (Minneapolis, University of Minnesota Press, 1999).

[24] Kant already tried to build a metaphysic without the idea of God understood as fundamental Being. His *Transcendental Aesthetic* in *The Critic of Pure Reason* has no need of the concept of God. But he maintains the idea of God as totality (that gives a regulatory aim to scientific knowledge) in his *Dialectic*. See J. Rivelaygue, *op. cit.*, p. 214. See also E. Cassirer, *The problem of knowledge* (New Haven, Yale U.P., 1950).

[25] We cannot ignore H. Kelsen's attempt to get rid of the notion of Sovereign and transform the Fundamental Norm in a norm that is not positive (a transcendental one in the language of Kant). We cannot critic here this attempt. But it is quite obvious that the science of law, refusing the ideas of H. Kelsen, has admitted that the old concepts of Sovereign and Fundamental law (considered as a positive constitution) were indispensable.

instance American States are supposed to keep their sovereignty in some fields. So we should distinguish between internal and external sovereignty in the American federation. But, if it exists a federal constitution described as a "supreme law" (article VI of the American Constitution) that American States should obey, these States don't seem sovereign at all, in any fields[26].

In fact, the absolute aspect of sovereignty prevents us from accepting the idea that a sovereign power would not be a supreme power. *A fortiori* this solution seems more absurd in the case of the European Union because the European constitutional legal order is not federal but, only supranational[27]. European States have more competences than American States (in essential fields such as Foreign Policy) and are bound only by an international treaty (not a constitution). In fact, this idea does not help to overcome the contradiction between sovereignty and system of law; it just reflects it implicitly.

Nevertheless the idea of a limitation of sovereignty has been adopted for a long time in the field of European law. The landmark case of Van Gend on Loos 1963 is quite demonstrative: "The states have *limited their sovereign rights* within limited fields". Concerning French constitutional law, the 15th line of the 1946 Preamble (still in force) says: "Without prejudice of reciprocity, France accepts *limitations of sovereignty* that are necessary to organize and defend peace". These formulas are ambiguous. That's why in France the French Conseil constitutionnel has preferred a new formula when interpreting the 1946 Preamble in 1992: the formula of "transfer of powers"[28]. The French constitution of 1958 itself in the new article 88-2 about the European Union, has adopted the same formula: "Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to *the transfer of powers* necessary for the establishment of the European Economic and Monetary Union »[29]. It means that a State because of its sovereignty (and not against its sovereignty) can transfer some competences. It implies that we distinguish between sovereignty (indivisible) and Power of State (divisible). The European States would have transferred themselves part of their Power of State (or competences) but not their sovereignty.

These last formulas are in fact reflecting a more convincing solution: the solution of "self limitation" or "self obligation" developed for instance by Jellinek in Germany, Carré de Malberg in France. It implies that the Sovereign when limiting itself, does not lose his sovereignty.

This solution has one advantage: it seems that is it may help to suppress the absolutism of sovereignty. In fact, according to this solution, a State can be sovereign without being completely independent. For instance,

[26] The article VI of American constitution says: « This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding ».

[27] In fact, concerning European law, the absurd idea of "half sovereignty" gives only arguments to the supporters of the so-called "Soverainist" ideology, refusing the building of any "supranational" European organization.

[28] See Decision n°1992-308 DC called decision « Maastricht I ».

[29] Art. 88-2 includes also these dispositions: « Subject to the same reservation and in accordance with the terms of the Treaty establishing the European Community, as amended by the Treaty signed on 2 October 1997, the *transfer of powers* necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed. Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty of European Union ». We must notice that a new 88-2 will come into effect upon the coming into effect of the Treaty of Lisbon. Its aim is quite different. See the new text: « Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union ».

the sovereign shall respect norms he has adopted or the transfers he has accepted. It can control and be controlled.

It seems that we have found a compromise or a third term; the first one would be an unconditioned production of law (the absolute). The second one would be a conditioned production of law (the system of law). The third one would be a conditioned production of law by itself[30].

