

IN PRAISE OF SOVEREIGNTY

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This article analyzes the concept of Sovereignty, that is an ever-changing one: whilst it was initially absolute and exercised by one single power, over the course of history it has been associated with a territorial dimension involving the government of the State, following which it came to be vested in the people according to the precepts of liberal constitutionalism. Therefore, popular sovereignty must be regarded as a keystone principle of contemporary liberal democracies as all forms of citizen participation are grounded on it, including not only the right to vote but also fundamental rights and constitutional freedoms.

1. For some time there has been talk of sovereignty in decline, or even of sovereignty eroded by supranationality or smashed on the rocks of globalisation (or by “walled” states¹). The long-standing concept of sovereignty has been placed under stress by the demands of new sovereign powers, which have not yet been well defined but are located outwith the territory of each individual state. These assertions are made in the conviction that certain elements of state sovereignty are currently being detached in favour of other institutions, from supranational bodies through to the global capital markets. The crisis of sovereignty may also be discerned in the economic and financial crisis of nation states, or in the loss of control over the management of national accounts. Thus,

¹ See, W. BROWN, *Walled States, Waning Sovereignty*, Zone Books, New York 2010

an already established sovereignty of the European Union is invoked, along with the relative loss of decision-making powers by the Member States. This process is legitimised by the Treaties which abolished national currencies in favour of a single European currency, or created the figure (and status) of the European citizen, vested with fundamental rights and judicial guarantees. Whilst all of this may be sustainable from a factual and legal perspective, does it really mean the end of sovereignty? Moreover – and above all – which sovereignty do we mean here?

2. Sovereignty is a difficult concept, which has its roots in a demanding and closely-argued theoretical debate starting from Thomas Hobbes and Jean Bodin.² The characteristics of sovereignty may be identified in the following terms, albeit in summary form: supremacy, perpetuity, decision-making power, absoluteness and completeness, non-transferability and the determinacy of jurisdiction.

The concept of sovereignty is an ever-changing one: whilst it was initially absolute and exercised by one single power, over the course of history it has been associated with a territorial dimension involving the government of the State, following which it came to be vested in the people according to the precepts of liberal constitutionalism. The 20th Century demonstrated the Janus face of sovereignty, as initially state sovereignty and subsequently popular sovereignty. Whilst state sovereignty characterised a political doctrine rooted in totalitarianism (Fascism conceptualised solely and exclusively State sovereignty), popular sovereignty allowed for a re-expansion of the rights and freedoms of the sovereign individual through institutional pluralism. The Constitutions created in the latter part of the 20th Century, which were rooted in liberal democracy, place the principle of popular sovereignty at the apex of their constitutional architecture

² The debate in D. QUAGLIONI, *La sovranità*, Laterza, Roma-Bari 2004

(as a kind of *Grundnorm*), because a democratic and liberal constitution cannot have any meaning unless it draws upon the source of sovereignty, which lies with the people: all powers emanate from the people and are exercised in the forms and subject to the limits of the constitution and of laws. Thus, *popular sovereignty is interrelated with constitutionalism*.³

3. In order to appreciate the decline of sovereignty and its resurgence, it is necessary to look back into the past and revisit the classic contributions to legal thinking from the 20th Century. Hans Kelsen concluded his magnum opus, *The Problem of Sovereignty and the Theory of International Law*⁴, with a suffered invitation to renew the concept of sovereignty at root because «this is the resolution within our cultural conscience which we need first and foremost!». However, the removal of the concept of sovereignty was a consequence of the assertion of the Kelsenien theory of the pure theory of law, under which the only sovereign is the legal system as a whole, as a logically coherent single unit. Kelsen writes that «sovereignty cannot mean – whether consciously or not – anything other than the fact that the coercive order which is known through law and which is customarily personified as the State is premised as the supreme autonomous being». However, it should be pointed out that it was subsequently Kelsen himself, more than forty years later, who ended up asserting in a paper prepared by him for the second *Oesterreichischen Juristentag* in 1964 entitled *Die Funktion der Verfassung*⁵ that the Constitution is the genuine *Grundnorm* of a legal order, and therefore that sovereignty is vested not in the legal

