Sovereignty in Europe

An idea in transformation

Policy paper requested by MEP Josep-Maria Terricabras Nogueras

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SUMMARY

Introduction

For decades, sovereignty was assumed to be a dying idea but it is reawakening, as witnessed by phenomena such as Brexit and self-determination processes at sub-State levels as in Scotland or Catalonia, the economic crisis in Greece and some other Mediterranean countries, and the rise of populisms across Europe. Some of these phenomena that nurture a renewed interest in sovereignty are somewhat connected to the European integration process and its crisis. In this context, describing, analysing and criticizing old and new uses of the notion of sovereignty seem a worthy, interesting and challenging undertaking.

The opening sections of this work attempt to grasp the idea of sovereignty by questioning a traditional understanding of it (section 1), by distinguishing it from other close notions (section 2) and by identifying different types of sovereignty (section 3). After that, this report should be in a better position to deal with the question of whether the idea of sovereignty is vanishing in international and EU law and politics (sections 4 and 5). Once shown that the idea of sovereignty is still present, distinct visions of sovereignty in the context of the EU are offered (section 6). Some closing remarks on the transformative power of sovereignty are made in the last section.

1 A traditional understanding of sovereignty

An established belief

Many classic political and legal theorists, such as Bodin, Blackstone, Hobbes, Rousseau and Dicey, have understood sovereignty as an absolute, independent, indivisible power.[1] If sovereignty with such attributes ever really existed, in our time and context the concept seems more qualified, relative, diffuse, divisible, shareable and transferable. Let us explore it.

Absolute

From its inception, sovereignty has been related to the idea of supreme, unlimited, unqualified, final political power. Hans Kelsen rejects, however, any compatibility between supporting the absolute sovereignty of States and the primacy of international law. If State sovereignty was assumed to be the supreme authority, this would be accepting the supremacy of State law over international law and, in the end, it would be proclaiming the supremacy of a particular State law over the other State laws. By contrast, the existence of international law, as regulator of the relations amongst States and of the limits of their powers, supports the principle of equality between States and thus their sovereignty. If the primacy of international law over State law is cherished, State sovereignty must be understood *in a relative sense*. In short, the sovereignty of States means, according to Kelsen, that they are subject to no other State, only to international law.[2]

"Many classic political and legal theorists, such as Bodin, Blackstone, Hobbes, Rousseau and Dicey, have understood sovereignty as an absolute, independent, indivisible power"

1 Absolute seems to come from *ab solutus* meaning free from. Therefore, the attributes of absoluteness and independence are closely related. Indivisibility is close as well, since something divided or divisible would hardly be absolute and fully independent. By the way, other classic political and legal theorists did not understand sovereignty with these attributes. See HINSLEY, F.H. *Sovereignty*.

2 KELSEN, H. *Principles of international law*, parts III, V. KELSEN, H. *Teoría General del Estado*, part II. KELSEN, H. *Peace through law*, pp. 34-6. Eminent philosophers, such as Rawls, pointed in similar directions. For Rawls, international law has evolved and ought to evolve towards restricting States'

Independent

Sovereignty has been identified as an independent power. However, State sovereignty is not an independent power from and beyond international law, but an independent power under and within the international legal order. This last notion of independence respects the sovereignty of other States. From a more internal sphere of independence, sovereignty may be conceived as a political power beyond or above the law. The qualification of the sovereign as a *legibus solutus* has traditionally meant a political power free from acting in accordance with the law. Many liberals, in contrast, have upheld that no one can be beyond or above the law, that everyone should be bound to it. For some liberals, the constitution and the law should be sovereign, since any power independent of the law, even in the hands of the people, could endanger both individuals and minorities and end up being totalitarian, authoritarian or tyrannical.[3]

> "If the primacy of international law over State law is cherished, State sovereignty must be understood 'in a relative sense' "

Indivisible

Rousseau wrote that "the sovereign authority is one and simple, and cannot be divided without being destroyed".[4] Beyond the common attributes of sovereignty, classic theorists differ on who held and should hold sovereign authority. For instance, Bodin and Blackstone assigned full sovereignty to the monarch, Rousseau to the people's assembly and Dicey to the Crown

sovereignty in light of his principles of ideal international law (to restrict both the right to war and the unlimited right to internal autonomy). RAWLS, J. *The Law of Peoples*, pp. 26-7.

3 Constant warned that "when sovereignty is unlimited, there is no means of sheltering individuals from governments". Therefore, "sovereignty has only a *limited* and *relative* existence". See CONSTANT, B. "Principles of Politics Applicable to All Representative Governments", in *Political Writings*, ch. 1.