That's a more rational way for integrating the Sovereign into a system of law (here the sovereignty of Member States in the European system of law). In this framework, European States (and consequently the European People) are supposed to be sovereign although they are bound themselves by European law. In consequence, the legal acting of European Member States has "a Grund" (produced in theory by themselves). And the legal order of each State (even the constitutional one) can be considered an integral part of the European legal order without losing its own legitimacy and identity.

Let us study the logical consequences of this last solution in the field of European law:

- A Member State can always quit the European Union even if this right is not defined by European treaties[31]. Of course, this decision would be illegal considering International law (See the Convention of Vienna art. 56) but it would be legal and not condemned considering Internal law.
- European law's superiority is just relative because it is justified in fact by internal constitutions (for instance article 55 in the French constitution that admits the superiority of treaties upon French statute, article 88-1 that legitimates the participation of France to the European Union).
- European Member States have just transferred, but not lost some competences and functions (concerning their power of state).
- European Member States control or supervise the transfer of power (because they can have a veto or define the extension if this transfer).
- The EU and EC have not sovereignty or Kompetenz-Kompetenz. (See article 5 of EC Treaty: "the Community shall act within the powers conferred upon it by the EC Treaty and the objectives assigned to it therein").

These sorts of arguments can invalidate partly the "soverainist" and "federalist" ideologies. The two ideologies would be wrong. The first one because the "soverainist" ideology supposes that European States would have lost their sovereignty. In fact, they have delegated only some functions. The second because the "federalist" ideology supposes that sovereignty would have been gained by a supranational power. But European Institutions have not a sovereign power; they are just exercise rights in the name of European States and Peoples.

In reality, many difficulties still exist. The old Political law (for instance, Rousseau in the *Contrat social*) can help to explore these difficulties and see the limits of these solutions.

Let us take a famous and central argument developed by Rousseau concerning sovereignty. According to Rousseau, sovereignty would be

[30] This third term has to do with Kant's theory of freedom. See J-F Marquet, 'Schelling et l'histoire de la philosophie' in Schelling, *Contribution à l'histoire de la philosophie moderne* trans. by J-F Marquet (Paris, Puf, 1983).
[31] The Treaty of Lisbon has accepted this logical consequence. See new article 49 A.

destroyed if the so-called Sovereign accepted any sort of representation and limitations. Sovereignty can survive only if a system of *democratic government* is organized[32]. This democratic government is not necessarily a direct democracy. Representative institutions can be legitimate and function correctly if the delegates have for instance an imperative mandate. In any case, direct or indirect government should be guided by the "general Will" that regulates the quantitative expression of democracy. Without the existence of a democratic government, the Sovereign is not obeying himself when obeying the law.

It seems obvious that European law has not organized such a democratic government implying that citizens and Peoples of Europe could govern. We cannot say that European citizens and Peoples can really act *through* European Agencies. European Law has only organized a limited European citizenship and a representation of States (through the European Parliament and the Council of the European Union). Consequently, it appears that the solutions of a limited or self-limited sovereignty had not permitted a real democratization (which still appears to be a goal). In fact, according to Rousseau's doctrine, solutions of a limited or self-limited sovereignty have just one consequence: the apparent loss of the Sovereign and the triumph of the system of law. In fact, these solutions help to solve the contradiction between sovereignty and the system of law by suppressing one of the terms of the contradiction.

This disappearance of the sovereign can be verified easily. For instance, the definition of a European Demos is not one of the requirements for the emerging constitutional European legal order. The constitutional Treaty did not even mention the existence of a Sovereign. Article I-1 mentioned only as "subjects" of the constitution the citizens and European States. Even the Peoples of Europe were not mentioned. They are just "lost in transition". Of course, we can admit that in the field of International law, Peoples are not juridical subjects. And so, they have to be "represented" by the States. But this argument is not available if we consider that the constitutional Treaty was supposed to create a democratic constitution. As a matter of fact, a democratic constitution should take into account the Peoples (inside the EU). And, if European sovereignty exists at least in the Peoples (and may be, one day, also in a European Demos), the Peoples should exert their sovereignty and consequently maintain their national personalities. But, even the word "sovereignty" is not used in the vocabulary of the constitutional Treaty (and the Treaty of Lisbon). It seems that a constitution without a Sovereign is under construction.

