Chapter 2
Paradigms of Constitution-Making, or Two Tales of One Dualism

The question of legal competence, i.e., the question of the (limits to) powers of the European Union is often the elephant in the room one prefers not to talk about as discussions quickly run into deadlock. Two camps stand opposed to each other in a dispute that seems unsolvable, since one is forced to take one of two sides, or so it appears. Either, one starts from the position of the Member States and is inclined to defend a rigorous interpretation of the principle of conferred powers, repudiating implied powers as inadmissible, or, the benchmark is the Union as an independent legal entity, and in that case, a doctrine like implied powers is welcomed as an essential means to obtain much desired flexibility. *Tertium non datur*, any attempt to bridge the difference seems jinxed from the start, with the *acquis communautaire* as the dupe.

It is a basic assumption of this book that any attempt to reach a solution has to start from a much deeper understanding of what is at stake in the attribution of legal competence. I will work from the hypothesis that the basic issue in discussions on creeping competences is that of the relationship between constituent (constituting) and constitutional (constituted) power. This distinction has proven to be central to discussions on democracy, the rule of law and the relationship between law and politics. This chapter will make some first steps in the analysis of the conceptual framework that the question of competence brings into play. First of all, I will show how the question of competence brings us to the heart of constitutional theory. Section 2.2 will focus on theories of permanent revolution and their ideas on constituent power. The third section will describe how constitutionalism denies the political roots of law. In the fourth section, I will demonstrate that what is at stake in both traditions of constitutional theory is the struggle with one and the same dualism. In the course of the discussion, I will have ample opportunity to show how this dualism developed in the history of constitutional thinking.

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2.1 Competence and Constitution

Competences are not a marginal problem for a European Union claiming to be a constitutional legal order. On the contrary, there is an unbreakable bond between the claim of constitutionality and competences, backed up by strong traditions of legal thinking in Europe. To sustain this claim, I would like to look first at how the concept of legal competence is understood in analytical legal philosophy. In the analytical tradition of legal thinking scholars agree that the legal concept of competence refers to the power to change legal relations.[1] These legal relations are central to Hohfeld's analysis of legal concepts. In his famous *Fundamental Legal Conceptions as Applied in Juridical Reasoning*, he expounds 'the "lowest common denominators" in terms of which all legal problems can be stated.'[2] For him, these common denominators should be expressed in terms of legal relations.[3] Hohfeld thinks of competence as 'the (legal) power to effect the particular change of legal relations that is involved in the problem.'[4] A power correlates with a liability of others to respect the exercise of power. An example may explain this: 'To say that A has a power entails that he can by his voluntary act change the legal relations of some other person, B, who has the correlative liability; and that it is not true that A has a disability as against B's legal relations, correlating with an immunity of B.'[5] Competence norms are thus those norms that confer on a person the power to change legal relations.[6] Not complying with a competence norm does not lead to a sanction (as not complying with other norms does). In case of a lack of competence, the supposed legal act is invalid. In other words: 'If we do not comply with such rules [i.e., legal power-conferring rules, LC], the result is not a sanction or a punishment, for it is not breach or violation of any obligation, nor an offense, but nullity.'[7]

Another important issue is whether or not competence norms qualify as norms properly speaking.[8] According to Kelsen, this is not the case since legal norms should be seen as 'the primary norm which stipulates the sanction.'[9] Competence norms are only derived from these 'real' norms. Hart strongly criticizes this view. According to him, competence norms have a completely different function in social

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[1] See: G. Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ', *German Law Journal*, vol. 11 (2010), pp. 966–1005, footnote 42, at p. 973 for references.

[2] W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (ed. W.W. Cook), New Haven: Yale University Press 1923, p. 6.

[3] Cf. J.W. Harris, *Legal Philosophies* (2nd edition), London (etc.): Butterworths 1997, p. 84.

[4] Hohfeld, o.c., p. 51.

[5] Harris, o.c., p. 84.

[6] Cf. Conway, o.c., p. 975.

[7] E. Bulygin, 'On Norms of Competence', *Law & Philosophy*, vol. 11 (1992), pp. 201–216, at p. 208.

[8] Cf. Ibid, pp. 204–207 and Conway, o.c., pp. 974–975. See also: T. Spaak, 'Norms that Confer Competence', *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*, vol. 16 (2003), pp. 89–104, at pp. 95–97.

[9] H. Kelsen, *General Theory of Law and State*, New York: Russel & Russel 1961, p. 61.

life and thus can not be reduced to other norms. In the private sphere, they constitute 'an additional element introduced by the law into social life over and above that of coercive control.'[10] Also in the public sphere there is a crucial difference: 'Those who exercise these powers to make authoritative enactments and orders use these rules in a form of purposive activity utterly different from performance of duty or submission to coercive control.'[11] He concludes then that '[t]o represent such rules as mere aspects or fragments of the rules of duty is, even more than in the private sphere, to obscure the distinctive characteristics of law and of the activities possible within its framework.'[12]

In his work on norms that confer competence, Torben Spaak takes the position that norms are prescriptions in the sense of Georg Hendrik von Wright.[13] This entails that 'the primary *function* of norms is to *guide human behavior by giving reasons for action*.'[14] Yet, competence norms do not do this. They are norms conferring a duty on legal officials 'to recognize as legally valid certain changes of legal positions brought about in a certain way in a certain situation by a certain category of persons.'[15] Not unlike technical norms, they merely 'indicate the necessary means to a given end.'[16] As a consequence, he comes to the conclusion 'that competence norms do not guide human behavior by giving reasons for action, and that, consequently, we should not recognize them as genuine norms.'[17] Now, Conway makes an illuminating comment on this position:

> Here, there seems a regress as to the exact origin of constitutional competence norms, which perhaps ultimately is determined by brute politics, rather than legal theory. A norm creates a power or competence, but the norm creating the power or competence presupposes a power or norm to create such competence conferral, and so on. Competence norms thus need to be interpreted in light of the constitutional framework determining what the 'origins' and 'ends' are of competence. In other words, there is a chain of validity, one norm creates another norm and each of these norms has to be interpreted.[18]

As Conway rightly points out, at this moment the issue of competences touches upon fundamental issues in constitutional theory. More concretely, one needs to think of the crucial question of 'a constitutional anchoring of competence norms, which can be related to the principle of conferral in EU law.'[19] And a little further he connects that to the idea of 'the will of the law-maker or constituent power.'[20]

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[10] H.L.A. Hart, *The Concept of Law* (2nd edition), Oxford (etc.): Oxford University Press 1994, p. 41.

[11] Ibid.

[12] Ibid.

[13] T. Spaak, o.c., p. 92.

[14] Ibid., p. 93 [Italics in the original].

[15] Ibid., p. 94.

[16] Ibid., p. 99.

[17] Ibid.

[18] G. Conway, o.c., p. 976.

[19] Ibid.

[20] Ibid.

This ties in with what we have seen in the previous chapter: The FCC holds that the people is the bearer of *Kompetenz-Kompetenz*. With this characterisation, the FCC assigns to the people the classical role of constituent power.[21] The people as constituent power is the subject of the constitution, whereas the powers of the state (legislative, executive and judiciary) are the constituted powers. For their legitimacy, the latter are dependent on the people as constituent power. This must be understood in the sense that the people, being the subject of political power, gives the institutions of the state their restricted powers, their competences. This shows the fundamental significance of the issue of competence as a constitutional theme.

Now, note that the FCC links the issue of legal competence directly with 'what binds the people together'. Here is the central passage of the Maastricht decision one more time: 'The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimises and controls, in order thus *to give legal expression* to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically. From all that, it follows that functions and powers of substantial importance must remain for the German Bundestag.'[22] Competences, the FCC holds, have everything to do with the identity of the people. That would be a rather unrevealing observation, were it not for its sequel. On closer reading, and more importantly, it also holds that competences have to do with expressing this identity, and with expressing it in a mode called law. This threefold clue will turn out to open more gates in old castle Europe than one may expect. But, before we are able to appreciate this, we should begin by realising where the gates and the gatekeepers are, i.e., what well-established theories guard the topic of political identity and constitutional law in the legal cultures with which we are familiar.

I propose to look at two traditions of constitutional theory, in particular. These traditions approach the topic of constitution-making in distinct, even opposed ways.[23] The two traditions differ in what they think a constitution should do, and what its functions and purposes are. Another way of separating them is by connecting each with its own place of birth: either America and France, or Germany and Great Britain.[24] Cutting across the great divide between common law and civil law, there is a revolutionary model that can be distinguished from an evolutionary model. Starting with the former, one can speak of the theory of constituent power as a French-American tradition because it emerged with the revolutions in those

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[21] Cf. H.K. Lindahl, 'European Integration: Popular Sovereignty and a Politics of Boundaries', *European Law Journal*, vol. 6 (2000), pp. 239–256.

[22] Extracts from Brunner et al. v. The European Union Treaty, *Common Market Law Review*, vol. 31 (1994), pp. 251–262 at p. 257 [My italics, LC].

[23] I will follow the distinction made in: H. Arendt, *On Revolution*, London: Penguin 1973 [1963].

[24] Cf. Ch. Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation', in: A. von Bogdandy and J. Bast, *Principles of European Constitutional Law*, Oxford (etc.): Hart 2006, pp. 183–226. Möllers follows the distinction made by Arendt, but assigns to each of the traditions its geographical place.

countries.[25] It focuses on the founding of a new order, and combines this with a radically democratic appeal. Although the French revolution chronologically followed the one at the opposite side of the ocean, it has always had more theoretical allure.[26] One of the reasons might be that founding a new order through a new constitution has always been connected with the name of the French revolutionary Sieyès, who theorized the law-making potential of the revolution at great length.

2.2 Constituent Power and the Primacy of Politics: Sieyès and His Legacy

The theory of constituent power is utterly modern, precisely by being connected with the revolutions in America and France.[27] In antiquity, the concept of revolution was unknown. Of course, there were plenty of regime changes. However, these were considered to be the next stage of an inescapable cycle. Revolutions, as we can learn from Hannah Arendt, cannot be understood with the help of this framework. Their pretension to be the start of something radically new does not register. Against the backdrop of an inalterable scheme of dominion, regime changes just reverse the charges in an ongoing battle, bringing no change to what the battle is about. Theoretically, 'revolutions are the only political events which confront us directly and inevitably with the problem of beginning.'[28] The growing dominance of Christian over ancient thinking, and the subsequent replacement of the cyclical with a rectilinear model of time, gradually provided the conceptual space for the kind of claim revolutions typically make. So, revolution is modern precisely because the concept is 'inextricably bound up with the notion that the course of history suddenly begins anew, that an entirely new story, a story never known or told before, is about to unfold, was unknown to the two great revolutions at the end of the Eighteenth Century.'[29]

If beginning is the first big idea connected with the concept of revolution, freedom is the second one. The new beginning the revolution seeks is a new beginning *in freedom*.[30] Freedom should be understood here as a political attribute; Man could

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[25] The connection between these two revolutions becomes clear from the life and writings of Thomas Paine. Cf. C.H. McIlwain, *Constitutionalism: Ancient and Modern*, Indianapolis: Liberty Fund 2008, p. 8.