4 ROUSSEAU. *The Social Contract*, book 3, ch. 13.

"Instead of coining new terms, perhaps adjusting the concept of sovereignty or building new conceptions would suffice"

in Parliament.[5] Indivisibility, however, can be questioned along two axes. Federalism and confederalism show that sovereignty and sovereign powers can be divided, transferred or shared between layers of government. Separation of powers indicates that the ordinary exercise of some sovereign powers can be attributed to and distributed among different branches of government.

Terms, concepts and conceptions

Terms such as *post-sovereignty* have been suggested to grasp and explain how sovereignty has evolved in various directions.[6] First, sovereignty can be distributed or shared, as the (con)federal and multinational systems and constitutional recognition of certain historical rights prove. Second, sovereignty does not have to be a single, absolute power, but a relationship agreed between sovereign subjects. Third, sovereignty may not need to be a pure and fixed normative concept, but more practical and functional to better describe constitutional power. Fourth, sovereignty is forced to change conceptually due to the evolution of international law and relations, especially in regional contexts such as the EU.[7] Instead of coining new terms, perhaps adjusting the concept of sovereignty or building new conceptions would suffice.[8] Some contemporary theorists, even cosmopolitans, point out that it is not necessary to abandon the idea of sovereignty but only to reject conceiving it as absolute and indivisible.[9]

5 Hobbes did write that sovereignty may lie in the hands of an individual or an assembly. See HOBBES. *Leviathan*, ch. XXVI. Similarly, for Montesquieu, sovereignty rests in different hands different species of government. In particular, "when the body of the people is possessed of the supreme power, this is called a democracy. When the supreme power is lodged in the hands of a part of the people, it is then an aristocracy. In a democracy the people are in some respects the sovereign, and in others the subject." See MONTESQUIEU *The Spirit of Laws*, book 2, ch. 1-2.

6 Other similar terms using the prefix *post* have been proposed to grasp the present-day nature of sovereignty, such as post-Westphalian sovereignty, post-modern sovereignty and post-national sovereignty. Adjectives such as *soft* and *liquid* have also been used to coin the terms soft sovereignty and liquid sovereignty.

7 KEATING, M. "Rethinking sovereignty", pp. 11-4.

8 For the distinction between *concept* and *conception*, RAWLS, J. *A Theory of Justice*, p. 5. DWORKIN, R. *Law's Empire*, pp. 90-6. MacCORMICK, N. *Questioning Sovereignty*, p. 32.

9 POGGE, T.W. "Cosmopolitanism and Sovereignty", pp. 57-61.

Time and place

The term sovereignty is both *contextual*, since it responds and adapts to circumstances, and *protean*, for it can take many forms. Indeed, the notion of sovereignty is adaptable, variable and malleable.[10]

2 Distinguishing sovereignty from other close notions

Distinguishing *sovereignty* from *power*

Power and sovereignty are sometimes confused but they are two different concepts. Sovereignty does indeed presuppose power, but the inverse is not true. The concept of power is much broader (its range is much greater) than that of sovereignty. Sovereignty could be a particular class of power.[11] Although large multinational corporations might have more power than some States in many fields, private companies do not commonly have sovereignty. While sovereignty is generally a strong type of power, it does not always trump other kinds of power in the factual world.[12] Nevertheless, some might point

"Sovereignty does indeed presuppose power, but the inverse is not true"

10 Although sovereignty is usually related to States and other similar political entities, some authors have linked it to individuals. See HOFFMAN, J. *Sovereignty.* The present work is, however, only interested in a collective approach to sovereignty.

11 "Sovereignty by no means exhausts the field of power, but it does focus our attention on the most significant and dangerous form that power can take." WALZER, M. *Spheres of Justice*, p. 281.

12 VERGÉS, J. "Sovereignty, Fragility and Time in the Catalan Process", p. 233.

out that sovereignty is not just a sort of power, but a political structure of power or a kind of collective will.[13]

Distinguishing *sovereignty* from *autarchy*

It is one thing to have power but quite another to be self-sufficient. While the Westphalian conception of sovereignty prevailed, the ideas of sovereignty, power and autarchy often went hand in hand. This connection seems to have ancient roots as for Aristotle a *polis* was an autarchic entity.[14] But despite having historical and factual connections, these notions should be conceptually differentiated. An idea of sovereignty divorced from economic independence can survive in a world of increasing global and regional economic integration. In fact, in some ways, economic integration seems to favour political disintegration.[15]