In the end, it is difficult to justify for instance the superiority of European law (specially secondary law) upon national law[33]. Such superiority is legitimate only if secondary law is "connected" with the will of the Sovereign. But, the European Peoples cannot currently orient or refuse secondary law. And of course one European Nation cannot change the treaties. One could say that this connection exists because European Institutions are in fact representative institutions. But it is hard to believe that European Institutions (with no exception for the European Parliament) represent the

[32] According to Rousseau, we must distinguish between a democratic government and a democratic Executive.
[33] See the same opinion expressed by M. Troper, *op. cit*., p. 136.

French or Italian Peoples (as French or Italian deputies do). It is true that the Treaty of Lisbon (like the constitutional Treaty) has tried to find some remedies in order to give legitimacy to primary and secondary legislation. For instance, the new Article 9 A affirms with solemnity that Parliament is a real co-legislator with the Council of Ministers. And Article 9 B clearly indicates that the European Council has no "legislative function"[34]. But these remedies are mainly verbal. In fact, we still need to rediscover the Sovereign. If not, obedience to European law is not really justified and the European Union looks like a machine running by itself[35].

This problem must be distinguished from other questions like the so-called "democratic deficit" and the ambiguous nature of EU. The democratic deficit does concern for instance the opacity of the decision-making process, the low degree of participation by European citizens in the Union institutions activity. One of the official remedies is the reinforcement of European citizenship (by developing the right to petition or the right to apply to the ombudsman). But this solution cannot help to solve the question of the forgotten sovereign. Concerning the debate on the character of European Union (federation or confederation), we must note that a confederation is not more democratic than a federation (or vice versa). For instance, if a European organ may bring decisions by unanimity (and not majority), of course it forces Member States to comply with legislation they disagree with. But it does not necessarily imply the Peoples themselves are heard. Can we say that international organizations like UNESCO, ILO or the WHO (which are confederations) are "democratic organizations"[36]?

If we succeed to create a real democratic government (that lets Peoples or Nations exert their sovereignty on a supranational level), is the contradiction between the Sovereign and the system of law still effective? Certainly no. Let us give a few indications with the help of Political Law.

Solving this contradiction seems to imply that we refuse the absolutism of the Sovereign. Logically, it means that we should give a "*Grund*" (or a justification) to the Sovereign. But of course, positive law cannot give this *Grund* to the Peoples or the States. There is no super constitution or Imperative International law that can make a positive foundation for the Sovereign. And the Sovereign would not exist himself if we could find such a foundation. But, this lack of *Grund* should not be understood in a negative way, as a privation. If not, we always try to find some "substitute": natural law, juridical values, principles created by a judge and so on. And in the end we cannot prevent this "substitute" to function as a dogma, a new religion (for instance the religion of Rights of men). The old democratic Political Law had not this negative vision. That is why, according to Rousseau, the General Will of the Sovereign is not limited or justified by natural law.

If we accept the idea that the Sovereign (and so on the State, the People) has no ultimate positive justification, we must just acknowledge that it is not an institution that needs a justification in a system of law. Let's name it "Authority" [*auctoritas* or *archè*]. An Authority does not need any normative

[34] See Articles I-19 and I-20 in the constitutional Treaty.

[35] This metaphor can help to understand and criticize a European doctrine like "functionalist method".

[36] Concerning international organizations and democracy: R. A. Dahl 'Can International Organizations be democratic? A Skeptics view' in D. Held and A. McGrew ed., *The Global Transformations Readers* (Cambridge, Polity Press, 2000), p. 531. D. Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, Princeton, Princeton University Press, 2008.

and positive justification. It is self-justified[37].

