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EU political and legal keyword: sovereignty

Prawno-polityczne słowo kluczowe Unii Europejskiej: suwerenność

Summary

The goal of this paper is to briefly analyse the historical movements that led to the emergence and the development of the concept of sovereignty and, secondly, to spread some light on the conceptual miasma which accompanied the development of such protean construct up to the present day. Finally, this paper will take in exam the status of sovereignty in relation to the current European political landscape, namely the European Union.

Keywords

sovereignty, European Union

Streszczenie

Celem artykułu jest analiza działań, które doprowadziły do powstania i rozwoju fundamentalnej kategorii polityczno-prawnej, jaką jest suwerenność, a także naświetlenie genezy i ewolucji istniejącego w społeczeństwie nastawienia wobec retoryki suwerenności. W artykule przedstawiono także obecny status tej konstrukcji w Unii Europejskiej.

Słowa kluczowe

suwerenność, Unia Europejska

Introduction

"Naming the mystical foundation of authority or the liminal sphere of indistinction between might and right, sovereignty appears as the very guarantor of the unstable union of politics and law – the afterlife of the original coup de droit that grounds every legal order."

[Kalmo, Skinner, 2011, pp. 3–4]

The current political horizon, especially when dealing with a *sui-generis* organization as the European Union, requires a further thought for what concerns the conceptions

of political realities, supposed to have a unitarian character on the one hand and, on the other, to take into account the diversity of the subjects constituting those realities. Therefore, the relation between the conceptual framework and the form of government is not only contingent but essential and unavoidable [Duso, 2015]. Since the birth of the modern state around the 15th century, the political debates in this regard have always revolved around one fundamental concept: *the sovereignty*. The sovereignty is not a new notion and has a long tradition. According to Richard Bellamy sovereignty originally appeared as a result of the supposed need for some ultimate adjudicator of all conflict in a world where consensual agreement on the right and the good cannot be counted on. Therefore, the author concludes, sovereignty means the possession of "supreme authority" [Bellamy, 2003, p. 171]. Such definition is commonly accepted by most scholars, who refer to it as a power over which there is no higher authority within a given territory. This is often, for instance, the sense given by "Europhobic" populist political movements when they call for a return to national sovereignty, of which European Union is said to have deprived their state [La Fondation, 2016]. Conversely, this is exactly the interpretation that, as early as 1951, Maritain strongly deplored in his work *Man and the State* because of its incompatibility with the ideas of international law, democracy and pluralism:

> "It is my contention that political philosophy must get rid of the word, as well as the concept, of Sovereignty: not because it is an antiquated concept […] and creates insuperable difficulties and theoretical entanglements in the field of international law; but because […] this concept is intrinsically wrong and bound to mislead us if we keep on using it – assuming that it has been too long and too largely accepted to be permissibly rejected, and unaware of the false connotations that are inherent in it."

> [Maritain, 1951, pp. 29–30]

Later, we shall look into this matter in a more detailed way, for now suffice it to say that there is no single uniform definition of sovereignty. The vitality and the mutability of this term have always been apparent as much as the misconceptions that surround it: the idea of sovereignty has been and is still widely used – and not always in the same way – by a whole series of figures connected to the international political arena, which have been providing it with a long list of different meanings, though often overlapping. For some sovereignty could represent the real or ritualized monarch or the absolute power, it could mean political legitimacy or political authority; for others, it could symbolize national independence as well as the constitutional order; for still others, it could be the source of all law, international recognition, legal immunities or basic governance competencies [Nagan, Hammer, 2004]. Recently, there are also those who, "seeking to ex-

plain the significance of contemporary trends, especially those paraded under the labels of globalization, flexibilization and the emergence of multi-level governance, have argued that we [are] now living in an era of post-sovereignty" [Loughlin, 2003, p. 55–56], where governments, bound by domestic and international human rights charters can no longer claim to be entitled to do whatever they wish in the name of their sovereign powers [Bellamy, 2003].

Whatever side one may choose one thing is for sure, though: after centuries, the idea of sovereignty, due to its ambiguity and versatility, is still leading to misunderstandings which make it today, as in the past, an easy target for distortion, instrumentalization and political infighting. For this reason – but not only – some people argue that we should get rid of an outdated and elusive concept such as sovereignty. The author of this work agrees with those scholars who believe that sovereignty is still an indispensable tool for understanding the modern political and legal order. Whatever meaning one could bestow on such concept, sovereignty remains "the very relational interface between law and politics, that which both separates these domains *and* binds them together" [Bartelson, 2006, p. 469]. Perhaps, the sole fact that we are debating about it could mean that sovereignty "still has plenty to say". First of all, the objective of this work is to briefly analyse the historical movements that led to the emergence and the development of the concept of sovereignty and, secondly, to spread some light on the conceptual miasma which accompanied the development of such protean construct up to the present day. Finally, this work will take in exam the status of sovereignty in relation to the current European political landscape, namely the European Union.

