The Purposiveness of Law

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According to Neil MacCormick, “Sovereignty and sovereign states, and the definition of law in terms of sovereignty and the state, have been but passing phenomena of a few centuries . . . Despite present problems, Europe is the theatre within which we find the possibility of transcending these concepts.”¹ Accounting for the novel features of the European Union requires shedding the thought pattern that elevates a contingent historical manifestation – the sovereign state – into a false necessity. This criticism is not only leveled against legal theory; it also strikes at the Maastricht judgment rendered by the German Federal Constitutional Court. For the Court reasons in terms of an exclusive disjunction: sovereignty accrues to either member states or a European (federal) state. While agreeing that sovereignty has not been transferred to organs of the European Union, MacCormick censures the Court on both terms of its disjunction: nation states are no longer sovereign and the specificity of the European legal order cannot be grasped in terms of a transfer of sovereignty.

MacCormick links this insight to an important philosophical implication. It is no coincidence, in his view, that the search for an absolute foundation of the state and state power emerges contemporaneously with the quest for an absolute foundation of knowledge in early modern philosophy. Whereas Western philosophy has largely abandoned Cartesianism as an illusion, legal philosophy has not yet disencumbered itself of this foundationalist heritage. To do so, it

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must elaborate a concept of legal order that no longer relies on sovereignty and state sovereignty. As a first step in this direction, MacCormick introduces the notion of “commonwealth”, namely “a group of people to whom can reasonably be imputed some consciousness that they have a ‘common weal’, something which really is a common good, and who are able to envisage themselves or their political representatives and governing authorities realizing this or striving after it through some form of political structure, embodied in some common constitutional arrangements.”

This definition is so capacious that it coincides with the concept of a polity in general. In other words, a commonwealth is a unity both political and legal. While the European Union and its member-states are commonwealths, they by no means exhaust the scope of this concept. For MacCormick, the idea of a commonwealth promises to liberate legal theory from the conceptual straightjacket imposed by the state and state sovereignty.

Recent developments have undoubtedly undermined the position of the nation state as the principal actor in the international arena, and may ultimately lead to its disappearance. Moreover, I fully agree with MacCormick that circumscribing legal theory to the paradigm of the nation state is reductionistic. But is a “commonwealth” imaginable in the absence of sovereign power? This paper argues that far from being contingent on the emergence and disappearance of the nation state, sovereignty is a necessary category for politics and law. In particular, I will argue that the claim to legitimacy of a legal order implies that the order’s norms are founded in or represent a (highest) purpose. The sovereign is the purpose or foundation of a legal order; borrowing MacCormick’s expression, the sovereign is the “common weal.” Accordingly, the challenge to legal philosophy is not to scrap sovereignty from the vocabulary of law and politics; it is to develop a concept of representation that acknowledges the need to found a legal order while avoiding the pitfall of foundationalism.

Our itinerary is as follows. Drawing on MacCormick and the Maastricht judgment, section 1 canvasses the relation between sovereignty and legitimate power. While MacCormick’s criticism of sovereignty proves to be contradictory, the Court’s defense of this
concept rests on a substantialistic concept of representation. An alternative to both views requires a different interpretation of the concept of representation. Section 2 addresses this task. Appealing to Cassirer’s philosophy of symbolic forms, it argues that the representational logic of legitimate power is relational or “functional”, rather than substantialistic. Finally, section 3 turns to the European Union, tentatively suggesting how the European legal order repeats and transforms the representational logic of power.

1. SOVEREIGNTY AND LEGITIMATE POWER

MacCormick and the Federal Constitutional Court agree on the traditional concept of sovereignty as the “highest” or “absolute” power; they disagree on the status of this concept, both de facto and de jure. Whereas MacCormick suggests that sovereignty has in fact ceased to be a meaningful category for legal and political theory, the Court argues that the Community Treaties, including Maastricht, have restricted but not extinguished the sovereignty of the member states of the Union. This difference concerning the empirical status of sovereignty is subordinated to a de jure disagreement. In MacCormick’s view, the connection between the concepts of sovereignty and a polity is contingent; for the Court it is necessary. This section concentrates on their de jure discussion, drawing out and criticizing their implicit presuppositions.

1.1. The Sovereign as Near-Absolute Power

MacCormick’s analysis has the decided advantage of being short and perspicuous. In a first step, he defines power as the ability to make people do things, regardless of their consent or dissent, and sovereignty as the highest or supreme power exercised over a territory. So defined, two kinds of power can be distinguished, namely political and legal power. The former is power de facto, effective power; the latter is power de jure, normative power conferred by law. Consequently, “political sovereignty is ultimate political power, de facto territorial power that is not subject to limitations imposed by superior power. Legal sovereignty is ultimate authority in law, not
subject to limitations imposed by higher legal authority.” ³ Again, sovereignty can be viewed internally, as the highest power within the state, and externally, as the independence of the state vis-à-vis other states. These definitions of sovereignty evidence why sovereignty is a contingent category. For the one, constitutional arrangements are possible in which none of the conferred powers is legally sovereign or, as he puts it, “near-absolute.”⁴ The position of the legal sovereign can be empty, so to speak. Roughly the same argument applies to political sovereignty: effective power may be so diffuse that no single political organ of the community can be said to possess sovereign power. By this reading, sovereignty is strictly an attribute of the modern nation state, characterized by centralized power under a constitution. MacCormick concludes that “In legal orders, the presence or absence of sovereignty in its legal sense is contingent, and the presupposition of sovereignty in its political sense is also unnecessary in logical terms and unproven in an evidentiary sense” (ibid., p. 16).