[26] Cf. Arendt, o.c., for example, at p. 24 and pp. 94–95. Arendt fundamentally disagrees with this evaluation. One of the aims of her book is to theoretically rehabilitate the American Revolution.

[27] Arendt, o.c., p. 12.

[28] Ibid., p. 21. See also p. 34 where she speaks of 'the experience of man's faculty to begin something new.'

[29] Ibid., p. 28.

[30] Ibid., p. 29: 'Crucial, then, to any understanding of revolutions in the modern age is that the idea of freedom and the experience of a new beginning should coincide.' See also Möllers, o.c., p. 186: 'Because the constitution must ignore and abolish already existing political power structures, it must make individual freedom its systematic reference point.'

only be free living with others in a polity. Yet, and this is crucial, this is not possible under any kind of political regime. Indeed, the revolutionary tradition goes hand in hand with a demand for a polity in which man could be truly free, yet bound in relationships to all others in that polity. In other words, a revolution heralds the foundation of a republic.[31] As a consequence, the conceptual space provided by Christianity turned against the provider. Machiavelli is important in this respect because he is considered to be the first who envisioned the foundation of a new and completely secular order. This order was supposed to be 'independent of the teachings of the Church, in particular, and of moral standards, transcending the sphere of human affairs, in general.'[32] However, the founding of a new order could not be done but by imposing a new authority by law. This new authority only counted as *authority* if it could, one way or another, link up with what was already authoritative. As we will see, it is this problem that will continue to haunt the revolutionary theory of constitution-making. The birth of a new legal order cannot be justified without referring (to a minimal degree) to the authorities overthrown.[33] They have to be pictured as the wrong agents at the right place. The revolution would lose its stakes if the place would vanish together with its occupants.

To understand the full significance of revolution as a political phenomenon, and its theoretical repercussions for the notion of constitution, one cannot but turn to France at the end of the Eighteenth Century. It is indeed the French Revolution that has offered the blueprint to all subsequent revolutionary movements.[34] It is here that the concept of revolution is understood for the first time as an irresistible movement, a wave to which we had better surrender, or else it will knock us down completely. Most of all, its theoretical influence resides in the new philosophy of history it offered. This culminated in the thought of Hegel, who conceptualised the movement of history as both necessary and dialectical. While these characteristics seem obvious within a cyclical model of time, they are not, if one speaks on the basis of a rectilinear model. They can only be explained as a direct account of how the various stages of the French Revolution were experienced.[35]

This is where the concepts of constituent and constituted power cut in. Although these notions are usually traced back to the work of Jean-Jacques Rousseau, it is the name of Emmanuel Joseph Sieyès that is indissolubly connected with them. Extracting bits and pieces from Rousseau where it seemed convenient, yet deviating from him at crucial points, the French abbot and revolutionary, Sieyès, formulated what is

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[31] This also has consequences for the concept of constitution. Cf. Möllers, o.c., p. 186: 'With this, constitution becomes an exclusive concept: Certain forms of order are now no longer labelled as faulty or wrong constitutions: Rather, their claim to be constitutions at all, is denied.'

[32] Arendt, o.c., p. 36.

[33] Arendt, o.c., pp. 38–39 and p. 155.

[34] Ibid., p. 50.

[35] Ibid., p. 55: '[T]he fact that necessity as an inherent characteristic of history should survive the modern break in the cycle of eternal recurrences and make its reappearance in a movement that was essentially rectilinear, and hence did not revolve back to what was known before, but stretched out into an unknown future, this fact owes its existence not to theoretical speculation but to political experience and the course of real events.'

considered to be the established view concerning the relationship between constituent and constituted power.[36] In his famous political pamphlet '*Qu'est-ce que le Tiers état?*', he devised his theory of constituent power in order to provide an alternative for the divine authority that the French kings claimed for themselves. Indeed, they alleged that their powers derived from a *droit divin*, and pointed to a higher, godly source to legitimise their authority.[37] One could call this conceptual account of the intertwinements between political and godly authority a kind of political theology.

Sieyès opposed this *droit divin*, and held firmly that the people, rather than the monarch, is the supreme source of authority.[38] This means that the theory of the relationship between constituent and constituted power is closely linked to the principle of democracy.[39] Indeed, in a democracy, all power flows from the people as a matter of principle. This entails that the people is considered to be the author of the constitution, the political force that gives the constitution.[40] In other words, the people is the subject of constituent power without being itself constituted by law. Then, there are the powers called into being by the constitution: the legislature, the executive power and the judiciary. These are so-called constituted or constitutional powers. According to Sieyès, constituent and constituted power should be understood as strictly separated. In this model, there is a clear primacy of the constituent power.[41] As one can see, in the view of Sieyès, constituted powers are subordinate to the constituent power because their power ultimately depends on that of the people as the constituent or sovereign power of a democratic state. Their power is only an emanation of the constituent power of the people. The power of the state organs only exists due to, and is limited by, the constitution (the law). State organs are bearers of constituted power; this is legal power, or competence. The people is the ultimate source of all law and legitimacy and, as such, is independent. In a democracy,

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[36] It is, actually, quite difficult to find any textual evidence for the claim that Rousseau invented the concepts of constituent and constituted power. In this respect, see: J.-J. Rousseau, 'The Social Contract', in: *The Social Contract and Other Later Political Writings*, ed. and trans. V. Gourevitch, Cambridge: Cambridge University Press 1997 [1762], pp. 39–152, at p. 49, where Rousseau states that 'before examining the act by which a people elects a king, it would be well to examine the act by which a people is a people. For this act, being necessarily prior to the other, is the true foundation of society.'

[37] Arendt, o.c., p. 156: '[T]he absolute monarch (…) also incarnated on earth a divine origin in which law and power coincided. His will, because it supposedly represented God's will on earth, was the source of both law and power, and it was this identical origin that made law powerful and power legitimate.'

[38] E.J. Sieyès, *What is the Third Estate?*, London: Pall Mall Press 1963, p. 126: 'The national will […] never needs anything but its own existence to be legal. It is the source of all legality.'

[39] Cf. A. Negri, *Insurgencies. Constituent Power and the Modern State*, Minneapolis (etc.): University of Minnesota Press 1999, p. 1: 'To speak of constituent power is to speak of democracy.' I will come back to Negri's theory later in this section.

[40] E.J. Sieyès, o.c., p. 119: 'If we have no constitution, it must be made, and only the nation has the right to make it.'

[41] In the words of the German phenomenologist Waldenfels: There is 'a preference in the difference'. Cf. B. Waldenfels, *Vielstimmigkeit der Rede: Studien zur Phänomenologie des Fremden 4*, Frankfurt am Mein: Suhrkamp 1999, p. 197.

the people is the sun illuminating everything. Accordingly, the people as constituent power is conceived of as some kind of god: one and undividable, transcendent, omnipotent and therefore able to create from a void (*creatio ex nihilo*). This means that one could say that Sieyès replaced the religious political theology of the *droit divin* with the secular political theology of the sovereign people.[42]

Now, the problem for Sieyès is how people can grow into 'the people', i.e., how a mere plurality of people can come to see themselves as a whole and refer to this whole as a unity. To solve this problem, Sieyès introduces the basic concept of the nation. The nation is the unifying point of identity to which all individuals relate. The legal expression of the nation takes place through the constitution and the other laws. At the same time, Sieyès's theory reads as a chronological tale of the birth of the legal order. The act of giving the constitution is the start, the origin of the legal order. That is why Sieyès holds that the nation's existence precedes everything: '[t]he nation is prior to everything. It is the source of everything. Its will is always legal; (…).'[43] Strictly speaking, one should even say that the nation is pre-legal: '[P]rior to, and above the nation, there is only *natural law*.'[44] For this reason, the nation is independent from the formal bonds of positive law created by the constitution. Moreover, the nation is not even allowed to bind itself to a positive form. The nation is independent of all forms. Sieyès can, therefore, say that it remains in a state of nature.[45] This means that the nation is, and remains absent from, the legal stage. Precisely for this reason, the nation needs to be represented in the legal order. This is the task of the representative body: to replace the nation and act in its place.[46] That explains why the constitutional forms posed by the nation bind this body.

It is not difficult to discern the dualistic relationship in this scheme of reasoning between the nation (constituent power) on the one hand, and state organs (constituted power) on the other. First, there is the nation: omnipotent, independent, unbound, the 'formless forming' subject of the constitution.[47] Precisely by stating that the nation cannot leave the state of nature, Sieyès emphasises that there is an absolute (and not merely a relative) difference between the nation as constituent power and the organs of the state.[48] The latter only exist after, and as an effect of, the creative labour of the nation. The powers of the state are dependent on the nation, bound by

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[42] E.-W. Böckenförde, 'Die verfassunggebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts', in: *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Frankfurt am Main: Suhrkamp 1991, pp. 90–112, at p. 95. I will analyse Böckenförde's theory in the next section.

[43] E.J. Sieyès, o.c., p. 124. See also Arendt, o.c., p. 163.

[44] Sieyès, o.c., p. 124 [Italics in the original].

[45] Ibid, pp. 127–128: 'We must conceive the nations of the world as being like men living outside society or "in a state of nature", as it is called.'

[46] Sieyès, o.c., p. 137: 'If it is to accomplish its task, the representative body must always be the substitute for the nation, itself.'

[47] Cf. C. Schmitt, *Verfassungslehre*, Berlin: Duncker & Humblot 1970 [1928], p. 79 and following. The theory of Schmitt will be discussed below in Sect. 2.4.

[48] Cf. Arendt, o.c., pp. 19–20: 'For, the hypothesis of a state of nature implies the existence of a beginning that is separated from everything following it as though by an unbridgeable chasm.'

the constitutional ties it formulated. One could thus go further than Sieyès himself, and say that *all* state powers (not just the representative body) in all their actions represent the nation. Representation should be understood here as substitution: The powers in the state replace the nation (that cannot leave the state of nature). This dualistic scheme of Sieyès has direct consequences for the concept of (legal) competence. As mentioned above, unlike the nation, the state organs do not have unlimited power. State organs possess competences: power created and limited by law. Because all actions of the state organs have to take place within the boundaries of given competences, one might say that representing the nation occurs through these competences. Exercising a competence can then be viewed as representing (replacing, rendering present again) the nation, as a legal representation of its pre-legal identity.