In this framework, the sovereignty has not to be founded. On the contrary, law is founded and created by the Sovereign. That is why the sovereignty (as *auctoritas*) can be only delegated, but not transferred (or lost according to Rousseau[38]). We know that Rousseau imagined different types of delegation described in the *Contrat Social* (livre III). In the 18th century, some Declarations of Rights have mentioned it. For instance Art. XVI of the Massachusetts Declaration of Rights says: "That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance ». Finally a Sovereign is still sovereign although he had made some delegations. And the institutions can only execute the Sovereign's Will by applying the law. Their competences are just "emanations" of the sovereignty (and not parts of it).

If we accept this solution, the constitution or a treaty should be the instrument of these delegations made by the Sovereign (as an authority). It should be understood as a Social Contract. It is not sure that the European treaties have been conceived as a Social Contract. On the contrary, it seems that they have been essentially conceived as a *norm* superior to local (national) norms; a superiority whose legitimacy is always a problem (because they do not have of positive justification needed in a complete system of norm). However this issue is just considered of solely academic importance. For instance the difference of positions between highest courts of many countries concerning the precedence of European law into their constitutions seems not to be a real difficulty. Or the question of a functional harmonization between the treaties and the national constitutions is not a central question. In the end, it seems that the superiority of the treaties seems obvious especially because they express fundamental values or give rights (Article 1 *bis* of the Treaty of Lisbon) like natural law. But the main issue from the point of view of Political Law is forgotten: the competence to create or interpret supranational norms has been given to European institutions that have not necessary received a delegation of the Sovereign (The Peoples). In fact, the latest treaties have preferred to focus on the "expression" of the citizen's will (mainly with the development of the European Parliament) or the rights of the citizens (with the creation of a European Citizenship). But the "expression" of the will of the Peoples has been forgotten.

The idea of *auctoritas* implies that we refuse the reduction of law to a *system of norms*. If not, as we have seen, we are obliged to find a norm (or some equivalent) to legitimate the Sovereign and his production of norms[39]. Or, we have to consider the Sovereign as an "exception", a default in the system of law. At the end, this last conception can justify a "decisionist"

[37] The absence of positive justification does not exclude a foundation (which is not positive). Myths of foundation (for instance the Roman myth) give a metaphysical or religious signification to the creation of States. There is no doubt that the positivist science of law cannot take seriously these myths (except giving them a rhetorical function).

[38] We should distinguish between losing sovereignty and abdicating of sovereignty. As A. V. Dicey explains, "to argue or to imply that because sovereignty is not limitable (which is true) it cannot be surrendered (which is palpably untrue) involves the confusion of two distinct ideas", note 48, *The Law of Constitution* (Indianapolis, Liberty Fund, 1982), p. 24.

[39] For instance, see the analysis of M. Troper. If M. Troper admits that "sovereignty does not result from any text or norms", he explains that "sovereignty is a quality that the *juridical discourse* gives to certain entities". This reference to a "juridical discourse" is just a desperate attempt to give a foundation to the Sovereign in a system of norms.

conception of law[40].

We can conclude that, according to the old Political Law, we should build a *European Social Contract*. Building such a European Social Contract has nothing to do with the re-creation of a pseudo Confederation that cannot avoid a structural confrontation between States and cannot create a unity of decision (mainly in strategic fields). It has nothing to do with the eternal problem of improving decision-making and extending the transfer of competences (or returning certain powers to Member States). It just implies that we don't forget the Peoples (or Nations) of Europe and imagine adequate delegations of Sovereignty. If we ignore this aim, we simply neglect the main criterion in order to evaluate and improve the relationship between the European constitutional legal order and the constitutional legal orders of the Member States. Consequently, we adopt implicitly a criterion of *efficiency* to fix the problem of the integration of European and national legal orders. On the contrary, considering European Union as a "democracy of Peoples" should guide us when we try to ameliorate the distribution of functions and the coordination of national and European institutions in the European Union. In other words, the democratization of the European Union cannot be a task *a posteriori* or an abstract goal; it conditions the clarification of the relation between European Union and Member States.

[40] In a fictional scenario imagined par C. Schmitt the State's decision "separates itself from any normative obligation and becomes absolute in the literal meaning of the word". This decision appears to be influenced by relations of power. C. Schmitt, *op. cit.,* p. 22.