1. The Emergence of Sovereignty

"The right is produced by the power insofar as the power, in turn, arose from the right."

[Bobbio 1999, p. 189]

The Peace of Westphalia in 1648 symbolically marked the end of the long transition from the Middle Ages to a world dominated by independent sovereign "nation-states". Tremendous political and religious conflicts have been ravaging the European continent for many years now with monarchs seeking to defeat rival contenders internally and to break free from the claims of the Papacy to rule in the name of Christian universalism [Newman,1996]. Particularly in France, the king fiercely strove to end the wars of religion that swept the nation throughout the last century and to make itself absolute ruler by beginning to oppose or ignore the rights of the courts. In an effort to deliver a theoretical

basis for justifying the actions of the French monarchy, the French philosopher Jean Bodin claimed that only one supreme *sovereign* power – which is to rest with the king of course – able to rise above the warring factions, could have forced them into a secular order under which they would exist side by side. In the Middle Ages, many "sovereigns" coexisted on the same territory: in this sense, the king was the primary sovereign, but not the only one, since he was not superior to the other holders of powers in all, or even most, regards [Grimm, 2015]. Yet, according to Bodin, the medieval notions of a segmented society were no longer be able to give an account of the new political reality, so that a paradigm shift was required in order to keep up with the changing times. Unlike in the past, the Bodin's *sovereignty* was to be indivisible: possession and exercise of it had to remain in one place, in the hands of the king [Grimm, 2001]. In Bodin's mind sovereignty was to be cleared of justifications as ancient privileges or Christian universalism, above any other human law and source of human law, free from external and internal constraints and located in the state [Newman, 1996]. The supremacy of this power, whose holder was accountable only to God and to the natural law, meant it was independent of the subjects' consent to such an extent that misrule would not justify disobedience or opposition [Kurtulus, 2005]. By the way, the ruler was entrusted with such authority not merely to end the war but also to create and implement a new, peaceful order within the territory of the state by means of his legislative power, which represented, for the French philosopher, the principal mark of sovereignty [Grimm, 2015]. The emergence of such concept, fully theorized by Bodin in *Les Six Livres de la République* (1576), not only provided the European monarchies with a very powerful means of legitimation to their takeovers, but also opened a debate meant to last until today.

Some decades later, the English philosopher Thomas Hobbes, writing against a similar background of turmoil, arrived at similar conclusions. In his view, in ancient times people established sovereign authority through a contract in which they transferred all of their rights to the *Leviathan*, the abstract notion of the state. As Bodin, Hobbes imagined only one ruler at the head of the Leviathan [Kurtulus, 2005] and also agreed with the French philosopher on the definition of sovereignty as a supreme indivisible authority. For Hobbes, the adjective "supreme" meant that the commands emanating from the will of the holder of sovereignty, along with the obligation to obey it, are absolute [Stanford Encyclopedia, 2016]. Bodin and Hobbes theories of sovereignty have been grouped together under the name of *doctrines of state sovereignty* [Newman, 1996, p. 6] or *ruler sovereignty* [Kurtulus, 2005, p. 42]. Some scholars, as will be seen, gave them a different name, *Westphalian sovereignty,* after the historical moment regarded as the spark that started the "sovereign fire[1]". Despite such doctrines were theoretically not meant to lead to "absolutism", their lack of "democratic guarantees" saw to it that mo-

narchical absolutism developed at the end of the 17th century with *state sovereignty* as justification [Newman, 1996].