According to Sieyès, the constitution of the legal order is a truly creative act: The nation creates the legal order *ex nihilo*. Indeed, in the fifth chapter of his pamphlet, Sieyès maintains that the nation exists independent of, and prior to, this act of constitution. Later, however, he says that the nation is equal to the total number of inhabitants, thus persuading his audience that the nation is an empirical entity rather than a construct of political discourse.[49] Yet, the equation seems to be highly problematic. If we define the nation in terms of inhabitants, our very first question should be inhabitants *whereof*? Sieyès seems to suggest that for an answer one can always point to a territorial border. The territory already makes clear whom the inhabitants, together forming the nation, are. But, quite apart from the problem of borders in a non-territorial sense, this will just push the question one step further back. In virtue of what else than a preceding nation, can a river or a mountain range count as a border, thus constituting a territory? Inversely, if a border precedes the nation, i.e., if it is indeed constitutive for its existence, how is Sieyès able to insist that the nation is formless and completely independent? The formation of a political community, Sieyès argues, begins with isolated citizens wanting to unite. In other words, as Rousseau before him, Sieyès starts from a contractual model. Consequently, Sieyès faces the very same problem as the man from Geneva.[50] Contrary to Sieyès however, Rousseau acknowledges this problem when he writes that 'men would have to be prior to laws what they ought to become by means of them.'[51] In other words, the consequence should turn into the cause. The contractual model presupposes that one knows who the contracting parties are. But how is one supposed to know this? Of course, one could refer to another contract to settle this issue. However, one merely whisks the problem away, without solving it. Namely, the new contract would pose the very same question of the contracting parties. To put it briefly, one is caught in an infinite regress.[52]

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[49] Sieyès, o.c., p. 133: 'Where is the nation to be found? Where it is; in the 40,000 parishes which embrace the whole territory, all its inhabitants and every element of the commonwealth; indisputably, the nation lies there.'

[50] See also Arendt, o.c., pp. 183–184.

[51] Rousseau, o.c., p. 71.

[52] If one does choose not to presuppose a contract before the contract, the argument of Sieyès would still run into one of the other two logical problems as defined by Albert in his Münchhausen Trilemma—*petitio principii* or mere dogmatism.

Sieyès's theory is thus incoherent and cannot help us to understand the problem of competences described in the previous chapter. Does this mean that all theories of constituent power are to be discarded? Are there not more sophisticated theories around? Let us turn to a contemporary elaboration of constituent power in order to investigate this. Although he criticises Sieyès in some respects, the Italian political theorist, Antonio Negri, tries to breathe new life into the concept of constituent power vested in the people in order to make it usable for contemporary politics. Negri aims at sketching a radical theory of constituent power, in the sense of 'democracy as a theory of absolute government.'[53] He explicitly distinguishes this approach from any kind of constitutionalism: Constituent power cannot be grasped by constitutionalism because the latter is essentially a theory of limited government. In other words, for Negri, constituent power and constituted power are not only strictly separated concepts, but also concepts diametrically opposed to one another. Any attempt at reconciliation is, therefore, completely futile and even dangerous: It risks eliminating constituent power, and this 'might nullify the very meaning of the juridical system and the democratic relation that must characterize its horizon.'[54] A legal approach to constituent power fails hopelessly.[55] Negri explicitly states and holds on to a dualistic approach: 'if, in the history of democracy and democratic constitutions, *the dualism between constituent power and constituted power* has never produced a synthesis, we must focus precisely on this negativity, on this lack of synthesis, in order to try to understand constituent power.'[56]

The way in which Negri subsequently proceeds to define constituent power calls to mind the omnipotent, formless, forming subject of Sieyès: 'Constituent power is defined, emerging from the vortex of the void, from the abyss of the absence of determinations, as a totally open need. (…) Constituent power is this force that, in the absence of finalities, is projected out as an all-powerful and always more expansive tendency.'[57] Negri passionately emphasises the radical nature of constituent power as being 'an act of choice, the precise determination that opens a horizon, the radical apparatus of something that does not yet exist, and whose conditions of existence imply that the creative act does not lose its characteristics in the act of creating.'[58] Although he explicitly rejects the equation of constituent power with the institution of power, Negri, nevertheless, holds that constituent power is inti-

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[53] Negri, o.c., p. 2.

[54] Ibid., p. 3.

[55] Ibid., p. 10: 'Whether it is transcendent, immanent or coextensive, the relationship that juridical theory (and through it the constituted arrangement) wants to impose on constituent power works in the direction of neutralization, mystification, or, really, the attribution of senselessness.'

[56] Ibid., p. 11 [My italics, LC].

[57] Ibid., p. 14. At p. 16, he states: 'The radical quality of the constituent principle is absolute. It comes from a void and constitutes everything.' At p. 23 he speaks of an 'originary productivity'.

[58] Ibid., p. 22.

mately connected with community.[59] His understanding of constituent power is a revolutionary one.[60]

To develop his own theory, Negri rereads the history of political thinking. He traces the concept of constituent power back to the *praxis* of revolution as described by Machiavelli (absolute democracy), Harrington (counter power and the egalitarian appeal), the American Constitutional movement (the spatial expression of freedom), the French Revolution (the temporal dimension of an ever unfinished constitution), Communism (the role of the commune and the Party as living labour), to end with a meditation on constituent power as an alternative for modernity: the multitude (inspired primarily by the work of Spinoza and Sartre). Negri's alternative consists in understanding constituent power as the revolutionary and purely creative power of the multitude. It is the power that continuously breaks open the bounds of what is constituted. In this way, it becomes the source of a radically new future, an always open politics and genuine liberty.[61] Furthermore, this brings with it an open ethics and what Negri calls a 'non-philosophy' of history.

With his concept of the multitude, Negri places his theory explicitly beyond Modernity. Modernity, in his reading, is 'the negation of any possibility that the multitude may express itself as subjectivity.'[62] That is to say, Modernity has preformatted the category of 'subjectivity' in such a way that it can only contain a unified, i.e., bounded, tamed, and therefore, lamed subject. But isn't subjectivity a palimpsest of older categories that are less restrictive and, thus, less oppressive? It is exactly this question of the subjectivity of constituent power that Negri answers with the notion of *multitudo*. This multitude always remains open, ever resistant to any definitive formation.[63] It is a new ontological category, the key to a new concept of rationality: a boundless, uninterrupted movement of individuals regarding each other as equals and, thus, releasing their unequal respective resources to the benefit of all.[64] This constituent power leads, first of all, to a new understanding of rationality, both critically destroying obstacles to, and constructing forms of, co-operation.

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[59] Ibid., p. 23: 'The desire for community is the spirit and soul of constituent power—the desire for a community that is as thoroughly real as it is absent, the trajectory and motor of a movement whose essential determination is the demand of being, repeated, pressing on an absence.'

[60] Ibid, p. 23.

[61] Negri points to the crisis of constituent power and that '[i]t presents itself as the continual interruption of the constitutive rhythm and, as revolutionary becoming with respect to political constructions and constituted being,' as such it 'reveals the incommensurability of the expression of the strength of the multitude.' Ibid., p. 318.

[62] Ibid., p. 325.

[63] Ibid., p. 327: 'The subject is a continual oscillation of strength, a continual reconfiguring of the actual possibility of strength's becoming a world. The subject is the point on which the constitution of strength establishes itself. (…) Constituent power is a creative strength of being, that is, of concrete figures of reality, values, institutions, and logics of the order of reality. Constituent power constitutes society and identifies the social and the political in an ontological nexus.'

[64] Ibid, p. 331: '[T]he multitude is an infinite multiplicity of free and creative singularities. (…) Constituent power takes shape not as reduction to one of the singularities but as the place of their intertwining and expansion.'

Secondly, and without a doubt more importantly for Negri, it leads to a new way of understanding the political. Indeed, according to Negri, it leads to the necessary and actual definition of the political.[65] This concept of the political, so Negri ends his argument, is that of continued revolution.

However poetic and often persuasive Negri is, the question remains whether he is ultimately able to offer a true alternative for what he calls the legal neutralisation of constituent power. Since his argument is developed on a fundamental level, this question concerns the very bedrock of his theory. That which he calls his 'real metaphysical approach' resides in 'recognizing that every formation of community and its duration are the continual product of the strength of singularities.'[66] This sentence on one of the very last pages of the book is clearly formulated as some kind of conclusion. However, is its meaning really so obvious? How is it possible to come from the strength of a *multiplicity* of individuals to the *unity* that the word 'community' undeniably implies? How does one transform the multitude into a 'we', a first person plural? Negri does not answer this question. To understand what the problem is, we should return once more to the first chapter of his book. Reading carefully, one realises that Negri's reason for opposing theories of constitutionalism is that they replace absolute democracy with some kind of indirect democracy. In other words, constitutionalism neutralises the constituent power by the legal doctrine of representation. This doctrine wants us to believe that the people remains the supreme power, although a constitutive assembly represents it by absorbing every action people can take in the political arena. Subsequently, it is this assembly that gives the constitution by which the powers of the state come into being. Negri's criticism supposes that the notion of representation is a legal trick to muzzle constituent power.[67] It supposes, hence, that there is no necessary connection between political power and representation: Absolute power can exist without representation.

The question, now, is whether this position is tenable. Without a doubt, Negri has a point when he warns us about a too rigid conception of constituted power, one that would freeze the *status quo* as it is, without a possibility of change. Also, he has a point in warning us about forms of representation that undercut all participation. Against these accounts, Negri is right to show that constituent power is not something that can be institutionalised once and for all. Yet, he seems to go too far

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[65] Ibid., p. 333: '[C]onstituent power is the definition of any possible paradigm of the political. The political has no definition unless it takes its point of departure from the concept of constituent power. […] In the constituent definition of the political, community is decided and reconstructed everyday, and violence is part of this decision and reconstruction. (…) Ontologically, we are faced with the multitude of singularities and the creative work of strength. The political is the site of this interweaving insofar as it presents itself as creative process.'

[66] Ibid., p. 334.

[67] Negri, o.c., p. 3: 'The paradigm is split: To originary, commissionary constituent power is opposed constituent power proper, in its assembly form; finally, constituted power is opposed to both. In this way, constituent power is absorbed into the mechanism of representation. (…) [T]he idea of constituent power is juridically preformed, whereas it was claimed that it would generate the law; it is in fact absorbed in the notion of political representation, whereas it was supposed to legitimize this notion.'

in his criticism. Negri claims that 'constituent power is a subject',[68] and that it is the multitude that embodies subjectivity without any form of representation. But then he writes: 'It is our task to accelerate this strength and recognize its necessity in the love of time.'[69] One thing is sure: This is not the radical plurality of a multitude. Negri distinguishes a vanguard and attributes it a power of acceleration over the constituent power. Furthermore, it is interesting to see that Negri implicitly acknowledges the need of a representative movement: How else is one to understand the reference to a 'we', a first person plural, in these very last lines of the book?[70] As a consequence, also Negri's theory of constituent power is ultimately incoherent. It cannot do without the concept of representation that it explicitly rejects.