Distinguishing *sovereignty* from *independence*

While in federal schemes sovereignty can be divided or shared between territorial units, independence usually refers to a certain stadium of full sovereignty. In addition, independence refers to actuality, whereas sovereignty may also include certain potentiality (to become, for instance, an independent State). In the Canadian debate on the clarity of the referendum question, many have considered the notion of sovereignty to be less clear than that of independence or, at least, not clear enough to create a duty to negotiate secession.[16] In the Scottish debate, the notion of independence light (or lite) was proposed as a way of maintaining certain ties with the rest of the UK.[17] In Scotland and Catalonia, as well as in other European minority nations, expressions such as "independence in Europe" and "new State of Europe" are common. Instead of demanding full sovereignty, such independence would claim sovereignty as a Member

13 "I hold then that sovereignty, being nothing less than the exercise of the *general will*, can never be alienated, and that the sovereign, which is nothing but a *collective being*, can't be represented except by itself: the *power* indeed may be transmitted, but not the *will*." (Emphasis added). ROUSSEAU. *The social contract*, book 2, ch. 1.

14 VERGÉS, J. "Sovereignty, Fragility and Time in the Catalan Process", p. 233.

15 ALESINA, A.; SPOLAORE, E.; WACZIARG, R. "Economic Integration and Political Disintegration".

16 See the Canadian *Clarity Act* of 29 June 2000, officially named "An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference".

17 See KEATING, M. "Rethinking sovereignty."

State of the Union. This kind of independence would be somewhere in between external and internal secessions.[18]

Distinguishing *sovereignty* from *autonomy*

> "While in federal schemes sovereignty can be divided or shared between territorial units, independence usually refers to a certain stadium of full sovereignty"

If two entities share jurisdiction over a population and a territory, sovereignty tends to be prior to and stronger and deeper than territorial autonomy. Prior in the sense that sovereignty might be primary and autonomy derivative or secondary.[19] Stronger in the sense that sovereignty usually implies broader and weightier competences than autonomy. Deeper in the sense that a sovereign entity seems to be more capable of maintaining, recovering or claiming competences that are in the hands of an autonomous entity. Priority, strength and depth may blur when autonomy is framed under a doctrine of shared sovereignty. Although differences between sovereignty and autonomy often seem to be just a matter of degree (especially to the external observer), sovereignty tends to be more related to ultimate control and, thus, to the notions of competence-competence and of constituent power.[20]

Distinguishing *sovereignty* from *constituent power*

The idea of sovereignty tends to be broader than that of *pouvoir constituant*, since not all manifestations of sovereignty are necessarily expressions of constituent powers. For instance, to declare war and states of emergency is often deemed as a manifestation of sovereignty, but it may not be considered as an expression of constituent power if exercised by the constituted powers in accordance with the current

18 See BOSSACOMA, P. *Justícia i legalitat de la secessió*, §§ 1.2, 3.6.3. BOSSACOMA, P. *Secesión e integración en la Unión Europea*, §§ 5, 10.

19 See TOMÁS Y VALIENTE, F. "Soberanía y autonomía en las Constituciones de 1931 y 1978" or "Sobirania i autonomia en la Segona República i en la Constitució del 1978", in FOSSAS, E. (dir.) *Les transformacions de la sobirania...*, ch. 2.

20 Having said all that, there might be circumstances in which a sovereign entity has less actual competences (i.e. real powers to make present and meaningful changes) than a non-sovereign but autonomous entity.

constitution. Nevertheless, constituent power is such a relevant species of the broader spectrum of sovereign powers. Indeed, the question of where the constituent power lies is strongly related to the question as to where ultimate sovereignty rests.[21]

Distinguishing *sovereignty* from *the right to secede*

Present sovereignty, meaning where sovereignty and sovereign powers currently lie, is different from the right to separate or withdraw from an existing polity. A unit that holds a constitutional right to secede is not necessarily sovereign from a static perspective, either internally or externally. However, if one main sovereign power is the power to transform or re-shape the constitutional order, the constitutional right to secede could be a sort of recognition of a potential, latent sovereignty. If a right to secede is properly constitutionalized, it can then be understood as a type of constitutional amending procedure. If this is so, it may acknowledge certain decentralization of the constituent power and some shared present sovereignty.[22]

> "The idea of sovereignty tends to be broader than that of 'pouvoir constituant', since not all manifestations of sovereignty are necessarily expressions of constituent powers"

21 See SIEYES, E. *Qu'est-ce que le Tiers état?*, ch. V.

22 If a constitutional right to secede is considered a type of constitutional amending procedure, it may symbolize a certain decentralization of the constituent power.