It is well known how fast and radically the political systems have been changing over the course of history: the concept of sovereignty could not remain unaffected [Grimm, 2015]. Around one hundred years after the publication of Hobbes' *Leviathan* in 1651, the doctrine of *ruler sovereignty* was rejected by Jean-Jacques Rousseau. The French philosopher was in complete disagreement with the Hobbesian idea thereby, due to the nasty and brutish man's nature, the people could have not been possessed the sovereign power; he claimed instead that the body of people should not merely enthrone the sovereign, but be themselves sovereign [Grimm]. Rousseau's *doctrine of popular sovereignty* did not only challenge *state sovereignty* but also raised one important question about power, that is, whose hands are to wield it. Michael Newman makes an interesting point in this regard. He claims that *popular sovereignty* could paradoxically end up strengthening a state, which for example claimed to embody the popular will. In his view, this idea had been distorted and adopted by Fascist, Stalinist – *doctrine of popular state sovereignty* – and even Nazi regimes – *doctrine of national sovereignty*. The former were built upon the belief that the unity between state and people is so complete that no separate institutions are necessary to represent the people, while the latter was based on the Hitler's conviction of embodying the *Volk* will [Newman, 1996, p.7].

That was just one example of the well-established ambiguous character of the concept of sovereignty, which, at the beginning of the 19th century landed again on the shores of Great Britain but under another name: *legal sovereignty*. Its major theorist John Austin, similarly to Rousseau, aimed at investigating firstly on the power allocation. Yet, unlike Rousseau's one, Austin's conception of sovereignty is close to the Hobbesian one. Sovereignty is described by Austin as absolute, indivisible and unlimited. According to him, such a power must be held by a sovereign, defined as a human superior habitually obeyed by society without owing obedience to any other authority, who implements laws by means of commands. Such commands are binding because the sovereign has the power to enforce penalties, but no external body has the ability to impose penalties on the sovereign authority. Thus, Austin believed international law does not exist because there was no sovereign to enforce it [Newman, 1996]. The *doctrine of legal sovereignty* on the one hand was enormously influential, both as a justification of state power and as basis for opposition to supranational notions. On the other, it has been recently greeted with deep scepticism by some scholars mainly because of one reason. They found it impossible to apply such doctrine to existing states. It is in fact to identify a sovereign in Austin's sense of the word a difficulty Austin himself experienced, when he was forced

to describe the British sovereign awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons [Stanford, 2018].

Broadly speaking, for many centuries the system's basis of what is called classical sovereignty, namely states as the sole subjects of international law secured by the prohibition on intervention with external independence and internal supreme authority remained quite stable [Grimm, 2015]. Since the end of the 19th century, efforts were initiated to ensure permanent peace among states in the form of treaties as, for instance, the multilateral Convention for the Pacific Settlement of International Disputes of 1899 and the Convention Respecting the Laws and Customs of War on Land signed in The Hague in 1907. The history reveals that those efforts have not been effective, considering that in 1914 the First World War broke out.

2. The Crisis of Classical Sovereignty

"I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it is a good thing that the sun comes up every morning. It does more good than harm. But even if I didn't much care for the dawn there isn't much I could do about it."

[Friedman, 1999, p. XVIII]

As has been said, during the eighteenth and nineteenth centuries Bodin's definition of sovereignty as the absolute power of a state was interpreted in terms of unlimited freedom and independence so that was widely seen as justifying the use of absolute power [Ferreira-Snyman, 2006]. According to this notion of sovereignty the right to engage in war was seen as one of the key elements of sovereignty and no binding legal rules obliging states to keep the peace were accepted. This tendency first led to the rise of the imperialism and then to the First World War. As a result of the horrors of war, anti-sovereign doctrines emerged together with a more positive attitude towards international relations to the extent that it became apparent that the classical approach to sovereignty as absolute and unlimited authority constituted a threat to international peace [Ferreira-Snyman, 2006]. Also, in debates among liberal intellectuals and professionals, since after the end of hostilities, sovereignty was predominantly seen through its dark side, as a functionally inept and morally corrupt form of absolutism and power politics [Koskenniemi, 2011]: theorists and scholars even started to doubt that *sovereignty* was still the master concept that needed to be analyzed. Moreover, the establishment by the League of Nations of the Permanent Court of International Justice in 1922 brought into being a legal authority whose judgments were capable – at least theoretically – of overriding

the jurisdictions of individual states in many areas over which they previously enjoyed an inviolable sovereignty [Skinner, 2011, p. 43]. Therefore, although sovereignty was traditionally conceived as the supreme authority of the state, it was clear that it was in "the process of evolving from an absolute concept of unlimited freedom and independence to a relative concept where the freedom and independence of states are limited both by the freedom of other states and by international law" [Ferreira-Snyman, 2006]. A growing body of scholars began to suggest that such definition of power had simply "had its day". In the same period, a group of political scientists made an assault on the traditional doctrine of *sovereignty* by putting forward the theory of *pluralism*. In their view, sovereignty was exercised by various political, economic, social and religious groups that dominate the government of each state and does not reside in any particular place but shifts constantly from one group to another [Encyclopedia Britannica, 2006].