³ See, T.E. FROSINI, *Souvanità popolare e costituzionalismo*, Milan, 1997

⁴ H. KELSEN, *Il problema della sovranità e la teoria del diritto internazionale* [1920], tr.it., Giuffrè, Milano 1989; Id., *The Principle of Sovereignty Equality of State as a bases for international organization*, in *The Yale Law Journal*, vol. 53, 1944

⁵ H. KELSEN, *Die Funktion der Verfassung*, in *Forum*, Heft 132, 1964

order as a whole, but in the Constitution, from which the legal system emanates through the *Stufenbau* system.

Kelsen's initial theory – i.e. that from 1920 – was opposed, as is known, by Carl Schmitt with his claim that the «sovereign is the body which decides on a state of exception», and the doctrine of decisionism. It is not the intention of this paper – and it would indeed not be possible – to provide an account of the stages of Schmittian thinking, which has now moreover been enriched by a vast literature; however, the renowned and famous phrase that the «sovereign is the body which decides on a state of exception» – which appeared in the Schmittian volume on *Political Theology* from 1922⁶ – must in my view be read in conjunction with the equally renowned and famous Article 48 of the Weimar Constitution, which provided for the issue of presidential *Reichsgebiete-Verordnungen*, the abuse of which led to Germany's "shaky democracy", as it has been most effectively defined.⁷ Thus, whilst Kelsen called for the twilight of sovereignty, Schmitt by contrast discerned a decisionist revival. Within these countervailing *Weltanschauungen*, the matter under discussion regained its force, specifically the concept of sovereignty, or its theoretical and political nature and its place within constitutional theory.

4. It may indeed be asserted that the concept of sovereignty revived precisely with the Weimar Constitution and through the works of scholars from the "Weimar laboratory" (including, in addition to Kelsen and Schmitt, Smend, Preuss, Triepel, Fraenkel and Kirchheimer). It revived because it drew strength from that dialectic between relativisation and

⁶ C. SCHMITT, *Teologia politica, Quattro capitoli sulla dottrina della sovranità* [1922], tr.it. in Id., *Le categorie del "politico". Saggi di teoria politica*, a cura di G. Miglio e P. Schiera, il Mulino, Bologna 1972, 29 ss.

⁷ V. FROSINI, *La democrazia pericolante (Note sull'art. 48 della Costituzione di Weimar)*, in *Scritti in onore di Egidio Tosato*, vol. I, Giuffrè, Milano 1984

absolutisation which had strongly distinguished the history of the idea of sovereignty in one sense or the other⁸. In fact, the democratic Weimar Constitution asserted that "sovereignty emanates from the people", thus depriving sovereignty of its typical configuration as a power originating from above and rather vesting it, within the context of a State founded on a democratic and pluralist legal order, with the characteristic of legitimacy originating from below. Furthermore, the strong winds of totalitarianism which were blowing through Europe in the 1930s, and which culminated precisely in Germany, were able to bend this notion of sovereignty back towards the original concept, understood as a strong and absolute decision adopted by a single subject vested with that power. However, with the advent of the liberal democratic constitutions in the aftermath of the Second World War, it became necessary to move beyond – and thus to leave behind – this conception associated with a system of government in which there must in all cases be one individual who decides, or worse who commands, and who will therefore be the sole and only sovereign. Within liberal democratic constitutional systems, there is no space for absolute authority, for the myth of the sovereign decider who grasps the sceptre of power. In fact, liberal democracies are such precisely because they do not recognise one single power, but rather a multitude of mutually divided powers, which are structured and arranged within a pluralist society. Within this perspective, the meaning or semantic scope of the concept of sovereignty must be radically different; and it is for this reason that it is vested in the people, understood not as a politically unitary subject in whose will the general interest (which is destined to prevail over each