Although plausible at first glance, this account of sovereignty contains a contradiction. Consider MacCormick’s account of “political” sovereignty. The definition of the sovereign as the person or persons highest in a chain of command harks back to John Austin’s characterization of sovereignty in terms of habitual obedience to a superior who does not habitually obey anyone else in the community. In turn, Austin is indebted to Bodin’s famous definition of sovereignty as absolute and perpetual power in a commonwealth. The problem, however, is that MacCormick is uncomfortable with it: “political power, to be sustained over time, requires legitimacy. Law is a significant source of legitimacy.”⁵ In other words, because political power strives to continue in power, it must present itself as conditioned. Thus, the highest power within the community – the “political sovereign” – must not be sovereign! By implication, political power is not merely de facto power, as MacCormick suggests;

by presenting itself as conditioned, political power raises the claim to being de jure power.

Notice that this contradiction is a late repetition of the contradiction which governs Bodin’s doctrine on sovereignty in *La République*. In effect, Bodin adds the following proviso to his definition of sovereignty as absolute power: “He is absolutely sovereign who recognizes nothing, after God, that is greater than himself.”6 Here again, if unconditionality defines sovereign power, then the characterization of the prince as sovereign after God is a contradiction in terms. Bodin was well aware of the contradiction: “if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign . . .” (ibid., p. 10). This acknowledgment posed no theoretical problems for Bodin, as he was primarily concerned with identifying the highest power within a political community, that is to say, the individual or individuals who effectively exercise command over the subjects of a polity. Accordingly, the subjection of the prince to a supreme power remains undisputed and, for that very reason, it lies beyond the pale of theoretical discussion. The same holds, we may conjecture, for MacCormick.

How does it fare with his account of “legal” sovereignty? MacCormick acknowledges that the “legal sovereign” enjoys powers conferred by law. Now, conferred power is conditioned power, whereas, by definition, sovereignty is unconditioned power. We are back at the contradiction we discovered in “political” sovereignty: the “legal sovereign” is not sovereign!7 Notice, moreover, that by acknowledging that legitimate power is subordinate power, MacCormick implicitly recognizes the necessity of a foundation for

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7 This contradiction is already present in Dicey. According to classical British constitutional doctrine, “The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament” (A.C. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), p. 3). As this definition makes clear, Parliament’s “sovereignty” is conferred or conditioned by the constitution.
power, thus of sovereignty. If legitimate powers in a community are conditioned, why not simply recognize that the law which confers said powers is sovereign? Would not the constitution satisfy the requirement of being the highest power of a legal order? The answer is “no.” For what makes the constitution binding for legal subjects? What is its “ground”? This question leads to neither Hart’s “rule of recognition” nor Kelsen’s “basic norm”; it leads to the fact that, in claiming legitimacy for itself, a legal order posits a purpose as its ground. Again, to say that legitimate powers within the community are conditioned means that such powers must represent the common good. MacCormick acknowledges as much when he defines a commonwealth as “a group of people to whom can reasonably be imputed some consciousness that they have a ‘common weal’...” For the common good is the purpose of a legal order, the telos whence the norms of the legal order derive their legitimacy. If, then, the sovereign conditions powers in the political community, the sovereign is the common good. This insight, which shall be elaborated at greater length in the following pages, can also be formulated as follows: legitimate powers within a polity represent the sovereign.

Thus, MacCormick has proved substantially less than what he claims. While he has shown that there may be no individual or group of individuals in a legal and political order who enjoys undisputed superiority over all others, he has not demonstrated that sovereignty is contingent. In fact, his analysis suggests that sovereignty is a necessary legal and political concept. By implication, the attack on sovereignty misses its mark. There may be compelling reasons for moving beyond the nation state, but if legitimate power is concep-

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8 Both Hart and Kelsen are wary of discussing the concept of law in terms of the relation between a manifold of norms and a purpose. In Kelsen’s case, this move is explicitly motivated by the desire to avoid any form of legal foundationalism; despite significant differences between Kelsen’s “basic norm” and Hart’s “rule of recognition”, the same motivation seems to govern Hart’s analysis of the concept of law. The problem with this approach is, first, that law is a purposive order and, second, that the concept of legitimate power is conceptually bound up with the purposiveness of law. Rather than sidestepping this issue, a principal task for legal philosophy consists in giving a non-foundationalist account of legitimate power and of the law’s purposiveness. Such, precisely, is the aim of this paper.
tually bound up with sovereignty, it makes no sense at all to suggest that we can or must move beyond sovereignty. Nonetheless, MacCormick’s attack on sovereignty can and should be defended if we construe it in another way, namely, as a critique of foundationalism. In effect, though postulating a foundation for a legal order does not entail foundationalism, it can lead to foundationalism. This point trenches, as we shall now see, on the Maastricht judgment rendered by the German Federal Constitutional Court.

1.2. *The Sovereign as a Substance*

Popular sovereignty is embarrassing for the critics of sovereignty. Can we delete this concept from the vocabulary of law and politics, without throwing out democracy as well? Precisely this question animates the reasoning of the Maastricht judgment. Implicitly, the Federal Constitutional Court argues that popular sovereignty instances the concept of legal and political order in general: the norms comprising a democratic polity are an order by virtue of being referred to the people. This proposition about the concept of democracy, intimates the Court, has nothing to do with the contingent fact that the German constitution explicitly embraces the principle of popular sovereignty.