Nevertheless, the changes in the first half of the century did not demolish the foundations of the classical international legal order considering that there was still no possibility of forcing a state to act against its will or to cease acting [Grimm, 2015]. Only due to the Second World War the bounds of sovereignty had been finally crossed. After the traumatic and devastating experiences of a conflict where almost 55 million people died and the Holocaust, meaningful legal and institutional circumscriptions of sovereignty arose with the aim of considerably abridging the sovereign rights. First of all, the formation of the United Nations in 1945 marked a turning point in this regard. In the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* of 1970 was declared that all States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social political or other nature. In particular, sovereign equality includes the following elements [Ferreira-Snyman, 2006]:
1. states are juridically equal,
2. each State enjoys the rights inherent in full sovereignty,
3. each State has the duty to respect the personality of other States,
4. the territorial integrity and political independence of the State are inviolable,
5. each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

Secondly, the Charter of United Nations not only limits the sovereignty of states, by subjecting them to international law, in respect of their relations with other states, but also, especially with regard to the protection of human rights, with regard to its subjects within its own territory [Ferreira-Snyman, 2006]. In 1948, the very large majority of states signed the *Universal Declaration of Human Rights* consisting of over 30 separate rights

of individuals. As a matter of fact, the document was not legally binding, which means that could not affect states' sovereignty; yet it was a first step towards bringing states and their universal obligations regarding internal affairs close together. Not long after, in 1950, the *European Convention for the Protection of Human Rights* was established with express authority to override the local jurisdictions. As Grimm clearly explains:

> "The European Convention on Human Rights departs from traditional concepts of sovereignty in two ways. First, it grants each member state the right to take another country's human rights violations before the court and thus to intervene in its internal affairs. Second, it not only pertains to relations between states but also allows individuals to bring proceedings against member states for violations of the rights protected in the convention."

[Grimm, 2015, p. 88]

There were certain generally recognized interests, as human rights for instance, that cannot be addressed independently, so that an ever-increasing trend of cooperation and interdependence started developing between states. More recently, due to *globalization*, also issues such as economic distribution, environmental protection, the rise of multinational corporations, the spiraling growth of international organizations and security came to be considered as "essentially global" and therefore were meant to be managed outside the old paradigm of classical sovereignty. This is not intended to be an *apologia* for globalization; what matters here is that whatever *globalization* may mean, at least, it signifies the informal government of an increasing number of people and things outside the anachronistic structures of sovereign statehood [Koskenniemi, 2011]. All these trends confirmed that sovereignty was no longer absolute, but should rather be understood as a relative and limited concept.

Finally, what one might call the "knockout blow" to the traditional concept of state sovereignty was delivered by the European integration process. Yet, as far as the author of this work is concerned, this does not mean the demise of the sovereignty. If anything, this is the evidence that sovereign states, at least in Europe, are no longer the sole rulers on their territory. It is apparent that the "state" remains the basic units of the international order and did not disappear to be replaced by "a variety of powers, distributed among several levels and holders, which can no longer be meaningfully bundled into a concept of sovereignty" [Grimm, 2015, p. 102]. It goes without saying that both the state and sovereignty have undergone major changes during the last eighty years. According to Grimm, nowadays, especially as regards foreign affairs, "no state is sovereign in the sense in which states were sovereign in the nineteenth and even the first half of the twentieth century" [Grimm, 2015, p. 91]. Troper, in the same spirit, came to the conclu-

sion that, since the second half of the 20th century, the "state" is becoming weaker and weaker as for its effective power:

> "The development within the state of powerful economic or social forces; the decline of public services and the increasing privatization of public corporations; the loss of control of the economy by the state and domination by the market; the fact that, in several countries, many important activities are regulated not by the state but by independent agencies; the developing role of minorities; and the dramatic changes that they see in the legal system because of such phenomena as the growing importance of international organizations or legal pluralism […] [are] the symptoms of the limited power of the state."

> [Troper, 2011, p.132]

All these factors, together with the new sensibility for human rights, the willingness to avoid genocide and disasters as the Holocaust and the two World Wars for the future, the rise of an international criminal court and of a supranational entity – the European Union – that assumes power of governance over economic – and sometime in the future, maybe, military affairs – the state's authority had been drastically curtailed [Stanford, 2003].