2.3 Tamed Power: Constitutionalism and the Case for Limited Government

Perhaps the second constitutional tradition is more helpful for our investigation into the problem of competences and authority. As mentioned above, this line of thought on constitutions has mostly been developed in Germany and Great Britain, where law is regarded in an evolutionary, rather than a revolutionary, perspective. Instead of overthrowing the *status quo* by a new order, this perspective on the constitution regards it primarily as a gradually emerging convention limiting the powers of the state. In fact, it comes close to what in the previous section was called constitutionalism. In this section, I will briefly analyse the tradition of constitutionalism. I will pay special attention to what distinguishes these theories from those of constituent power.

We can find an early expression of modern constitutionalism in the work of Henry St. John Bolingbroke. His famous definition of a constitution holds: 'By constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of the common good, that compose the general system, according to which the community hath agreed to be governed.'[71] This definition, having much in common with ideas that can already be found in the work of Ancient writers, regards certain laws as 'constitutional' because of their superior character and binding authority. These were not the fruit of a radical beginning, as in the tradition of constituent power. To the contrary, they were handed over from the past in the form of institutions.[72] Even though constitutionalism appears

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[68] Negri, o.c., p. 324.

[69] Negri, o.c., p. 336.

[70] For a similar critique, see: B. van Roermund, 'Constituerende macht, soevereiniteit en representatie', *Tijdschrift voor Filosofie*, vol. 64 (2002), pp. 509–532.

[71] Bolingbroke, H. St. John, *A Dissertation upon Parties* (1733–34), in: *The Works of Lord Bolingbroke* (1841), II, p. 81, quoted in: C.H. McIlwain, *Constitutionalism: Ancient and Modern*, Indianapolis: Liberty Fund 2008, p. 9.

[72] Cf. C.H. McIlwain, o.c., p. 14.

in different guises over time, it keeps one essential idea, which is the limitation of government.[73]

In a contemporary article on the political foundations of constitutionalism, we can find the following description of what a constitution is supposed to do: 'A constitution *constitutes* a political entity, establishes its fundamental *structure*, and defines the *limits* within which power can be exercised politically.'[74] Accordingly, the constitution has three functions: constitutive, formative and limiting. The first purpose comes to the fore when we ask more precisely what it means 'to constitute'. The answer is that 'constituting a polity is the act of giving origin to a political entity and of sanctioning its nature and primary end', in other words, 'the constitution defines a people and its way of life.'[75] When it is the constitution that gives origin to a political entity, this means that no political entity exists prior to the constitution. In other words, contrary to the theory of Sieyès, constitutionalism seems to date the birth of the people at the same moment as (and not *preceding to*) the birth of the constitution. The constitution is, as it were, a speech act calling the legal order into existence in virtue of certain conventions of the polity; it is not an act that aims at overthrowing the conventions it feeds on.

When we look at the second purpose of the constitution, the two traditions are also mutually opposed. A constitution's second purpose 'is that it gives *form* to the institutions and procedures of governance (in its broadest sense, comprising the legislative, administrative and judicial functions) of a political community.' These make up 'the functional division of competences and powers within the community according to certain objectives and values.'[76] The formative function, assigned by Sieyès to the nation as a formless former, is supposed here to be exercised by the constitution. Since no people exists prior to the constitution, constitutionalism cannot assume it as the sovereign creator of the polity. The constitution takes over this function: It is the constitution that is forming. One could, therefore, say that constitutionalism denies the extra-legal origin of the legal order. As a result, constitutionalisation can only mean a process whereby the legal order as it exists transforms into a more intense version of itself.

Yet, this does not mean that the constitution has lost its function as form. The last purpose—limitation—reflects this: '[T]he third main purpose of the constitution is to limit the exercise of power.'[77] Liberal thought has usually taken this notion of limitation in a negative way as a 'firewall' against the sphere of government

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[73] Ibid., p. 19: '[I]n all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.' See also: G.F.M. van der Tang, *Grondwetsbegrip en grondwetsidee*, Gouda: Quint 1998, Sect. 3.4.

[74] D. Castiglione, 'The Political Theory of the Constitution', in: R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford (etc.): Blackwell 1996, pp. 5–23 at p. 9–10 [Italics in the original].

[75] Ibid., p. 10.

[76] Ibid. [Italics in the original].

[77] Ibid.

action.[78] However, these limitations are also factual, and follow directly from the constitutive function. According to the tradition of constitutionalism, the creation of the polity is already its limitation since it names certain ways in which power can be exercised in a 'political' way, hereby factually excluding others. This means that the constitutive limitations 'guarantee that there are areas of activity and social relationships not directly touched by politics itself, insofar as they fall outside either its scope or its reach,' because 'the definition of the "political" guarantees that political power is limited insofar as its normal workings are made regular and predictable.'[79] Nevertheless, both negative and constitutive limitations 'represent the attempt to de-personalize political power.'[80] Concerning the last point, the traditions of constituent power and that of constitutionalism agree with one another: The constitution *limits* political power. However, they fundamentally disagree as to the appraisal of this limitation. Whereas constitutionalism defends it as one of the three main purposes of any constitution, the theory originally devised by Sieyès regards any attempt of limiting the sovereign power of the nation as problematic. Formulated differently, agreement exists on the need to distinguish a political sphere from a legal one. Disagreement concerns the way in which politics and law relate.

It is exactly this last topic that forms 'the classical *topoi* of the relationship between the "government of laws" and the "government of man" (…) [which] captures the essence of discussions about constitutionalism.'[81] For our purposes, it is important what conclusion on the nature of political power we should draw from this time-honoured theory.[82] In this view, power appears as essentially limited: '[P]olitical power is not absolute both because, in its normal administration, it is limited by the laws, and because it is *political* in nature—a power, that is, exercised on the basis of the principle of (relative) equality.'[83] This vision of political power differs fundamentally from what we have seen in the tradition of constituent power. Indeed, according to the latter view, the power of the nation was the absolute source of all power. Of course, one could discard this problem by pointing to the *pre*-political nature of the nation as constituent power. However, this merely hides the difficulty, rather than offers a veritable solution. The problem, it seems to me, is that constitutionalism always already starts from a notion of power that is limited, rather than absolute. Political power is limited because it is supposed to be based on equality as a matter of principle. By explicitly limiting political power, the constitution

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[78] Cf. Arendt, o.c., p. 143: 'the liberties which the laws of constitutional government guarantee are all of a negative character (…) a safeguard against government.'

[79] Castiglione, o.c., p. 11.

[80] Ibid.

[81] Ibid. [Italics in the original].

[82] Aristotle starts his political thinking from the perspective of a *polis* devised of free and equal citizens. Equality was a criterion of justice: an equal distribution is a just distribution for it gives to each his due (*suum cuique tribuere*). Accordingly, *politeia* (usually translated as 'constitution') was to reflect the equality of citizens as a politically just regime. The constitution corresponded to the ultimate purpose (*telos*) of political life. Cf. Castiglione, o.c., pp. 11–14.

[83] Ibid., p. 14.

(as one of its main functions) reiterates the point. So power is limited… because it is constitutional power, i.e., power exercised according to limiting principles. The limitation of power, so precious to all theories of constitutionalism, is only possible if one *presupposes* that political power is limited in the first place. It is exactly this presupposition that the theories of constituent power attack. Just as do the theories of constituent power, the theory of constitutionalism ultimately runs into circularity.

This circle returns in a specifically legal perspective on the issue. The famous German constitutional lawyer and legal theorist, Ernst-Wolfgang Böckenförde, wrote about the concept of constituent power as being a concept at the borders of constitutional law.[84] For him, as a constitutional lawyer, the question raised by the concept of constituent power is, first and foremost, why a positive constitution would have a higher authority than ordinary laws. This higher value does not reside in the constitution itself, but rather, in a *pre-constitutional* factor: The special power or authority that gave it. It is this special power, Böckenförde states, that is called constituent power ever since the French Revolution. The question of constituent power concerns, therefore, the origin and basis of legitimacy of the constitution. This query takes us to the very borders of constitutional law because it inquires after the constitution itself, and more. This 'more', Böckenförde argues, entails that this topic transcends the scope of positive law. Note, however, that the 'more' goes beyond positive law for reasons different from those that Negri submitted in the previous section. It is not the plural subjectivity of 'the multitude' growing to permanent revolution, but rather, the plural objectivity of the facts that have to be taken into account in any legal order. Whereas the ground (or foundation) of law is a part of law and, therefore, an object for scholarly legal discipline, no legal order can allow itself not to link up with what is given without suffering in authority: 'The connection between law and what is given pre-legally, the problem of the missing link between norms and facts, appears imperatively in the case of the constitution.'[85]

Even though he recognises other ways of approaching the question, Böckenförde wants to stress that in his constitutional law-approach, the concept of constituent power has the function of legitimising the normative validity of the constitution, on the one hand, and stabilising this validity, on the other. In order to obtain these aims, Böckenförde dismisses both what he calls 'the empty legitimacy of Kelsen' (who allegedly cut norms loose from facts) and the ideal legitimacy of natural law theories (which advocate continuity between positive norms and norms of reason). One should recognise the power giving the constitution as a political player, i.e., as a political force (*Kraft*). Consequently, he comes to the following definition: 'The constituent power is that (political) power and authority that is able to give, support and nullify the constitution in its normative claim to validity. It is not identical to the

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[84] E.-W. Böckenförde, 'Die verfassunggebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts', in: *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Frankfurt am Main: Suhrkamp 1991, pp. 90–112.

[85] Ibid., pp. 91–92: 'Die Verknüpfung des Rechts mit vorrechtlichen Gegebenheiten, das Problem des missing link zwischen Normativität und Faktizität kommt daher bei der Verfassung unabweisbar zum Vorschein.'

constituted state powers, but precedes it. However, when [the constituent power] expresses itself, it works on these [state] powers and, depending on the form of the expression, also in them.'[86]

This characterisation is close to that of Sieyès, and Böckenförde seems to follow the French revolutionary on other points, also. His is a sophisticated defence of constitutionalism, taking the opposite position into account. But under the surface, Böckenförde consistently returns to the basic tenets underlying his constitutionalist position. For example, he agrees that the question of who should be the bearer (or subject) of constituent power is a strange one. Precisely because it is a democratic and revolutionary concept, both in origin and in content, there can be but one possible subject: the people. However, the next question is: What does 'people' mean in this context? Following Sieyès, Böckenförde understands the people as a nation. This is a people in the *political* sense: 'the group of human beings (politically converging and delimitating itself) that is aware of itself as a political entity that matters and that enters history acting as one.'[87]

From the point of view of constitutional law, however, the higher authority of the constituent power is not only a blessing, but also a problem. Since the constituent power of the people precedes and transcends the positive constitution, it cannot be bound by this constitution. Constituent power retains 'an original, immediate and elementary character.'[88] Although it seems inviting to dismiss constituent power (and the whims of politics) altogether, Böckenförde explicitly rejects this possibility as a fiction. The constituent power of the people remains available as a political force. Moreover, he argues that, without the continuous support of political and legal convictions of a particular society for the fundamental traits of the constitution, it becomes eroded. This may lead to civil uprisings or to total apathy.