The passage relevant to our inquiry is found at the very beginning of the substantial part of the decision, when, having declared Brunner’s constitutional complaint to be admissible, the Court discusses the articles germane to the complaint. Referring to article 20(2) of the German *Grundgesetz*, which lays down the principle of popular sovereignty, the Court notes: “In the act of voting the power of the state proceeds from the people. The Bundestag then exercises state power as a legislative body, which also chooses the Federal Chancellor and controls the government.”

The Maastricht judgment follows up on this observation by later calling popular sovereignty a “principle of imputation” (*Zurechnungsprinzip*): in a democracy, all normative relations must be imputed to the people.

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10 Ibid., p. 256. The English version inaccurately translates this expression as “principle of accountability.” I shall not discuss here the similarities and
Albeit implicitly, these two observations contain a nutshell theory about the concept of legal order in general and democracy in particular. The gist of this theory is the following: A legal order may confer power on various organs. These organs, operating jointly or separately, give rise to a manifold of normative relations. The totality of the normative relations composing a legal order (including the constitution) must be referred to a ground whence this totality appears as a unity. The ground of a legal order is not itself a legal norm; it is the finality whence a manifold of relations can appear as a purposive unity. In democracy, this purpose is “the people”, in the sense that norms are enacted and enforced “for the sake of” the people. Not only does a democracy subordinate all normative relations to the people, but the reference to this purpose makes it possible to view this manifold of relations as a single legal order. Finally, “referring” the norms of a legal order to the people means that, in a democracy, conditioned powers represent the sovereign people.

Popular sovereignty is not, however, only a “formal principle of imputation” (ibid., p. 256), as this would reduce democracy to a mere principle of legality. To be legitimate, the law must be oriented toward the common good, toward that which unifies rather than divides the people. What, then, is the “common good” in democracy? The systematic function of the homogeneity thesis for the Court’s reasoning surfaces at this point: “the States need sufficiently important spheres of activity of their own . . . in order to give legal expression to what binds the people together (to a greater of lesser degree of homogeneity) spiritually, socially and politically” (ibid., p. 257). In other words, the Court contends that, to be legitimate, the content of the legal order must represent what unifies a people existentially. The Maastricht judgment also speaks, in this context, of an “existential sameness” (*existentieller Gemeinsamkeit*). The features shared by the polity’s citizens are the “common good”; they define the political identity of the community. Notice that the Court’s concept of representation is dualistic: the people must already be a unity, prior to all legal normativity. A polity is two orders, not one: an existential order and a legal order, where the latter represents differences between the Court’s and Kelsen’s employment of the term “imputation.”
the former. The sovereign people is not merely the finality of the legal order; the homogeneity thesis implies that the content of this purpose – political identity – is fixed in advance. Only thus can the people truly be the “bearer” or “ground” of a legal order. Such, opines the Court, is the concrete meaning of the insight that legitimate powers in the community represent the sovereign. Noting that there is, at present, no relatively homogeneous European people, the Court concludes that “the Union Treaty . . . establishes an association of States for the purpose of realizing an ever closer union of the peoples of Europe (organized as States) and not a state based on the people of one European nation . . .”

We shall criticize the Court’s views on the European Union in section 3. For now, it suffices to note that the terms of the discussion have shifted. In effect, the question is no longer whether sovereignty is or is not a necessary category for politics and law; it is. The sole object of discussion concerns in what sense the sovereign is the ground or foundation of a legal order. What does it mean that legitimate powers represent the sovereign? According to the Court, law is democratically legitimized when the content of law reproduces what unifies a people existentially. Here lies the snag. Although sovereignty and legitimate power are indeed conate concepts, the nature of the connection between these concepts is entirely different from that espoused by the Court. The problem with its doctrine does not lie in positing the people as the ground of a democratic legal order; the problem resides in the concept of ground which it ascribes to the sovereign people. Succinctly, by equating the sovereign people with a pre-given existential community, the Court makes of sovereignty an ontic category. Again, the Court’s doctrine is not flawed because it argues that legitimate powers represent the sovereign; the doctrine is flawed because it involves a substantialisic concept of representation. This, ultimately, is what MacCormick opposes when he attacks the concept of sovereignty. Thus, his criticism can and should be endorsed if we restate it as follows: the challenge to legal philosophy after the Maastricht judgment consists in elaborating a concept of representation which recognizes the

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11 Ibid., p. 258. The English version incorrectly translates Staatenverbund as “federation of states.” The inimitable German reads: “. . . keinen sich auf einer europäisches Staatsvolk stützenden Staat.”
necessity of sovereignty, yet avoids the pitfall of foundationalism. This restatement requires displacing and radicalizing our inquiry. Having begun with the question “What is sovereignty?”, we have been led to ask “How can we avoid foundationalism?” To the extent that foundationalism is associated with a substantialistic concept of representation, we must now ask “What is representation in general?” One of the great merits of Ernst Cassirer’s philosophy of symbolic forms consists in having elaborated a general concept of representation that is explicitly directed against foundationalism. Let us examine his reflections on this topic.

2. REPRESENTATION

Cassirer’s entire philosophical project is organized around a single, fundamental insight: the human relation to the world is representational, or as he usually puts it, “symbolical.” In support of this idea, Cassirer concretely analyzed various ways of representing reality, including science, myth, language, religion and art. Remarkably, the representational processes constituting politics and law largely escaped his attention. Limiting myself to the essential of Cassirer’s account of representation, I shall attempt to evince its relevance for the characterization of legitimate power as the representation of sovereignty.