The classical notion of sovereignty could no longer fit the scenario. Nevertheless, precisely because the object of sovereignty, namely the "state", is still there – and, in my opinion, will continue to be there for very much longer – it would be therefore unwise indeed to take the notion of sovereignty out of the picture. Certainly, with the creation of a *sui generis* institution such as the European Union, which someone defines as "something between a supranational organization and a federal state" a real challenge has been issued to those trying to depict it in terms of sovereignty. The debate about such notion and its application to the European situation has been around a long time and not even close to the end. Given that it would be impossible to give room to the entire literature on this matter, I will take in exam two opposing theories I deem paradigmatic as for the question of sovereignty, while in the final part I will deal with the European Union.

3. The Fate of Sovereignty

> "[T]he understanding of matters of public law was beset with immense confusion. The location of power was the most intricate question of all. It touched upon the very existence of political power. Sovereignty was brought forth as the regulative principle of what would otherwise have been a chaos of authorities, powers, magistrates, etc."

> [Baranger, 2011, p. 50]

The nature of the notion of sovereignty changed very much over time along with the customs and practices of nation-states and international systems [Jackson, 2003]. Nonetheless, although much criticized, sovereignty is still central to most thinking about international relations and particularly international law. Most of authors, in fact, continue to hold onto it by either abandoning the element of indivisibility in favor of a pooled, shared, divided, split or partial sovereignty to make it fit to the newly emerging international order, as well as to the special case of the European Union, or by developing an updated version of it [Grimm, 2015]. Conversely, more and more authors are willing to get rid of this concept for many reasons: some say it has lost its object and hence is no longer helpful in explaining the current situation, others claim that the vagueness which surrounds it is a source of dangerous misunderstandings and instrumentalization, to a point where abandoning sovereignty seems advisable [Grimm, 2015].

One of the most interesting criticism of the concept of sovereignty is contained in the book *Democracy, Sovereignty and the European Union* of Michael Newman[2]. The author, before revealing his own point of view, analyzes some arguments against sovereignty. In his view, those who believe that sovereignty "has outlived its purpose and should now be confined to the *dustbin of history*" base their position on two pillars. Firstly, they affirm that "sovereignty" is a *myth* which bears no correspondence with reality and aim to prove it with empirical evidence; secondly, stressing out the normative aspect of sovereignty, they hold that the doctrine is *dangerous*. The supporters of the *sovereignty as a myth* usually dispute the claims thereby "the state is rightfully ascendant within the territory" and that "it is not answerable to external forces" – namely, *state sovereignty* and *legal sovereignty*. *State sovereignty* rebuttal relies on the fact that "in no society does the state actually hold a monopoly of power, and that in liberal-democracies some degree of dispersion of power is institutionalized and explicitly advocated" [Newman, 1996, p. 9]. *Legal sovereignty* review, instead, is based on the premise that states' powers are strongly curtailed by international forces in a more and more interconnected world. Since the sovereignty is no longer able to describe the reality, what is it for?

The most decisive consideration, however, is the normative one, which sees *sovereignty as a danger*. It is dangerous both internally inasmuch as "the so-called sovereign state will seek to assume absolutist powers even within a liberal-democracy" and externally because "sovereignty (particularly when reinforced by nationalism) it legitimizes aggression, expansion, and disregard for others in the name of a single interest defined by the state" [Newman, 1996, p. 10]. Very often such interest does not coincide with the urgent world problems, so that sovereignty ends up diverting attention from the proper solutions. The "alternative values" promoted by the detractors of sovereignty "may be that domestic power should be divided, that the needs of world community should be

recognized or, more specifically, that the demands of the EU should supersede those of the nation-state" [Newman, 1996, p. 10]. For Newman, one of the ways in which defenders of sovereignty may respond is by asserting that sovereignty exists because the UN recognizes the existence of sovereign states. At first sight it could seem a very weak argument; yet, since the state remains the dominant form of political organization today and given that the existence of a state means that at least some people within a territory area possess some power, Newman concludes that it cannot be assumed that "the possession of *sovereignty* (in the sense of recognition) is to possess an empty shell without significant content" [Newman, 1996, p. 12]. Either way, the author does not aim at "sweeping out" the notion of sovereignty: in his view, it is simply *unhelpful*.