Contrary to what Sieyès teaches, Böckenförde emphasises that the problem with the concept of constituent power is that it confronts constitutional law with opposite demands. On the one hand, it gives an opportunity to ground the higher authority of the constitution, but then one should keep the *connection* between the constituent power of the people and the positive constitution. On the other hand, the pre-normative fluctuations of constituent power are a threat to the stability of the constitutional order and, therefore, a *detachment* is needed. How does one deal with this problem? How is one to keep the legitimising quality of constituent power without exposing oneself to its political force? Böckenförde sees here an important task for constitutional law, even though he acknowledges that this goal cannot ever be attained completely. The assignment of constitutional law is 'to somewhat re-

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[86] Ibid., p. 94: 'Verfassunggebende Gewalt ist diejenige (politische) Kraft und Autorität, die in der Lage ist, die Verfassung in ihrem normativen Geltungsanspruch hervorzubringen, zu tragen und aufzuheben. Sie ist nicht mit der verfaβten Staatsgewalt identisch, sondern liegt ihr voraus. Sie wirkt aber, wenn sie sich äuβert, auf diese ein und je nach ihrer Äuβerungsform auch in sie hinein.'

[87] Ibid., p. 96: 'die (politisch sich zusammenfindende und abgrenzende) Gruppe von Menschen, die sich ihrer selbst als politische Größe bewuβt ist und als solche handelnd in die Geschichte eintritt.'

[88] Ibid., p. 99: 'einen originären, unmittelbaren, auch elementaren Character.'

strict the never excludable actions of the constituent power of the people. With the right precautions one could make sure that its expressions, when they appear, lead to procedures especially prepared for this purpose, where they are picked up and made valid by their channelling. In this way, they [the expressions, LC] would retain their possibility of actualisation.'[89] Böckenförde enumerates three different ways in which this could be done. The first possibility is a distinction and demarcation between constituent power and the constituted powers. This entails some classical legal-conceptual work. The second way would be to develop democratic procedures to articulate and regiment the expressions of the constituent power. Yet, most of the time, these expressions are negative and remain rather vague. One should, therefore, try to convert them into clear designs and executable orders; examples are a constitutional convention and a referendum about a specific proposal to change the constitution.

Furthermore, there is a third way to restrain the constituent power that, nevertheless, aims at leaving the door open for influence of the unordered people *in the framework of* the constitution. To understand what Böckenförde means by this, it is essential to grasp his distinction between the unorganised people and the organised people, and how the two relate: 'It is only when the people acts as an organised entity, in the form of active citizenry, that the unorganised people of the constituent power also somehow takes part and is present. In state-political reality, it is possible to legally distinguish between the people as organ and the people as sovereign. However, it is impossible to separate them, as if they were two different real entities; in the end, they are both the same "people".'[90] As an example of this inseparability, Böckenförde points to procedures of direct constitution-making.

In the final analysis, Böckenförde tries to answer the question whether, and in which sense, positive law can bind constituent power. He starts by observing that in democratic theory no such prior legal bond can exist. However, he proceeds by rejecting the view that constituent power is a random and arbitrary force. He has two different arguments for this move, one conceptual and one ethical. To start with the former, for Böckenförde the concept of constituent power entails the will for a constitution. Since a constitution cannot mean absolute power, the concept of constituent power already entails the delimitation of power. However, if we scrutinize this argument, it turns out to be a *petitio principii*. Böckenförde claims that constituent power already means limited power because it is the will to make a constitution. But the only way to say that constituent power is limited power is to

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[89] Ibid., p. 100: 'Die niemals ausschließbaren Aktionen der verfassunggebenden Gewalt des Volkes können irgendwie eingegrenzt und es kann durch geeignete Vorkehrungen erreicht werden, daß ihre Äußerungen, wenn sie hervortreten, in dafür bereitgestellte Verfahren einmünden, dadurch aufgefangen werden und sich kanalisiert zur Geltung bringen, in dieser Weise aber auch die Möglichkeit der Aktualisierung haben.'

[90] Ibid., p. 104: 'Denn immer dann, wenn das Volk als organisierte Größe, in Form der Aktivbürgerschaft, handelnd auftritt, ist auch das unorganisierte Volk des pouvoir constituant irgendwie beteiligt und mit anwesend. In der staatlich-politischen Wirklichkeit lassen sich Volk als Organ und Volk als Souverän zwar juridisch unterscheiden; sie lassen sich aber nicht voneinander abtrennen, als ob sie zwei verschiedene reale Größen wären; beide sind letztlich dasselbe >>Volk<<.'

presuppose that it is the will to make a constitution. Yet, this is exactly the question. Negri, for example, would never agree with the view that constituent power entails the will to make a constitution. According to him, any form of constitutionalism is immediately an act of treason towards the constituent power. Furthermore, it does not follow from Böckenförde's earlier definition of the nation: If it were already an organised entity before the constitution, why would it need a constitution at all? For what reason would it limit its force?

Let us turn to Böckenförde's second argument for a limited conception of constituent power. In this framework, his reasoning is that constituent power can be limited either from the outside by non-positive law, or from the inside. Human rights are called upon in our day to form this limitation. Böckenförde proposes to understand this limitation not in the sense of positive law imposed on constituent power (which would be self-contradictory) but rather as a demand that remains dependent on recognition by the bearer of constituent power: 'This demand can only be legally claimable if it complies with it. For the concrete legal validity, it boils down again to the recognition and positive conversion of the bearer of constituent power, itself.'[91] Following Hermann Heller, Böckenförde regards this as an *ethical* limitation. He will also refer to it as the 'spirit' of a people.[92] This entails that it cannot be seen as a legally claimable right. But this seems to beg the question. Presupposing an ethical limitation prior to the legal limitation amounts to presupposing a constitution *behind* the constitution. In other words, it is again a limitation before the limitation appears, without it being argued for.

2.4 Law, State and Democracy: Rereading the Schmitt-Kelsen Debate

A direct confrontation between a supporter of the primacy of politics and a defender of constitutionalism can be found in a discussion on the legal-political foundations of the Weimar Republic. Just after the First World War, confronted with the failing of the Weimar Constitution, Carl Schmitt and Hans Kelsen engaged in a debate. Their polemic did not just concern the legitimacy of this constitution; it also forced them to take a stance towards the underlying issues concerning the relationship between law and politics. The political background of the debate made the contributors defend their own position with ever-sharper arguments, letting their views come to the fore in their most radical form. Furthermore, the debate had

[91] Ibid., pp. 109–110: 'deren rechtliche Einforderbarkeit davon abhängt, daβ er ihr entspricht, so kommt es für die konkrete rechtliche Geltung wieder auf die Anerkennung und positive Umsetzung durch den Träger der verfassunggebenden Gewalt selbst an.'

[92] Ibid., p. 111: 'Worauf es ankommt, ist also, daβ in einem Volk dann, wenn es sich als verfassunggebende Gewalt betätigt, ein lebendiges Rechtsbewuβtsein, wirksame Ordnungsideen und ein ethisch-politischer Gestaltungswille vorhanden sind, kurz, daβ es einen >>Geist<< in sich trägt, der sich in Institutionen, Regeln und Verfahren ausformen kann und auch ausformt.'

dramatic consequences, both on a personal and on an ideological level. Whereas Kelsen chose to flee to the United States, Schmitt flirted with National Socialism. It also makes clear that it is too easy to equate the view that proclaims the primacy of politics with a revolutionary tradition, as Arendt does. The Weimar Republic shows that this position has defenders among conservative (Von Savigny, Schmitt) and progressive thinkers (Heller and Luxemburg). In the same vein, the tradition of constitutionalism has supporters on the left (Kelsen, Habermas) and on the right (Burke). In the following pages, I will reread the discussion between Schmitt and Kelsen.[93] I will first discuss their views on the relationship between parliament and democracy, and subsequently, their opinions on the relationship between law and state. Finally, I will draw some conclusions concerning the way legal doctrine understands the concept of competence.

According to Carl Schmitt, the failure of the Weimar Constitution shows that there is a contradiction between parliamentarism and democracy. By disconnecting the two concepts, Schmitt does not only claim that they can exist separately, but also opens the possibility for dictatorship as a legitimate alternative for a parliamentary democracy under certain circumstances.[94] To understand this last move, we need to focus on Schmitt's concept of democracy. For Schmitt, democracy is equal to the principle of popular sovereignty: The people are both the rulers and the ruled.[95] With regard to the concept of people, Schmitt holds that it is a political unity.[96] As such, it precedes the legal order: The political unity of the people is presupposed in every legally binding decision. Day-to-day politics can only take place after an act of self-inclusion drawing a border between 'we' and 'them', 'inside' and 'outside', 'friend' and 'enemy'. The drawing of this border is the institution of the community. The unity of the people, Schmitt argues, resides in equality understood as homogeneity.[97] This homogeneity is at the very heart of democracy, for, '[t]he democratic identity of governed and governing arises from that.'[98] Because of this homogene-

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[93] For my interpretation of the debate between Schmitt and Kelsen, I am much indepted to Hans Lindahl, see: H. Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford (etc.): Oxford University Press 2007, pp. 9–24.

[94] See: C. Schmitt, *The Crisis of Parliamentary Democracy*, trans. E. Kennedy, Cambridge, Mass.: MIT Press 1985, in particular the 'Preface to the Second Edition (1926): On the Contradiction between Parliamentarism and Democracy', p. 16–17. See also C. Schmitt, *Verfassungslehre*, Berlin: Duncker & Humblot 1970 [1928], p. 237: 'Eine Diktatur insbesondere ist nur auf demokratischer Grundlage möglich.'

[95] C. Schmitt, *Verfassungslehre*, p. 234: 'Demokratie (…) ist Identität von Herrscher und Beherrschten, Regierenden und Regierten, Befehlenden und Gehorchenden.'

[96] This becomes clear in the following definition of democracy: 'Demokratie ist eine dem Prinzip der Identität (nämlich des konkret vorhandenen Volkes mit sich selbst als politische Einheit) entsprechende Staatsform.' Cf. C. Schmitt, *Verfassungslehre*, p. 223.

[97] Ibid., p. 226: 'Die spezifische Staatsform der Demokratie kann nur auf einen spezifischen und substanziellen Begriff der Gleichheit begründet werden.' Schmitt speaks of homogeneity at p. 235 and p. 238. See also p. 34, where he states that: 'Die demokratische Gleichheit ist wesentlich Gleichartigkeit, und zwar Gleichartigkeit des Volkes.'