2.1. Substance and Function

In his mature work, Cassirer approaches the concept of representation from the all-encompassing notion of “understanding.” The project of a philosophy of symbolic forms consists in elaborating “the various fundamental forms of man’s ‘understanding’ of the world (Weltverstehen) . . .”\(^\text{12}\) In effect, Cassirer argues that activities such as science, myth, language, religion, technology and art are, at bottom, different ways of understanding the world. Bear in mind that these are correlative concepts: that human beings “understand” reality means, according to Cassirer, that they have a world; conversely, having a world consists in a specific manner of relat-

ing to reality, namely, understanding. What, then, does it mean to “understand” the world? To answer this question, Cassirer introduces the concept of objectivation. In its general, albeit abstract formulation, objectivation consists in “raising the particular to the level of the universally valid” (ibid., p. 78). In other words, to objectify or understand reality means to ground the particular in the general. By means of this process, beings (in the very broadest sense of the term) acquire objectivity because, when related to a whole, they become “stable”, that is, they impose themselves on us as being what they are independently of our subjective inclinations or determinations. Scientific objectivation, for example, consists in placing specific natural occurrences under general laws. Scientists understand a phenomenon – cognize it – by transcending its particularity, that is, by viewing it as an instance of a general rule. “The particular must not be left to stand alone, but must be made to take its place in a context, where it appears as part of a logical structure, whether of a teleological, logical or causal character” (ibid., p. 77).

Again, the act of picking up or putting away a pen already implies the basic logic of understanding as a surpassing of the given in its pure here and now, a transcending which relates the given to a highly general complex of purposive relations – a “world” –, whence the real derives its objectivity as a “this”, a pen. Thus, objectivation is not specific to science, nor is it even restricted to theory; objectivation characterizes human activity in general. In the fundamental sense of the word, to “act” is to objectify reality, to “look beyond” the particular, relating it to a whole. Objectivation is a pragmatic concept.

The concept of representation now comes into view. In effect, objectifying reality consists in viewing the particular being, given here and now, as an “instance” of the general. In other words, the particular represents the general. Nothing exists “simply ‘there’ as an isolated and detached content, for in its very existence it points beyond itself, forming a concrete unity of presence and representation.” Cassirer calls this “concrete unity of presence and representation” a symbol; symbolization and representation are

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interchangeable terms. In this highly general sense of the term, a pen, a religious rite, a scientific phenomenon, a work of art are symbols. Human being is the *animal symbolicum* because it apprehends the real by going beyond it. Otherwise put, the human relation to reality is representational because the real appears to human beings by representing something *other* than itself.

But what does it mean that the particular, given here and now, represents the general? What is the nature of the relation between the “representative” and the “represented”?

Cassirer distinguishes between a substantialistic and a functional notion of representation. The former, which he also calls the “naïve-realistic view of the world”, is dualistic and metaphysical in nature. All epistemology that originates in Aristotle’s logic severs thinking and being into two entirely different, ultimately incommensurable, domains. In effect, that a thing appears as a “this” – an instance of a species –, is in no way related to the thing’s cognition. A manifold of beings is a unity – an order – because each member of the species instances the same essence or real form. In other words, that a being represents a generality means, in the tradition of Western metaphysics, that the relation between the particular and the general is conceived as the relation between a *substance* and its *properties*. This assumption entails that cognition operates abstractively, isolating only those properties that are common in a manifold of particular beings. Consequently, concepts reproduce the “essence” of particular, concrete beings. A judgment is grounded (objective) if and when its content – the logical relation between subject and predicate – mirrors the ontic relation between the substance and its “real form.” Here, then, is the presupposition at the root of foundationalism: an absolute substance is given *directly* to human cognition, that merely reproduces (represents) the properties inhering in the substance.

Cassirer shows that this substantialistic interpretation of representation ultimately founders. For what guarantees that the properties which we isolate in concepts are really the common features distinguishing a class of beings? The metaphysical response – concepts reproduce the “essence” or “real form” inhering in beings – begs the question: what criterion guarantees that the proper-

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ties which we reproduce are essential (common)? Once thinking and being have been dissembled, they can no longer be re-assembled.

In reaction to this metaphysical dualism, Cassirer proposes to view the relation between the particular and the general as functional. While he borrows this term from mathematics, a mathematical function is only a specific instance of the concept of function in general. In effect, mathematical functions highlight what is constitutive for all forms of understanding, namely, the process of relating elements. In this sense, the particular and the general become pragmatic concepts. To understand something as a “this” is not to apprehend the “essential” properties inhering in a substance; it is to view the particular as related to other particulars from a certain perspective. The unity of a manifold is the unity of a relation, rather than the unity of a “species.” From this perspective, every particular, given here and now, “possesses a ‘representative’ character, as it refers to something other [than itself] . . . But this reference now concerns the transition from a single member of a series to the totality to which it belongs, and to the general rule governing this totality.” This citation suggests that an order possesses intensional and extensional aspects, namely, the “general rule” and the “series” unified by the rule. Cassirer does not tire of insisting that the “general rule” is not itself a real element of the order. At bottom, substantialism reifies functions, transforming these into a being next to others. A function is not what appears

15 Retrospectively, Cassirer’s choice of the term “function” is unfortunate, as the contemporary reader is tempted to equate it with “functionalism” or “instrumentalism.” This equation is mistaken, for Cassirer conceives the term function as being synonymous with relation. Significantly, Part I of Substanzbegriff und Funktionsbegriff, the work in which he introduces this term, is titled “Thing-Concepts and Relation-Concepts.”
– the given particular; it is the condition for the appearance of the particular as a “this.” For this reason, Cassirer also speaks of the particular and the general as, respectively, the “seen” and the “point of view” (Gesichtspunkt) conditioning the visibility of the particular.