⁸ See, P. C. CALDWELL, *Popular Sovereignty and the crisis of German Constitutional Law. The Theory and Practice of Weimar Constitutionalism*, Duke University Press, Durham and London 1997; for a critical to "Weimar doctrine", M.S. GIANNINI, *Sovranità (diritto vigente)*, in *Enciclopedia del diritto*, vol. XLIII, Giuffrè, Milano 1990

individual desire) expresses itself, but rather as a subject comprised of a multiplicity of individuals, groups and small social bodies; moreover, it will retain this multi-faceted nature also after expressing a unitary position through elections. The recognition and assertion of popular sovereignty led to a significant reduction in the scope of State sovereignty, which remains only with regard to international relations with other states. However, at present this aspect too is on the wane.⁹

5. Whilst it is certain that sovereignty has entered a twilight age, this can only relate to one of its two “faces”, namely state sovereignty. This therefore leaves us with popular sovereignty. This must be understood essentially as a general principle which determines the forms of legal, social and political participation of citizens in the consolidation of a liberal democratic State, and which renders participation effective through constitutional structures that enable the people to express their views in both individual and collective form. It is clear that this can only occur within the confines of the Constitution because, as Carlo Esposito writes, «outwith the Constitution there is no sovereignty, but popular arbitrariness, there is no sovereign people, but the masses with their passions and weaknesses».¹⁰ It is therefore necessary to place the sovereign people within the Constitution, letting go of the original view of the people as the author of the Constitution, and grafting it onto the democratic principle of popular sovereignty as one of the fundamental principles of the Constitution located alongside the other

⁹ A. CHAYES AND A.H. CHAYES, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press 1998; for new prospective, G. DELLA CANANEA, *Al di là dei confini statuali*, il Mulino, Bologna 2009. With problematic approach, G. BARCELLONA, *Metaformosi della sovranità e strategia dei diritti*, Città aperta edizioni, Enna 2010

¹⁰ C. ESPOSITO, *Commento all'art. 1 della Costituzione*, in Id., *La Costituzione italiana. Saggi*, Cedam, Padova 1954, 6 ss.

essential principle of the inviolability of fundamental rights. This means that the sovereignty of the people – understood as a multiplicity of individuals, groups and small social bodies – represents a form of pluralism reaching far beyond the sole framework of the structure of government and operating in a complex manner within various institutions – including specifically local bodies – in which the interests of citizens may be satisfied. This is because a complex society cannot and must not look for solutions to its legitimate needs solely and exclusively within the political and parliamentary circuit. To do so in fact would be tantamount to enshrining the primacy of politics, and even attributing to it a unity and centrality which appears to contrast with an open society acting within a constitutional State where it is the rights and freedoms of citizens which have genuine primary status.

6. The principle of popular sovereignty permeates the entire constitutional order and by is by no means exercised solely during elections of members of Parliament. Therefore, popular sovereignty must be regarded as a keystone principle of contemporary liberal democracies as all forms of citizen participation are grounded on it, including not only the right to vote but also fundamental rights and constitutional freedoms. In fact, sovereignty cannot be encapsulated solely within representation: whilst it is certain that elections represent an essential moment within a democracy, they are only one of the manifestations of the process of the formation of the popular will, which is expressed spontaneously in elections, but the contents of which are nourished from the rights and freedoms according to which the citizen is sovereign of himself, the exercise of which constitutes a permanent expression of popular sovereignty. This is a vision which enables the people to be conceived of as sovereign *within* the Constitution, as the only addressee of its terms through a form of constitutional pluralism in which the people – either as individuals or as organised groups – take on a central role within the

constitutional system. Therefore, the content of popular sovereignty results from the overall body of constitutional legal interests which citizens are empowered to exercise either individually or in associate form. It is considered that, at the present moment in history, this is a model which provides a suitable basis upon which to revitalise the principle of popular sovereignty, and also to praise it in a convincing manner.