[98] C. Schmitt, *The Crisis of Parliamentary Democracy*, p. 14.

ity, citizens are equals; strangers are excluded as being unequal. In Schmitt's words: 'Every actual democracy rests on the principle that not only are equals equal, but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.'[99]

It is important to take into account that, for Schmitt, the people *qua* agent is a *real* entity. Only as a real entity can the people interfere in the course of political events and be the bearer of sovereignty, the subject of constituent power.[100] Schmitt claims that, in this respect, the concept of 'the people' takes over from God. Whereas in the Middle Ages, God was sovereign in virtue of His omnipotence, in Modernity, the people is considered to be 'a mortal God', to quote Hobbes's famous phrase, and thus, unlimited in power. This thesis fits into Schmitt's broader contention of a political theology: The modern concepts of law and politics are the secularised versions of theological notions.[101] It is only against this background that we can understand what Schmitt has to say about sovereignty. For Schmitt, sovereignty entails the fundamental decision regarding the people as a whole; it is the political decision *par excellence*.[102] It draws the line between homogeneity and heterogeneity, between who is inside (a friend) and who is outside (an enemy).[103] The consequence of this definition is of the utmost interest to our own inquiry because it concerns competence as legal power. According to Schmitt, sovereignty cannot be legal power because it is the power to create legal powers. In other words, sovereignty precedes competence because the people (as a political unity) precedes the legal order (as a legal unity, an order of competences). By calling it *Kompetenz-Kompetenz*, one only begs the question.

As an analogy of the power of God, the sovereign power of the people is without limits. This is intimately connected with the state of exception. Sovereignty, as the highest power, comes to the fore in the state of exception because then the usual limits on state powers (competences) are suspended: 'The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited.'[104] In the state of exception, exceptional powers are needed because what is at stake is the very existence of the people in its unity, i.e., in its homogeneity.[105] This means, first of all, that the state of exception is not something that

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[99] Ibid., p. 9.

[100] C. Schmitt, *Verfassungslehre*, p. 223: 'Das Volk ist Träger der verfassunggebenden Gewalt und gibt sich selbst seine Verfassung.' At p. 236 Schmitt stresses: 'Staatsgewalt und Regierung gehen in der Demokratie vom Volke aus.'

[101] Cf. C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, The University of Chicago Press 1985, p. 36.

[102] Ibid., p. 6: 'The decision on the exception is a decision in the true sense of the word.'

[103] C. Schmitt, *The Crisis of Parliamentary Democracy*, p. 11: 'Until now there has never been a democracy that did not recognize the concept "foreign" and that could have realized the equality of all men.' The distinction between 'friend' and 'enemy' is central to C. Schmitt, *The Concept of the Political*, trans. G. Schwab, Chicago: The University of Chicago Press 1996 [1932].

[104] C. Schmitt, *Political Theology*, p. 7.

[105] Ibid., p. 6: 'The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like.'

happens only rarely. Every time the unity of the people is in danger, this calls for a sovereign decision, a decision on who is equal and who is unequal.[106] This is a decision that draws the border between 'we' and 'them'. The second consequence is a paradoxical one. When Schmitt characterises the sovereign decision as a decision on the state of exception, it is this state that defines normality, and not the other way around. It is the exception that constitutes what is normal; the normal case exists only by the grace of the exception.[107]

If what is decided upon in the case of exception is the homogeneity, the ultimate unity of the people, this brings us back to the question of democracy. With his account of the sovereign decision, Schmitt has given us a particular reading of the principle of popular sovereignty. Indeed, for Schmitt, the people being at the same time rulers and ruled means that the laws in a democracy represent the concrete homogeneity of the people, the people as a unity.[108] Representing should be understood as *copying*: The people is only sovereign when the laws that rule it are a copy of its particular and concrete homogeneity.[109] The question that immediately arises is whether parliament is able to perform this task? Schmitt's answer is negative, as democracy and parliament are incompatible in the final analysis.

Schmitt argues that the incompatibility between democracy and parliament is essentially one between homogeneity and diversity. We have seen how he connects homogeneity with the concrete unity of the people. Diversity, on the other hand, is linked to the characteristically liberal idea of parliament.[110] According to Schmitt, liberalism is a position that starts from the individual, and thus, from selfishness and a plurality of opinions.[111] This is completely at odds with democracy, where the homogeneity between citizens relates them to each other in solidarity. Therefore, he speaks of an 'inescapable contradiction of liberal individualism and democratic

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[106] C. Schmitt, *Verfassungslehre*, p. 227: 'Der demokratische Begriff der Gleichheit ist ein politischer Begriff und nimmt, wie jeder echte politische Begriff, auf die Möglichkeit einer Unterscheidung Bezug.'

[107] C. Schmitt, *Political Theology*, p. 15: 'The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule, but also its existence which derives only from the exception.'

[108] C. Schmitt, *Verfassungslehre*, p. 235: 'repräsentiert werden nicht die Regierenden, sondern die politische Einheit als Ganzes.'

[109] Schmitt stresses this concrete character of equality, in *The Crisis of Parliamentary Democracy*, p. 9: 'The question of equality is (…) about the substance of equality. It can be found in certain physical and moral qualities, as for example, in civic virtue, in *arete*, the classical democracy of *vertus* (*vertu*). (…) Since the Nineteenth Century, it has existed above all in membership in a particular nation, in national homogeneity. Equality is only interesting and valuable politically so long as it has substance, and for that reason, at least the possibility and the risk of inequality.'

[110] C. Schmitt, *The Crisis of Parliamentary Democracy*, p. 8: 'The belief in parliamentarism, in government by discussion, belongs to the intellectual world of liberalism. It does not belong to democracy.'

[111] Ibid., p. 4: 'But worse, and destroying almost every hope, in a few states parliamentarism has already produced a situation in which all public business has become an object of spoils and compromise for the parties and their followers, and politics, far from being the concern of an elite, has become the despised business of a rather dubious class of persons.'

homogeneity.'[112] Liberalism should be connected with civil society where man appears as a private person and not as a citizen. As persons, everyone is equal. However, Schmitt warns us that '[t]he equality of all persons as persons is not democracy but a certain kind of liberalism, not a state form but an individualistic-humanitarian ethics and *Weltanschauung*.'[113] So, 'private person' is not a political category. This becomes clear when we focus on the individual rights advocated by classical liberalism: These were supposed to secure that the individual retains a domain in which he is free in the sense of *free from* governmental interference. This negative freedom is the product of a chasm between state and civil society, a chasm that works at the expense of the common good and the political state. In contradistinction to the liberal freedoms, Schmitt, therefore, points to the importance of positive political rights. To wrap up the argument, Schmitt rejects parliament because of its liberal nature. Liberalism denies the truly political content of democracy as a decision about what makes the people. Because of its reduction of human relations to relations between selfish individuals, the liberal institution of parliament is unable to represent the people as a unity. Paradoxical as it may seem, for Schmitt parliament is not democratically legitimised.[114]

Schmitt also understands the relationship between state and law in a dualistic way. According to him, the much-praised 'democratic *Rechtsstaat*' breaks down in two distinct components. On the one hand, there is a political component: Democracy. On the other hand, there is a liberal-legal component: The *Rechtsstaat*, the civil constitutional state that is based on individualism.[115] In the state, this element comes to the fore in the recognition of individual rights and the separation of powers.[116] Schmitt argues that these components are not just different, but are even at odds with one another. The civil constitutional state reduces power to competence.[117] In this way, Schmitt argues, it is responsible for the elimination of the political element from the legal order, thus letting it slip away into the darker spheres of sheer power.[118] Because Schmitt sees an undeniable link between democracy and

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[112] Ibid., p. 17. See also p. 2, where he mentions that 'the distinction between liberal parliamentary ideas and mass democratic ideas cannot remain unnoticed any longer.'

[113] Ibid., p. 13.

[114] Ibid., p. 15: 'As democracy, modern mass democracy attempts to realize an identity of governed and governing, and thus it confronts parliament as an inconceivable and outmoded institution. If democratic identity is taken seriously, then in an emergency, no other constitutional institution can withstand the sole criterion of the people's will, however it is expressed. Against the will of the people especially, an institution based on discussion by independent representatives has no autonomous justification for its existence, even less so because the belief in discussion is not democratic but originally liberal.'

[115] C. Schmitt, *Verfassungslehre*, p. 125: 'Die moderne bürgerlich-rechtstaatliche Verfassung entspricht in ihren Prinzipien dem Verfassungssideal des bürgerlichen Individualismus.'

[116] Ibid., p. 127: 'Grundrechte und Gewaltenteilung bezeichnen demnach den wesentlichen Inhalt des rechtstaatlichen Bestandteils der modernen Verfassung.'

[117] Ibid., p. 126: 'die (prinzipiell begrenzte) staatliche Macht wird geteilt und in einem System umschriebener Kompetenzen erfaßt.'

[118] Ibid.p. 125: 'Das Politische kann nicht vom Staat – der politischen Einheit eines Volkes – getrennt werden, und das Staatsrecht entpolitisieren, hieße nichts anderes als das Staatsrecht entstaatlichen.'

the political, the constitutional state is a threat to democracy understood as popular sovereignty. Contrary to the idea of *Rechtsstaat*, Schmitt's own vision of the state is characterised by its independent existence. For him, the state is equal to the constitution (*Verfassung*). Therefore, what is at stake in the constitution is the independent political existence of the state.[119] Note that this differs from a strictly legal concept of the constitution. For (constitutional) lawyers, the constitution is, first of all, a set of basic legal rules on the organisation of public power which calls the state into existence as a *legal* entity. Schmitt fundamentally disagrees with this view. Any constitution in the legal (normative) sense presupposes a unity, the unity of a *political* will belonging to a people.[120] The constitution, in the theory of Schmitt, is the political decision of a people concerning its independent existence, its existence as a separate unity. So, a political unity precedes the legal order.[121] That a political order must precede the legal order means that the genesis of the legal order is a political act, the act of the people giving the constitution.[122] This act is thus preceded by the decision on the political organisation of a people. Note that Schmitt speaks of a decision to organise, which entails that the people already exists before this decision. There is already a separation between 'we' and 'them', between friends and enemies, before any law can be enacted. Schmitt claims that this is a natural distinction based on the people as an organic unity.[123] As such, this forms the foundation of the legal order, the political form that precedes it.[124] It is this absolute foundation that the legal order copies.