Several important implications follow from this functional concept of representation. First, it overcomes the dualism inherent to substantialism. The distinction between the particular and the general is a distinctio rationis, not a distinctio in re: “the universal can be perceived only in the particular, while the particular can be thought only in reference to the universal.” In contrast with the abyss between being and thinking characteristic of metaphysical substantialism, a functional concept of representation is monistic. The general and the particular, the represented and the representative, are aspects which can be abstracted from the concrete unity we call an order, but neither term of the distinction enjoys an autonomous character.

Second, the relation between the particular and the general is dynamic. Cassirer’s observations concerning theory-building in science illustrate this point. He notes that “the changed material [of experience] conditions a changed way of relating [the material], whereby the general function of this relation remains the same, namely, deriving the individual from a highest principle of a series that we posit as the ground.” Although scientific cognition of reality is mediated by theories about the structure of reality, scientific theory is always “inconclusive”, or more accurately, “unfinished” (unabschließbar). Experience presents theory with “anomalies”, with particulars that cannot be related to other particulars on the basis of the extant function. Integrating new cases requires reformulating the general rule – the function. Crucially, the scope of this dynamic is not limited to science; the unfinished character of the relation between the particular and the general characterizes all human experience.

Netherlands: Tjeenk Willink, 1997), Bert van Roermund has linked Wittgenstein’s analyses of rule-following to Erwin Panofsky’s studies on the “point of view” in art, which build on Cassirer’s concept of functional representation.

18 E. Cassirer, Philosophy of Symbolic Forms, Vol. 1, p. 86.
19 E. Cassirer, Substanzbegriff und Funktionsbegriff, p. 343.
A further implication is closely bound up with the second. The integration of “new cases” by re-elaborating the general rule merely highlights what always happens in understanding, but only attracts our attention in such cases. In effect, the relation between the particular and the general unfolds a two-way dynamic. While the particular, given here and now, can only be understood as an instance of the general, on the other hand the general can only be presented in the particular. To put it another way, “grounding” the particular in the general does not only consist in deriving the former from the latter; it also consists in positing the content of the general in and through the particular. The process of grounding or objectifying reality encompasses both aspects, namely, “deriving” and “presenting.” Although the presentative character of representation is only striking when we are confronted with a “new case” which resists integration into the extant unity, it is no less at work in “normal” cases. Consequently, representational processes are reproductive and productive.

Finally, the concept of a function implies that the human relation to reality is indirect. Rather than an absolute substance given directly in its essential properties, a functional concept of representation recognizes that the real appears to humans within a “horizon of objectivity.” In other words, the real is not given absolutely, as assumed by foundationalism, but always relatively, that is, in relation to a certain point of view. By implication, new cases that resist integration into the given “horizon of objectivity” modify the latter. The unfinished relation between the particular and the general enjoins the “openness” of this horizon. Thus, Cassirer makes of representation the central concept of hermeneutics.

2.2. Representing the Sovereign

Although apparently far removed from our topic, Cassirer’s philosophy of symbolic forms proves decisive for the concept of legitimate power. First, his analysis makes clear why sovereignty

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21 What Gadamer calls “application” in Truth and Method can be advantageously characterized as “representation.”
is a necessary category for politics and law. Second, it exposes the Federal Constitutional Court’s reasoning as an example of metaphysical substantialism. Third, it suggests that legitimate power needs to be understood in terms of a functional concept of representation.

Although Cassirer scarcely concerned himself with representational processes in politics and law, his philosophical project provides the strongest imaginable justification of the necessary relation between sovereignty and legitimate power. We had earlier noted that every legal order claims legitimacy for itself by referring its norms to a purpose, posited as the ground whence those norms can appear as a purposive unity. The justification of this political “Faktum” ultimately leads to the logic of understanding. For the reference of particular norms to a single, “highest” purpose instances the objectivation characteristic of world-understanding. “Referring” a legal norm to the common good exemplifies the process of relating the particular to the general constitutive of understanding. By the same token, legitimacy is the political mode of objectivity. In other words, the binding character of a particular norm, the claim to obedience which it raises, regardless of the consent or dissent of those subject to the norm, is a specific manifestation of the stability characteristic of the objective. In contrast therewith, norms become illegitimate when they forfeit their orientation toward the common good, thereby appearing as “subjective” or arbitrary – unstable. Accordingly, it should be clear why the Court correctly views sovereignty as a necessary category: to suppress it is to suppress the condition whereby we can understand and orient ourselves in a polity. Returning to MacCormick, abandoning legal foundationalism in no way liberates us from the need to found – objectify – the law.

Cassirer’s philosophy of symbolic forms also clarifies why the Court’s reasoning on legitimate power and sovereignty lapses into metaphysical substantialism. In the Court’s view, every polity distinguishes itself from other polities on the basis of a series of properties embodied in its citizens. These features define its political identity. In other words, “what binds the people together ... spiritually, socially and politically ...” is the Court’s interpretation of the “common good.” Phrased in Aristotelian terms, the citizens of a
community are the members of a “species.” See here the substantialism of the Maastricht judgment: it views the relation between the particular (the citizen) and the general (the common good) as the relation between a substance and its properties. Again, it conceives the political identity of a community as the (general) set of traits “inhering” in the (particular) citizens of the polity, which distinguish them from the citizens of other polities. This presupposition implies a specific view of the task of politics. In the same way that, within Aristotelian logic, knowing a thing means to cast into concepts the properties distinguishing a species, the politician must (re)cognize and cast into legal norms the political identity of a community. In other words, legal norms capture and render obligatory the content of existential unity. Thus, the dualism which dominates metaphysical thinking also governs the reasoning of the Maastricht judgment. In effect, the proposition that, to be legitimate, a legal order must represent an existential community assumes that reality “is given in its being and in its structure, and that the sole task of the human spirit is simply to take possession of this given reality.”