In order to demonstrate his thesis, Newman starts from the very beginning, thus by trying to give a definition to the concept of *sovereignty*. While retracing its steps over the course of history, the author realizes that there is a host of different uses of term sovereignty and he comes to the conclusion that sovereignty should be at least acknowledged as a very equivocal word. *Inter alia*, he mentions: *state sovereignty, legal sovereignty, popular sovereignty, national sovereignty, divided and shared sovereignty* – and the list is much longer. In his view, because of all these *nuances* of meaning, "if someone refers to *sovereignty*, without further clarification, we cannot be sure what s/he is talking about". If we take, for example, the view, according to which sovereignty is associated with international recognition, Newman says that, even if in this case it could seem valuable, given that "all states that are recognized as such are sovereign and all bodies that are sovereign are recognized as states", thinking of sovereignty as an attribute of statehood does not seem to be so useful [Newman, 1996, pp. 9–10].

Also, sovereignty could – and is – used as a doctrine of *legitimation,* for example in the context of the European Union, by right-wing nationalists who, appealing to an alleged threat to sovereignty – and hence to democracy – aim at mustering votes. The blurring hovering over the concept of sovereignty, in fact, "reinforce[s] its legitimating functions" to such an extent that precisely "by failing to specify the usage, opinions may be mobilized on bogus grounds as if sovereignty constitutes some holy order which is to be preserved" [Newman, 1996, pp. 12–14]. Newman, by arguing it, did not want to take a political stand; referring to the European Union debate, in fact, he writes:

> "It is possible to feel great sympathy with Norwegian opponent of EU, who feared that membership could threaten their democracy and high welfare expenditure. But it would be preferable to conduct the argument in these terms than to invoke sovereignty as a justification."
>
> [Newman, 1996, p. 14]

To recap, Newman's reasoning has taken the first steps relying on the classic criticisms of the concept of sovereignty to arrive at the conclusion that there is no benefit in using this term. The latter, as a matter of fact, it appears to be quite *unhelpful* on the grounds that:

"There is not a single usage of the term [among those mentioned above] which cannot be expressed more clearly in other ways. If we want to talk of state sovereignty we can examine the specific justification for state power over society; if we want to talk of popular sovereignty, we can more usefully discuss this in terms of 'democracy'; if we want to consider divided sovereignty or shared sovereignty, we can understand these more fully by analyzing the kinds of constitutional/institutional relationships within states […]. It diminishes clarity rather than adding […] it."

[Newman, 1996, pp. 13–14]

It would be counterproductive, or even illogical, to insist on making use of a concept that, firstly, is not able to describe the current political situation, secondly, is a dangerous means of political legitimization and propaganda, and, thirdly, is the cause of misinterpretations, misunderstandings and mistakes.

For what concerns those who "still believe" in the value of sovereignty as a useful and explanatory term, either political or legal or both, Neil Walker is a leading voice. In the opening chapter of the book titled *Sovereignty in Transition* (2003), of which he is editor and co-author, he develops a completely different view concerning sovereignty as compared to Newman. He first of all gives his own definition of sovereignty, which it is:

"The discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity".

[Walker, 2003, p. 6]

As we will see later, according to Walker, such definition would wipe out some of the criticisms which have been brought against sovereignty. After that the author briefly presents his own vision as for the history of such troubled notion, which in his view consists of two phases:

1. the Westphalian phase,
2. the post-Westphalian phase.

The Westphalian phase describes the international order after 1648 (Peace of West-phalia). Such order was backed by two complementary frameworks of law: *constitutional law*, connected to the internal government of sovereign states, and *international law*, deal-ing with the relations between those states. Yet, according to Walker, "despite this dual le-gal structure the Westphalian order was characterized by a one-dimensional configuration of legal authority", given that "no claims to authority other than by or on behalf of the state were seriously countenanced". In this context, sovereignty was as a very successful term used "to explain and to justify the world". It was both understood as "a discursive claim" and, as well as "an institutional fact within that world" [Walker, 2003, p. 9].

On the other hand, with the Post-Westphalian phase, "while sovereignty clearly continues to form part of the object-language, it is no longer so confidently conceived of as part of the meta-language of explanation and political imagination" [Walker, 2003, p. 10]. This is to say that, although the term of sovereignty is still being widely used does not mean it is still able to play a role nowadays. Walker agrees with the argument there-by the modification of the institution of the state throughout history forced the concept sovereignty to change accordingly. It is precisely the premise that, in a world where "many circuits of power operate beyond the direct control of the sovereign state", where "we see the growth of polities which are not states but which rival states in terms of legal and political authority – paradigmatically the EU, but also international organisations such as the Council of Europe, UN, WTO – and where "globalization of economic orga-nization, transnational commerce, culture and travel, and the new communications me-dia" effectively challenge the political capacity of the state, to the point that 'sovereignty figures lower and lower in the register of explanatory variables which may be invoked to make sense of that world', well it is this premise which has led many observers to "re-ject or marginalize sovereignty as irrelevant" [Walker, 2003, pp. 9–10].