The consequence of Schmitt's thoughts on constitutions is a view radically opposed to the *Rechtsstaat,* and its reduction of power to competence. Against this no-

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[119] Cf. C. Schmitt, *Verfassungslehre*, p. 4, where Schmitt speaks of the *Verfassung* as 'den konkreten einzelnen Staat (…) in seiner konkreten politischen Existenz. (…) [D]er Staat ist Verfassung, d. h. ein seinsmäßig vorhandener Zustand, ein *status* von Einheit und Ordnung. Der Staat würde aufhören zu existieren, wenn diese Verfassung, d. h. diese Einheit und Ordnung aufhörte. Die Verfassung ist seine "Seele", sein konkretes Leben und seine individuelle Existenz.'

[120] Ibid., p. 9: 'In Wahrheit gilt eine Verfassung, weil sie von einer verfassunggebenden Gewalt (d. h. Macht oder Autorität) ausgeht und durch deren Willen gesetzt ist. Das Wort "Wille" bezeichnet im Gegensatz zu bloßen Normen eine seinsmäßige Größe als den Ursprung eines Sollens. Der Wille ist existenziell vorhanden, seine Macht oder Autorität liegt in seinem Sein.'

[121] Ibid., p. 10: 'Der Begriff der Rechtsordnung enthält zwei völlig verschiedene Elemente: das normative Element des Rechts und das seinsmäßige Element der konkreten Ordnung. Die Einheit und Ordnung liegt in der politischen Existenz des Staates, nicht in Gesetzen, Regeln und irgendwelchen Normativitäten.'

[122] Ibid., p. 238: 'Das Volk ist in der Demokratie Subjekt der verfassunggebenden Gewalt. Jede Verfassung beruht nach demokratischer Auffassung auch in ihrem rechtstaatlichen Bestandteil auf der konkreten politischen Entscheidung des politisch handlungsfähigen Volkes. Jede demokratische Verfassung setzt ein solches handlungsfähiges Volk voraus.'

[123] C. Schmitt, *Political Theology*, p. 49: 'The unity that a people represents does not possess this decisionist character; it is an organic unity, and with national consciousness, the ideas of the state originated as an organic whole.'

[124] C. Schmitt, *Verfassungslehre*, p. 200: 'Die Prinzipien der bürgerlichen Freiheit können wohl einen Staat modifizieren und temperieren, aber nicht aus sich heraus eine politische Form begründen.'

tion of legal power, Schmitt holds that competences ultimately depend on power in the strong sense of the word, i.e., political power. In other words, the power to give the constitution, i.e., constituent power, is the source of all legal power. It would be a mistake, however, to place this political act *par excellence* only at the beginning of the legal order. It is the sovereign decision that we described above: Not only every time the state is in crisis, but also every time its political unity is at stake, however trifle the issue might be, this asks for a political decision. This is the state of exception, as distinct from the state of emergency. In these cases, one can witness how legal power depends on political power.[125] Then, the sovereign appears, the one 'who decides on the exception,'[126] the one who has the power to suspend the normal legal order *in toto*, the order of competences.[127] This brings Schmitt to a distinction between two concepts of law. The concept of law that belongs to the constitutional state stresses its rationality. Yet, this rationality presupposes the irrationality of what Schmitt calls the democratic-political concept of law. The latter is a concrete act of will of the sovereign people. Schmitt refutes the sovereignty of law as proclaimed by the *Rechtsstaat*, by pointing to democracy as the political sovereignty of the people.

The starting point of Kelsen's argument is radically opposed to that of Schmitt. The Austrian lawyer, first of all, stresses the connection between democracy and parliament.[128] Yes, their fate is inextricably linked.[129] Even though his definition of democracy seems almost identical to the one of Schmitt—identity of rulers and ruled—it differs on a decisive point.[130] This becomes clear when we look at the concept of 'people'. Where Schmitt stresses the homogeneity of the people, its *real* unity, Kelsen tries to question it. Where Schmitt chooses equality as the basic characteristic of democracy, for Kelsen it resides in freedom.[131] Where Schmitt says

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[125] C. Schmitt, *Political Theology*, p. 13: 'The exception reveals most clearly the essence of the state's authority.'

[126] Ibid., p. 5.

[127] Ibid., p. 12: 'What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.'

[128] Cf. H. Kelsen, 'On the Essence and Value of Democracy', trans. B. Cooper and S. Hemetsberger, in: A.J. Jacobson and B. Schlink (eds.), *Weimar: A Jurisprudence of Crisis*, Berkeley (etc.): University of California Press 2002 [1929], pp. 84–109, at p. 92: 'Modern democracy is based upon political parties, whose significance increases the more the democratic principle is implemented. Considering this fact, one can understand the tendency—though still weak—to anchor political parties *in the constitution* and give legal form to what they have de facto long since become: organs forming the will of the state.' [Italics in the original].

[129] Ibid., p. 95–96: 'Within the democratic parliamentary republic, the problem of parliamentarism becomes a fateful question. The existence of modern democracy depends on whether parliament is a workable tool to solve the social problems of our time. (…) Thus a decision about parliamentarism is at the same time a decision about democracy.'

[130] How close Kelsen's definition is to that of Schmitt becomes clear from the following quotation: 'Democracy is the identity of the leader and the led, of the subject and the object of rule; it means the rule of the people over the people.' Cf. H. Kelsen, 'On the Essence and Value of Democracy', p. 89.

[131] With regard to democracy, Kelsen states: 'Politically free is he who is subject to a legal order in the creation of which he participates. An individual is free if what he "ought to" do according

that the people is a political (pre-legal) concept, Kelsen stresses that it is a legal notion. For a better understanding of this last claim, one should keep in mind what has been said above about the relationship between the people and democracy. In a democracy, the people is both subject and object of legislative ruling. Kelsen admits that as ruled, as the object of rules, the people is indeed a unity: a unity of norms, a unity of several actions. So, the unity of the people is the unity of a legal order. The people is a normative, i.e., a *legal* unity.[132]

Things are different with regard to the people as the subject of rules. Kelsen points to the fact that the number of citizens really actively engaged in norm creation is much smaller than that of those ruled. The group of 'norm creators' is limited to the voters.[133] The difference between the people as rulers and the people as ruled is shown by the existence of political parties. One may regard these as the embodiment of the plurality of the people. So, the people as rulers is the sum total of voters, a factual disunity. On the other hand, the people as being ruled corresponds to a legal unity. This is the unity of a legal order. In other words, since we are always already born in an existing legal order, Kelsen argues, the people as a legal unity always already exists. *Pace* Schmitt, political unity is formed by the legal act drawing the borders of the polity.

Kelsen's point against Schmitt is relevant on yet another level. Above, I have demonstrated how Schmitt puts emphasis on the conceptual and even temporal primacy of constituent power. Kelsen remarks that '[u]sually, an individual is born into a community constituted by a pre-existing social order.'[134] That is to say, Kelsen, by showing how we always already find ourselves within an existing legal order, in a sense, points out how there is a primacy of the constituted order. Far from being problematic, it is this constituted state that forms the condition for all acts of constitution. According to Kelsen, the reason why I, as an individual, participate in politics is to change the existing (constituted) condition into one that suits me more, into a condition with which I could agree.[135] Important in his theory is *the difference* between the normative unity of the people, on the one hand, and its factual disunity on the other.[136] Precisely because of this difference, he can understand the factual disunity as

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to the social order coincides with what he "wills to" do. Democracy means that the "will" which is represented in the legal order of the State is identical with the wills of the subjects.' See: Cf. H. Kelsen, *General Theory of Law and State*, New York: Russel & Russel 1961, p. 284.

[132] H. Kelsen, 'On the Essence and Value of Democracy', p. 90: 'Only in a *normative* sense can one speak of a unity. (…) Fundamentally, only a *legal* element can be conceived more or less precisely as the unity of the people: the *unity* of the *state's legal order*, which rules the behavior of the human beings subject to its norms.' [Italics in the original].

[133] Ibid., p. 91: 'Participation in creating the will of the community is the content of so-called *political rights*. Even in an extreme democracy, the people as embodiment of those with political rights represents only a small segment of those obligated by the state order, of the people as object of rule.' [Italics in the original].

[134] H. Kelsen, *General Theory of Law and State*, p. 286.

[135] Ibid.: 'The problem, thus, can be narrowed down to the question how an existing order can be changed.'

[136] Cf. H. Kelsen, 'On the Essence and Value of Democracy', p. 90: '[T]he unity of the people is only (…) the object of rule. As ruling *subject*, human beings are recognised only to the extent that

a continuous discussion about how to achieve unity. In a situation of unity, rulers and ruled would actually coincide; every member of a polity could agree with the laws. This would be a state of true political freedom in the sense of self-determination.[137]

One could discard these ideas as utopian or unreal, but then one misses Kelsen's point. He stresses that democracy is exactly this tension between an ideal unity and a factual disunity. This makes his theory an important argument against totalitarian regimes. While claiming the unity of the people to be really available, these regimes try to deny the tension and look away from it. Against these attempts, Kelsen is able to point to the continuous tension within democracy. Moreover, the tension helps to explain the value of majority rule. This rule reflects the conviction that the people is factually a plurality. Thus, it denies the totalitarian claim. Furthermore, it offers the minority the easiest way to become a majority.[138] Kelsen's view on parliament is an immediate result of his views on democracy. Since the unity of the people is a fiction, parliament as the representation of that unity can also only be a fiction. This fiction resides in the difference between the unity and the disunity of the people. It makes that the acts of parliament are but a compromise between the different groups within society, a compromise about the content of laws.[139] Democracy is a method for Kelsen; it is only a form of social order. It says nothing whatsoever about the content of the rules. Parliament is the exemplary (however not the only) place where the discussion about the content can take place, the place where a unity can be formed of the plurality of opinions and interests.

Kelsen also disagrees with Schmitt when it comes to the relationship between law and state. Contrary to Schmitt's dualism of law and state, the Austrian lawyer defends the position that law and state are one and the same.[140] Therefore, Kelsen

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they participate in *creating* the state order. And it is precisely this function, crucial for the idea of democracy, which includes the "people" in the norm-creating process and at the same time reveals the unavoidable distance between this "people" and the "people" understood as the embodiment of those subject to norms.' [Italics in the original].

[137] H. Kelsen, *General Theory of Law and State*, p. 285: 'The ideal of self-determination requires that the social order shall be created by the unanimous decision of all its subjects, and that it shall remain in force only as long as it enjoys the approval of all.'

[138] Ibid., p. 286: 'The idea underlying the principle of majority is that the social order shall be in concordance with as many subjects as possible, and in discordance with as few as possible. Since political freedom means agreement between the individual will and the collective will expressed in the social order, it is the principle of simple majority which secures the highest degree of political freedom that is possible within society.' For an interesting elaboration of this Kelsenian approach to democracy with regard to the freedom of speech, see: Q.L. Hong, *The Legal Inclusion of Extremist Speech*, Nijmegen: Wolf Legal Publishers 2005.