Inevitably, the problem of all metaphysical dualism reappears in the context of the Maastricht judgment: what criterion ensures that the “spiritual, social and political” properties which the Court or anyone else could single out as “essential” really qualify a manifold of citizens as a community? What guarantees that the legal order is a faithful reproduction of a pre-given political identity? Notice that the Court sidesteps this problem by simply assuming the existence of a set of features common to the citizens of a polity; it carefully refrains, however, from enumerating them. And for good reason: on the one hand, any enumeration of properties would always be contestable; on the other hand, the contestability of any enumeration exposes the fact that such enumeration assigns a content to political unity, not merely reproduces it. Moreover, and no less importantly, even if it were possible to isolate a set of properties defining the identity of a political community at any given moment, a polity is a unity over time. If identity is conceived in terms of the properties of a substance, each mutation of the distinctive traits of a people must

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22 Ernst Cassirer, “Die Sprache und der Aufbau der Gegenstandswelt”, op. cit., p. 121.
be denied or, if recognized, it excludes the durability of the polity. For if these traits change over time, what guarantees the continued identity of the polity? A substantialistic concept of representation condemns a polity to immobility or to imminent dissolution. The political temptation to play off these two terms against each other is great: fending off “threats” against political identity justifies social immobility and closure. This, ultimately, is the stake of political foundationalism.

In short, the Court’s distinction between a normative and a real order illustrates the danger which Cassirer constantly warns against, namely “the danger of reifying the [general], assigning it an autonomous reality next to that of individual things.” For the sovereign is a function, not a being. It is the normative point of view whence the individuals in a community can “see” themselves as participating in a single community. Politics calls that “point of view” the common good. Understanding ourselves as actors within a polity implies “looking beyond” particular normative relations toward the whole, and viewing these relations as instancing or representing the common good.

This does not imply, however, that the common good has an existence independent of particular norms. In contrast with the dualism of the Maastricht judgment, a functional concept of political representation is monistic. A polity is the concrete unity of a purpose – the ground – and a manifold of normative relations – the grounded. In other words, a polity cannot be reduced to either of the two terms, nor is it their summation. The relation between the particular and the general constitutes a polity. This relation is a distinctio rationis, not the distinctio in re postulated by the Maastricht judgment. Again, although the legitimacy of legal norms implies the claim that the values protected by law represent the identity of a polity, the identity of a political community can only be grasped in the values postulated and protected by the legal order. Although a legal order must always represent the political identity of a community, this does not mean that political identity is a pre-established set of values which is subsequently captured in a (legitimate) legal order. A functional

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23 Cassirer, *Substanzbegriff und Funktionsbegriff*, p. 34. As will be clear from the following discussion, reifying the general also implies reifying the particular.
concept of representation implies that representing political identity is also assigning an identity to a polity.

Moreover, the relation between a legal order and its purpose is dynamic. It is a truism that politics is an incessant process of reformulating the common good. A legal order must be oriented toward the realization of the common good but, at the same time, the common good must always be given a content, thus limited, by a positive legal order. Once and again, experience confronts politics with new situations which resist integration into the common good, as specified by the positive legal order. Such situations call into question (the meaning of) the values positivized in the law as constitutive of the identity of a political community. In the face of such questioning, the option of a politics of exclusion can and often is pursued, and precisely by recurring to a substantialistic conception of representation. A politics of integration, on the other hand, recognizes the need to constantly reformulate the common good of a polity by renegotiating the content of the community’s legal norms. To put it another way, a politics of integration presupposes that the relation between the legal order and its purpose is and must remain inconclusive. The irresolvable tension between the common good and the positive legal order, between political identity and its legal concretization, exemplifies the unfinished character of the human relation to reality: while the absolute can only be grasped by means of the conditioned, the latter does not exhaust the former.

The foregoing paragraph also suggests that the relation between the legal order and its purpose unfolds a two-way dynamic. Objectifying or grounding legal norms means both showing why these norms are subordinated to the common good and positing the common good in the particular norm, i.e. assigning the common good a content. To be legitimate, norms must appear as a particularization of the common good, but we cannot apprehend the common good otherwise than in the multiple particularizations which it obtains in the ongoing process of norm-production. Thus, the enactment of norms in a legal system unfolds the dynamic of reproduction and production constitutive of representation in general. Importantly, this two-way dynamic is constitutive of all levels of norm-
production, going from general legislation to the judicial decision of a particular case.\textsuperscript{24}

Finally, a functional concept of representation implies that access to political reality is indirect. The Maastricht judgment notes that, in a democracy, the sovereign people are “the starting point for a state power relating to that people.”\textsuperscript{25} The Court interprets this “self-relation” as direct. For, as earlier intimated, the Maastricht judgment equates the sovereign people with the electorate. The foregoing considerations suggest that this equation is mistaken. Whereas the sovereign people is the ground of the unity of a manifold of normative relations, the electorate implies precisely the opposite of unity and generality, namely division and particularity.\textsuperscript{26} Whereas the sovereign is a function, the electorate are beings. The self-relation of the political actors in a polity is always mediated by a “point of view” that is not itself a part of political reality. Every (democratic) polity relates to and orders itself from the point of view or “horizon” of the common good. The majority party or coalition that exercises power perforce presents its legislation as oriented toward the common good, but such legislation inevitably particularizes the common good, giving it a determinate content. Far from effacing the unfinished character of the relation between the legal order and the common good, democracy institutionalizes the openness of this relation as the guiding principle of politics. In contrast with the static polity enjoined by metaphysical substantialism, a functional concept of representation suggests that every polity (including the German Federal Republic) is engaged in a continuous process of redefining its identity. Is a comparable process constitutive of the European Union?