According to Walker, those who insist on the irrelevance of such notion, base their theories on mistaken assumptions. First of all, they see sovereignty as representing "the actual capacity of a polity to retain full internal control and external independence", that "due to globalising trends, less and less corresponds to the idea of a sovereign state in *re-ality*" [Walker, 2003, p.7]. Having in mind his own definition of sovereignty, Walker answers to this criticism claiming that, as a discursive form, the validity of sovereignty:

"Depends upon its plausibility and its acceptance as a way of knowing and ordering the world, which in turn depends upon its status as an 'institutional fact' a fact whose authentic-ity and credibility depends upon the internalisation by key actors of a complex of rules and expectations which support and subscribe to the sovereign claim."

[Walker, 2003, p. 7].

Secondly, they detractors of sovereignty believe that nowadays "it is rivalled in intensity by other forms of power" – for instance, economic power – to such an extent that "its very distinguishing characteristic, and so its very conceptual relevance, fades and becomes peripheral" [Walker, 2003, p. 6]. For Walker:

"This makes no more sense than to assert that the continuing relevance of the concept of law itself, namely its claim to provide an encompassing framework of normative order, depends upon its capacity to dominate and subsume all other forms of normative order."

[Walker, 2003, p. 6]

However, rejecting the allegations against sovereignty is not enough if our goal is that of attesting the actual validity of the term. Walker is aware that if we really want to maintain a weighty concept such as sovereignty we have to rephrase it in a new and suitable way. To draw a line between the past and the present, Walker renamed the term *late sovereignty*. In order to "convince the audience" of his intuition, he explains this new definition in detail. He has chosen *late sovereignty*, because, first of all:

"Suggests fundamental continuity […], that the basic conceptual apparatus of sovereignty can be adapted to understand the new order. Secondly, it suggests a distinctive phase in the discursive career of the term. That just as there are continuities in the meaning of sovereignty, there are also significant changes. Thirdly, it suggests irreversibility, that there is no way back to the world of early sovereignty and the one-dimensional system of states which it represented. Fourthly, it suggests transformative potential, that sovereignty has entered a final stage, that its capacity to represent the world of political authority is being tested to the limits, and even, possibly, that in that challenge there may be a transformation into an order of authority where sovereignty is of diminishing value, and where its continuing use both in the object-language of constitutional representation and in the meta-language of explanation and normative projection is tested to the limit."

[Walker, 2003, p. 19]

In the last part of the argumentation, the author goes even beyond suggesting that *late sovereignty* "contains the seeds of its own transformation". Taking into account the European situation, characterized by "endemic boundary clashes" between states and no state institutions and by "the proliferation of those putative polities", the system, along with its understanding, may change in the future. For Walker, this will not cause the demise of the sovereign polity, considering that they have always been able to adjust

to a transforming environment; in his view, it is simply not possible that those actually existing polities might one day "re-imagine themselves out of existence, and out of power". Instead such change could envisage a brand new "order of relations between and amongst polities and putative polities, a new and enlarged zone of boundary politics, and a new set of approaches to negotiating these boundaries" [Walker, 2003, pp. 27–28]. We have no way of knowing how the situation will actually evolve, but, certainly, by way of conclusion, we can safely assume that the author is not willing to put sovereignty aside, since it remains a valuable "framework within our explanatory model", which "heavily or lightly, directly or indirectly […] might impinge in any particular place at any particular time" [Walker, 2003, p. 30].

4. European Union and Sovereignty

"For the first time, an international assembly would be more than a consultative organ; the parliaments themselves, having surrendered a fraction of their sovereignty, would regain that sovereignty, through its common exercise."