[139] H. Kelsen, *General Theory of Law and State*, p. 287–288: 'The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. (…) Free discussion between majority and minority is essential to democracy because this is the way to create an atmosphere favourable to a compromise between majority and minority; and, compromise is a part of democracy's very nature. (…) It is precisely because of this tendency towards compromise that democracy is an approximation to the ideal of complete self-determination.'

[140] Ibid., p. 182: 'However this dualism [of law and State, LC] is theoretically indefensible. The State as a legal community is not something apart from its legal order, any more than the corpora-

holds that every state is a legal order. The order or unity of the state consists of a plurality of human actions. However, the only human actions relevant in this regard are those that can actually be imputed to the state. In order to distinguish state actions from other human action, Kelsen observes that state actions are essentially representative. That is to say, state actions are never imputed to the subject performing them but always to someone else.[141] For Kelsen, the state is this point of imputation, the point that makes it possible to understand all these actions as a unity.[142] 'Unity' here should not be taken to mean that all actions are performed from one central point, but performances by various agents are authoritatively judged from some final point by whether they make sense as a whole. It means that they aim at systematic coherence: The idea is that each norm hangs together with all other norms so that its application brings the whole legal order to bear on the case in question. Thus, what a norm prescribes amounts to this whole. In other words, a state action can only be qualified as such when it coheres with all enforceable (i.e., legal) norms.[143] Indeed, for Kelsen, the state is a normative legal order, to wit an order that regulates human behaviour by means of norms.[144] The will of the state is, then, nothing else than the content of the legal norms.[145]

Kelsen's monism offers a strong argument against the invocation of a state of exception to exceed the boundaries of given competences. Since Kelsen stresses

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tion is distinct from its constitutive order.' See also p. 189: 'There is only a juristic concept of the State: the State as—centralised—legal order.'

[141] Ibid., pp. 186–187: 'What is the criterion by which those relations of domination that constitute the State are distinguished from those which do not? (…) The one who commands "in the name of the State." How then do we distinguish between commands "in the name of the State", and other commands? Hardly otherwise than by means of the legal order which constitutes the State. Commands "in the name of the State" are such as are issued in accordance with an order whose validity the sociologist must presuppose when he distinguishes between commands which are acts of State, and commands which do not have this character.'

[142] Ibid., p. 191: 'The judgment by which we refer a human action to the State, as to an invisible person, means an imputation of a human action to the State. The problem of the State is a problem of imputation. The State is, so to speak, a common point into which various human actions are projected, a common point of imputation for different human actions. The individuals whose actions are considered to be actions of the State, whose actions are imputed to the State, are designed "organs" of the State. Not every individual, however, is capable of performing an act of the State, and only some actions by those capable are acts of the State.'

[143] Kelsen stresses that the legal order is a special kind of social order, not merely because of its normative nature, but because its norms are being enforced by coercion: A legal order is a *Zwangsordnung*. Cf. H. Kelsen, 'Das Wesen des Staates', in: H. Klacatsky, R. Marcić and H. Schambeck (eds.), *Die Wiener Rechtstheoretische Schule*, Wien (etc.): Europa Verlag 1968, pp. 1713–1728, at p. 1723. See also: H. Kelsen, 'Law, State, and Justice in the Pure Theory of Law', in: *What is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays by Hans Kelsen*, Berkeley (etc.): University of California Press 1971, pp. 288–302 at p. 289.

[144] H. Kelsen, *General Theory of Law and State*, p. 182: 'The term "community" designates only the fact that the mutual behaviour of certain individuals is regulated by a normative order.'

[145] As a consequence, Kelsen argues, sociology presupposes this legal notion when it wants to say something about behaviour in a certain society. Thus, for Kelsen there is no distinction between the legal order and society, either. Cf. H. Kelsen, *General Theory of Law and State*, p. 188–189.

that law and state are one and the same, an action against the law is *eo ipso* an action against the state. This has an important consequence for the relationship between state power and legal power: Only the exercise of competence, i.e., the use of power within the limits of the law, counts as an act of state authority.[146] Consequently, exceeding competences for the sake of the state is impossible.[147] The full extent of Kelsen's thoughts on competence becomes clear when we understand legal powers in connection with the positivity of law.[148] Competences are powers given and restrained by positive law, i.e., human law, and therefore essentially contingent on competences already attributed. Thus, competences, like other aspects of the legal order, are predicated on the majority vote of the moment as it comes through in legislation, even in constitutional legislation. To realise this order in its contingency, while giving the minority the institutional chance to become the majority, is what democracy is all about. In that respect, democracy and *Rechtsstaat* are conceptually connected: Both show that the existing order is not a necessity. The monism of law and state that Kelsen defends as an alternative against the dualistic account of Schmitt, ultimately means that every state is a *Rechtsstaat*, a constitutional legal order in the sense discussed above.

However, Schmitt also has a point against Kelsen. Even though Kelsen rejects Schmitt's dualism, and defends a monism of law and state, his theory hides its own dualism. Kelsen can only equate law and state by *implicitly* defending a dualism of law and politics. Schmitt's critique would be that, in this way, Kelsen does not take politics seriously. For Kelsen, politics falls completely outside the domain of law. This position is, however, not tenable since the positivity of law (something Kelsen explicitly defends) is linked to it being a political artefact. Even without defending a primacy of politics over law, one cannot deny that the connection between law and politics is much closer than Kelsen wants us to believe.

2.5 The Dualistic View and the Competence Creep

Now that I have analysed both the theory of constituent power and the tradition of constitutionalism, the conclusion is that, notwithstanding their importance as far as they go, both end up in a *petitio principii*. Authors like Sieyès and Schmitt presuppose the existence of the nation before the existence of the state. The tradition of constitutionalism, in its turn, presupposes that power is already limited before the

[146] Ibid., p. 190: 'Power in a social or political sense implies authority and a relation of superior to inferior.'

[147] Ibid., p. 192: 'An action is an act of the State insofar as it is an execution of the legal order.' See also H. Kelsen, 'Das Wesen des Staates', p. 1721: 'Nur der normativ qualifizierte Tatbestand ist Staatsakt, nur in ihm handelt der *Staat*. Und darum gibt es – im Bereiche des Sozialen – ein Phänomen, das im Bereiche der Natur gänzlich ausgeschlossen ist: die Nichtigkeit, den nichtigen Staatsakt.' [Italics in the original].

[148] H. Kelsen, 'Law, State, and Justice in the Pure Theory of Law', p. 296–297: '"Positive" law means that a law is created by acts of human beings which take place in time and space (…)'.

constitution. That is why Kelsen reduces all state power to legal power, thereby ditching the political dimension of law. Above, I have, most of all, stressed the differences between the traditions. However, these differences are possible only because they share a common presupposition: the dualism between constituent and constituted power. Böckenförde hints at this dualism when he speaks of the distinction between unordered and ordered people, and between *Sein* (the domain of 'is', or facts) and *Sollen* (the domain of 'ought', or norms).[149] One may speak of a dualism precisely because a distinction is made between two separate domains. These are politics and law, absolute power and limited power, presence and absence, formless forming and form, *Geist* and expression, original and representation. The two traditions of constitution-making both take this dualism for granted in their discussions. Furthermore, their differences can be understood as different conceptualisations of it. Whereas the theory of constituent power stresses the political moment, constitutionalism steers away from the political roots of law and puts all hope on constituted powers. In other words, the traditions *mirror* each other. The theory of constituent power reads the dualism from the viewpoint of a sovereign constituent power; constitutionalism turns this view around by taking its vantage point from constituted power. So, both traditions emphasise opposite poles of one and the same dualism.[150]

Let us now return to the problem of the competence creep in the European Union. In the previous chapter, we have seen how the European Court of Justice, a legal institution, formulated the doctrine of implied powers. It did this while claiming that it only recognised powers already given in the Treaty. In other words, according to the ECJ, its recognition of implied powers was an act of applying the law. At the same time, however, I have shown the *creative* nature of this act: After the recognition of the existence of implied competence, the European legislator had more powers than before. Now the question is whether the dualistic theories of constituent power and those of constitutionalism can make sense of this.

Both traditions of constitution-making regard legal power as essentially limited, power under law. This is a consequence of a strict separation of law and politics. From the viewpoint of the theory of constituent power, the creativity of the judge, as exercised in the recognition of implied powers, is inadmissible. What happens in the cases on implied powers is that the judge takes a political decision, the decision of where the limits of powers lie. This is the *Kompetenz-Kompetenz*, the power of sovereignty. This power belongs to the people as constituent power, not to one of the constituted powers. Even if the people would have to be represented, certainly it should not be by the most undemocratic power in the state, the judicial branch. When we start from the tradition of constitutionalism, we will also reject the doc-

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[149] E.-W. Böckenförde, o.c., pp. 104–112.

[150] Cf. Möllers, o.c., p. 193: 'Order-founding and power-shaping constitutional traditions do not principally contradict one another; (…) western legal systems have long been familiar with the antagonism of two forms of law: one driven by politics and one that arose autonomously. This dualism, which gives courts the scope to create law, and legislatures the general power to correct the courts, is also necessary for the adequate functioning of the legal and political systems.'

trine of implied powers as developed by the ECJ. The punch line here is again that the powers given to state organs are *legal* powers and, therefore, essentially limited. In the case of the European Union, they are even enumerated in the Treaty. Any change in this system can only occur through the *political* process of Treaty revision. It cannot happen by an act of the Court of Justice. By appropriating the power to assign the Union more competences, the ECJ has overstepped the boundaries of its own powers.

The two traditions of constitution-making discussed in this chapter come to the same conclusion regarding the implied powers doctrine of the ECJ. Emphasising the limited nature of legal power and the separation of law and politics, both traditions would reject the actions of the ECJ. However, because of their own inconsistencies they fail to offer a viable alternative. This brings us back to where we started: How are we to make sense of the competence creep? I suggest digging deeper into the nature of legal competence. My assumption is that the doctrine of implied powers questions exactly the limited nature of legal power and, therefore, the dualism of law and politics underlying it. It asks us to rethink both, and that is exactly what we will do in the next chapters.

2.6 Conclusion

In this chapter, I first showed that the question of legal competence is a fundamental issue of constitutional theory. Then, I sketched the views of two opposing traditions of constitutional thinking. Both traditions, theories of constituent power and the tradition of constitutionalism, ultimately fall prey to circular reasoning. This also goes for the positions taken by Carl Schmitt and Hans Kelsen in their discussion on law, state and democracy. The cause of these problems is that they both take for granted the dualism between constituent power and constituted power. They differ as to which pole of the dichotomy receives primacy over the other. However, neither can make sense of the doctrine of implied powers. In the end, this means that the simple conception of competence as power under law is not tenable, and that a better understanding of competence can only be obtained by rethinking the relationship between constituent and constituted power beyond the dualistic view.

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