\textsuperscript{25} Brunner et al. v. The European Union Treaty, op. cit., p. 257.
3. SOVEREIGNTY AND THE EUROPEAN LEGAL ORDER

The emergence of an independent European legal order illustrates, according to many, the crisis of sovereignty. They argue that understanding the specificity of European law requires scrapping this concept from the basic vocabulary of law and politics. The foregoing analyses contest this increasingly wide-spread assumption. While the nation state is coming under increasing pressure as a viable form of political organization, sovereignty is a condition for the emergence of an independent European legal order. The challenge to legal philosophy consists in clarifying how European integration both repeats and transforms the representational logic of power, rather than trying to explain why sovereignty must fade away. As European integration is still very much in flux, the considerations contained in this final section are tentative. They aim to illustrate the analytic and critical potential of a functional concept of representation in the context of the EU. The bulk of the section is analytical, focusing on the common market and the European Court of Justice’s teleological interpretation of the European legal order. For many, however, the idea of a common market unduly instrumentalizes or even reifies European identity. Whatever the merits of this criticism, the concluding remarks of the paper argue that it presupposes, rather than rejects, the functional concept of representation outlined heretofore.

3.1. Representing the Common Market

The problem of sovereignty in the context of the European Union can be approached by referring to the Les Verts decision of 1983, in which the ECJ consolidated twenty years of jurisprudential evolution by qualifying the EC Treaty as “the basic constitutional charter” of the Community. Characterizing the EC as a community based on the rule of law, the ECJ argued that the Treaty distributes power horizontally between the organs of the Community, and vertically between the Community and its member states, thereby fulfilling the task of a constitution. But notice that the ECJ stopped short of explicitly characterizing the EC as a political community. Various authors have suggested that, sensitive to the “mixed” character of

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the European legal order, which includes both intergovernmental and federal features, the ECJ favored a pragmatic approach that avoids postulating political unity as a condition for the autonomy of European law.\footnote{R. Barents and L.J. Brinkhorst, for example, remark that the autonomy of European law “does not rest on determinate metajuridical conceptions about European unity, federal structures or something of the sort. On the contrary, the ECJ conceives its mandate as a call to interpret Community law in view of the far-reaching integration objectives set out in articles 2 and 3 of the Community Treaty” (Grondlijnen van Europees recht (Alphen aan den Rijn, The Netherlands: Samsom H.D. Tjeenk Willink, 1996), p. 242).}

Not surprisingly, the Maastricht judgment sharply contests this view. The Federal Constitutional Court’s argument can be resumed as follows: 1) either the EU is a political community or it is not an independent legal order. In effect, the constitutional distribution and limitation of powers within the EU implies that these powers represent a \textit{single} power, to which all normative relations can be imputed. In other words, constitutionalism – limited government operating under the rule of law – presupposes sovereignty. 2) There is no European people that could be the bearer of the EU. There are only European peoples (in the plural). Notice that the preamble of the EC Treaty refers to “an ever closer union among the peoples of Europe.” In contrast with, say, the American constitution, the Treaty does not begin by declaring “We, the European people . . .” As there is no sovereign European people that could be the ground of the European legal order, its bearers are the peoples of the member states. 3) By implication, the EU is an “association of states”, not an independent legal order with its own constitution.

The first step of the Federal Constitutional Court’s reasoning is assuredly correct: the independence of the European legal order presupposes that the EU is a political community, and the EU is a political community only if there is a sovereign which functions as the “imputation point” of the normative relations composing the EU. This thesis merely reaffirms the idea that sovereignty and a legal order are correlative concepts. The second and third steps of the Court’s argument, on the other hand, are dictated by a substantialistic concept of representation. The Court presupposes that there must be an “existential unity” given \textit{prior} to a normative unity. We are confronted, once again, with the dualism of metaphysics: first a
people and then a legal order that represents the people. The Court’s proviso that economic integration could lead to a single European polity in no way undermines this presupposition. For if and when a (relatively homogeneous) European people emerges, it can become the bearer of the EU.

A functional concept of representation casts the ECJ’s constitutionalization of the EC Treaty in a different light. When Van Gend & Loos argued that “The objective of the EEC Treaty, which is to establish a Common Market, . . . implies . . . that the Community constitutes a new legal order of international law . . .”, 29 it fulfilled a basic condition for the emergence of a polity: it indicated the purpose or finality whence a manifold of normative relations could appear as a purposive unity. The cited passage of Van Gend & Loos in fact posits the common market as the “common good” of the EC. To be sure, the Single European Act later introduced the notion of an “internal market”, but, as the Court itself has noted, this notion does not imply a break with the common market. Furthermore, although the Union Treaty has broadened the scope of the EC with Economic and Monetary Union, EMU is not an end in itself; it is a condition for the realization of a common market. The modifications and additions of the Union Treaty confirm that the EU remains firmly oriented toward the realization of a common market.