[Robert Schuman quoted by Dedman, 2009, p. 82]

The classical concept of absolute sovereignty is absent within the European Community. Therefore, the question is: what is in its place? Some said that what we have in the European Union is partial, split, shared or pooled sovereignty; others tried to re-conceptualized the concept to adjust it to the new reality – as Walker did with the notion of *late sovereignty*; others again prefer to ignore it, as for instance Newman, or to put in its place something new. This is the case of Neil MacCormick and its *post-sovereignty*. MacCormick has compared the pooling of sovereignty to a loss of virginity, thereby something is lost without anyone else gaining it. Apparently, MacCormick is not fond of such "sovereignty sharing system": in his view, by dint of "scattering around" their own power, member states are no longer in possession of ultimate power over their own internal affairs, no less [MacCormick, 1999, p. 132]. Lindhal, *au contraire*, believes that the diffusion of political power which is going on in Europe represents the realization of democracy. He further claims that we should abandon certain "crypto-Europhobic" approaches as regards sovereignty [Lindhal, 2003]. Another harsh and interesting criticism delivered to those who thumb their nose at the political and legal consequences which European Union has brought about is that of Marek Dabrowski who writes:

"The European Union and its institutions are often criticized for their supposed ineffectiveness, slowness in responding to various challenges, lack of transparency in decision making and lack of democratic legitimacy. All those who levy such criticisms should remember, however, that many of the weaknesses of the EU institutional setting arise from its voluntary character and the reluctance of EU countries to transfer more powers to the Union. Nevertheless, it is in the interest of all member states to have an effectively functioning Union, which will be able to deliver European public goods to their citizens. Therefore, the member states should be ready to repair the EU's architecture even at the cost of sharing more sovereignty."

[Dabrowski, 2017]

By now, for sure, we came to understand that it is mainly due to the European Union that the question of sovereignty has been posed in a new way. Apart from all these debates, it is true that, at the beginning, the European Union was supposed to be an international agreement between sovereign states and nothing more. However, history reveals that, in concluding the treaties, the member states deliberately transferred sovereignty rights to the Union, and the latter now exercises in its own name [Grimm, 2015]. At this stage, as Marlene suggests:

"The question to be discussed is whether the European 'authority structure', as it has evolved, has come to possess its own independent sources of governance and therefore has subordinated the member states to it, or whether it would be more correct to say that we are dealing with a new order of overlapping and competing systems of governance where the national and EU level claim equal authoritative standing."

[Marlene, 2001, p. 81]

Political theorists, politicians and scholars have been debating over years with the aim of defining this institution and determining the impact such event had on the European political framework. Saying that the EU is just another traditional international organization in my view would mean deny the reality, but it is also difficult to explain how is it possible that sovereign states, which are meant to be the sole master of their international obligations are simultaneously bound by a law that they themselves have instituted [Marlene, 2001]. In Marlene's view, there are at least four different scenarios which could answer this question:

1. within the first scenario, states had "pool their sovereignty" in order to deliver solutions to collective problems. States shared power with supranational institutions

after thorough calculations and voluntarily so that such situation in any moment can be reversed. In this case, we would speak, rather than integration, of cooperation, which could be treated as a normal interstate interaction,

2. the second scenario classifies the EU as a structure looking at a federalist future,

3. in the third scenario, one would not "lose time" in defining such organization but would be interested in "purely empirical studies of policy making" within the framework of the EU, considered as a "holy grail",

4. the fourth vision would define the EU as an "altogether new political phenomena that contains strong elements of both fragmentation and federalisation" [Marlene, 2001, pp. 2–3].

Still it is not clear which scenario fits best the situation Perhaps, the fact that, for now, no one came up with a definitive and convincing answer, is the reason why the European Union is still drawing so much attention to itself. I would like to conclude this work with a fascinating idea which has that federalist flavor that I like so much:

"[Has the Union] been successful in propelling us into a post-sovereign Europe? Or has the irony of history prevailed, so that what was first an anti-sovereignty project has now turned into an aspiration for statehood, with all its paraphernalia, including a flag, an anthem, and, yes, sovereignty itself?"

[Kalmo, Skinner, 2011, p. 19]

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NOTES

[1] Krasner, the same author that appositely coined the expression *Westphalian sovereignty*, admits that "the rules and practices of sovereignty did not begin at any particular point in time. Rather they evolved over several centuries. The Peace of Westphalia, which is often seen as the key transition to the modern state system, was, in fact, only one of many way station"[Krasner, 2011, p. 97]. Moreover, the term *sovereignty* was not invented by Bodin but was already in use for some time when the philosopher adopted it: "The expression *sovereign* and *sovereignty* had been linked to political rule since the 13th century in France, where they first appeared a century earlier. In the beginning, they served to characterize concrete phenomena of significant height, such as mountains or towers. Somewhat later, they were also used to describe the power of God. The reference to physical objects was soon lost. The application to God continued for somewhat longer time. The term's use in connection with political rule became common" [Grimm, p. 13].

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