Returning to the preamble of the EC Treaty, later taken up in art. A of the Union Treaty, the possibility of an “ever closer union among the peoples of Europe” presupposes a reference point from which these different peoples can appear as the participants of a single community. Paraphrasing Cassirer, the idea of a common market “indicates the point of view under which [the European peoples] . . . are apprehended and ‘seen together.’” 30 In contrast with the Federal Constitutional Court’s dualism, a functional concept of representation suggests that there is already a European people, in the sense of a manifold of normative relations united from the point of view of realizing a common market. Here again, the

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29 Case 26/62, ECR (1963), p. 12. Significantly, the Van Gend & Loos decision unfolds the two-way dynamic of representation: the Court derives its decision from the EC Treaty and it also ascribes a specific meaning to the Treaty.

particular and the general are co-originary; the idea of a European common market and a manifold of normative relations are simply the two aspects of a single order. Understanding oneself as an actor within the EU implies “looking beyond” particular normative relations toward the polity as a whole; this “looking beyond” requires viewing these relations as instancing the European common market.

Thus, the “constitutionalization” of the Community Treaties implies that the organs of the EU are called on to realize a common market, that is, to represent the common market. The ECJ’s doctrine implies that the authorities of the EU are the authorities of a single community by virtue of representing the common market. Although the European Parliament is composed of “representatives of the peoples of the States” (art. 137 ECT), and the Council is composed of a “representative of each Member State” (art. 146 ECT), the concept of “representation” employed in both articles refers to the personal composition of these organs. No less than the other institutions of the EU, the European Parliament and the Council represent the European common market. Rather than abandoning the representational logic of power, the ECJ’s constitutionalization of the Community Treaties gives this logic a new content, concretising the sovereign as a common market.

In short, MacCormick appears to be mistaken on both counts, when he argues that “the same analysis as requires us to confirm that sovereignty has not been bestowed on European organs requires us at the same time to deny that it is a continuing property of any Member State.”31 The “constitutionalization” of the Community Treaties suggests, to the contrary, that both the member states and the EU are sovereign. The coexistence of sovereign member states and a sovereign EU does not mean, however, that sovereignty is divided. For the idea of “divided sovereignty” is self-contradictory. The point is, simply, that the member states and the EU are sovereign from different points of view. More precisely, each of the different points of view whence a manifold of legal norms can be viewed as a purposive

unity, be it a national or the European legal order, is what we call the sovereign.\textsuperscript{32}

3.2. The Common Market and the Common Good

But the problems concerning sovereignty in a European perspective do not end here. Even if the ECJ’s approach protects European law from the brand of substantialism advocated by the Federal Constitutional Court, can the ECJ avoid the charge of having instrumentalized European law? Significantly, many qualify the ECJ’s teleological interpretation of European law as functionalistic, arguing that European law has been reduced to a mere means for the realization of a pre-ordained end. The immediate question this objection raises is whether the common market can be the normative foundation of a legal order. A more general question raised by this criticism is, of course, whether a functional interpretation of representation does not simply boil down to functionalism.

A full discussion of the first of these questions exceeds the scope of this paper. In particular, it would be necessary to link the economic focus of European law to a comprehensive analysis of the constitutive features of the political domain. It suffices to note that a functional concept of representation calls into question the sharp distinction between instrumental and practical rationality implied in the critique of the ECJ’s alleged functionalism. Consider art. 2 ECT. On a first reading, the article contains a straightforward distinction between the means and ends of the EC. The common market, EMU and common policies or activities are the means to realizing a series of objectives, including a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, convergence of economic performance, social cohesion and solidarity, etc. But art. 2 is amenable to a second reading. Notice, to begin with, that EMU and common policies or activities are conditions for the establishment of a common market.

\textsuperscript{32} This, I think, is what Bankowski and Scott call “overlapping normative orders” in “The European Union?” in R. Bellamy (ed.), \textit{Constitutionalism, Democracy and Sovereignty: American and European Perspectives} (Aldershot: Avebury Press, 1996). Although they understand such normative orders as incompatible with the idea of sovereignty, the coexistence in identical space of different normative orders presupposes the different viewpoints assured by sovereignty.
As noted earlier, realizing a common market remains the core of the EU. Moreover, the common market is no mere “means” for the realization of the objectives listed in art. 2 ECT. Rather, these “objectives” are the normative criteria which define the common market as a good market, i.e. as a particularisation of the common good. To realize the common market is to attain those normative criteria. Concepts such as cohesion, solidarity, sustainable growth and respect for the environment are thoroughly normative; potentially, they offer the point of departure for political debate between the citizens of the EU.

This insight is decisive, for it highlights the tension between the general and the particular which we have already discovered in the functional concept of representation. In effect, the idea of a common market is a point of view because it does not coincide with the real operation of the market. To put it another way, the relation between the purpose of the EU and its legal order is dynamic. New social and natural circumstances force a continued reformulation of the content of a common market, as concretized in the European legal order. Art. 2 ECT ensures that the realization of a European common market remains an “unfinished” project. The irreducible tension between the common market as a normative idea and its concretization in a positive legal order evidences, once again, that if the absolute can only be apprehended in the conditioned, the conditioned does not exhaust the absolute. Again, the tension between the idea and the legal concretization of the common market is a two-way dynamic. Community law particularizes the normative idea of a common market; but norm production in the Community also ascribes a determinate content to the idea of a common market.

But it can still be objected that a functional concept of representation retains a residue of functionalism. For suggesting that the common market is a functional, rather than substantialistic concept seems to obscure a fundamental question confronting the European Union today: can the idea of a common market exhaust the notion of the common good? In particular, does not the notion of a common market conflate European identity with the pursuit of capitalism? This question certainly merits careful attention. In particular, it remains to be seen what critical potential lies enclosed
in the idea of a common market. Notice, however, that this question already moves within the logic of functional representation: the common market concretizes, thus limits, the common good. Thus, a functional concept of representation recognizes that the identity of the European Union is and will remain unfinished. While this does not get us beyond sovereignty, it contributes to moving beyond foundationalism.

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