3 Distinguishing types of sovereignty

Distinguishing *internal* from *external* sovereignty

Internal sovereignty, or sovereignty under internal law, is identified with the supreme power towards the population in its territory. This sovereignty faces inwards and tends to be recognized from within. Conversely, external sovereignty, or sovereignty under international law, is identified with a supreme power in a negative sense, namely independence. This sovereignty faces outwards and tends to be recognized from outside.[23] Obviously, both perspectives of sovereignty are related in the sense that sovereignty is the plenary legal competence for running the internal affairs of the State under international law. Rather than simply limiting sovereignty, international law is a superior legal order which ensures that all States enjoy equal sovereign powers and status. Hence, external sovereignty, meaning independence and thus non-intervention, protects internal sovereignty. Internal (inside) and external (outside) are then just perspectives of a whole idea.[24] Yet, there can be situations where internal and external sovereignty do not fully coincide.[25] On the one hand, a political entity can enjoy effective internal sovereignty without being recognized as a State and thus lacking full external sovereignty. On the other hand, a State can be recognized as such without effectively controlling its population and territory.[26]

"Rather than simply limiting sovereignty, international law is a superior legal order which ensures that all States enjoy equal sovereign powers and status"

23 HEGEL *Philosophy of Right*, §§ 278-340. Krasner proposes to substitute the classic distinction between internal and external sovereignty distinguishing four types: domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty. See KRASNER, S.D. *Sovereignty*, ch. 1.

24 KELSEN, H. *Teoría General del Estado*, § 20.D.

25 The lack of coincidence may be for good reasons (for example, deny recognition to unjust factual situations), not so good reasons (such as for particular political or economic interests) or more technical reasons (as the significant decentralization of international law that makes it difficult to have a global decision in this as well as many other issues).

26 For instance, after the fall of Saddam Hussein, while the Kurds in Iraq had no external sovereignty, Iraq had no effective control of the Kurdish population and territory.

Distinguishing *vertical* from *horizontal* dimensions of sovereignty

While the vertical dimension is related to the territorial division of powers, the horizontal dimension tends to refer to the separation of powers among branches of government. Under the constitutional law of liberal-democratic States, the horizontal dimension of sovereignty shall be exercised by different branches either in strict separation or in a more overlapping fashion grounded on the idea of checks and balances. In addition, (con)federal and multinational doctrines tend to divide power vertically.[27] Under international law, the vertical dimension of sovereignty is heavily concentrated at the State level, albeit allowing States to transfer sovereignty to lower and upper levels of government. In particular, by means of international treaties, under the international norm *pacta sunt servanda*, States may transfer sovereign powers to international organizations. International law, nonetheless, tends to neither force nor incentivize the division and dispersion of sovereignty.[28]

"While the vertical dimension is related to the territorial division of powers, the horizontal dimension tends to refer to the separation of powers among branches of government"

Distinguishing *juridical* from *political* conceptions of sovereignty

In its origins, many proponents of the liberal State appealed to and advocated for the sovereignty of the constitution or the sovereignty of the law.[29] The

27 See TIERNEY, S. *Constitutional Law and National Pluralism*. BOSSACOMA, P. "An Egalitarian Defence of Territorial Autonomy".

28 Against that, some cosmopolitans such as Pogge claim more upward and downward distribution of sovereignty under international law and politics. Intergovernmental bargaining rather than having a single dominant level should be the way to deal with (ultimate) conflicts. Internal constitutional struggles between the three branches of government, often without a clear final decision-maker, point out that this possibility, though difficult, should be pursued. Constitutional democracies with no clear sovereign branch of government have proven to be at least as enduring as autocratic regimes. Constitutional crises within the former do not need to be frequent nor unresolvable. POGGE, T.W. "Cosmopolitanism and Sovereignty", pp. 57-61.

29 "(I)n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other." PAINE, T. *Common Sense*, ch. 3. This liberal doctrine of the sovereignty of the law is grounded on the dualism between Law and State. Kelsen, however, defends another kind of juridical sovereignty based on the monism between State and Law. The State is a personification of the legal order. Rather than the former submitted to the latter, they are in essence the same. This is because, according to Kelsen, all States, including those that are illiberal, are law States, since the legal order identifies the authority and the way of

constitution they envisioned implied the separation of and legal limits on public powers.[30] Only States under such type of constitution would be a *Rechtsstaat*, a State based on the rule of law. This would be a form of juridical sovereignty for preventing political abuses of sovereignty.

> "Political sovereignty is more related to the notion of constituent power, whereas juridical sovereignty is more related to constitutional amending power"

In contrast to such legalistic theories, for Schmitt sovereignty is a political power that allows for departing from constitutional provisions and other laws.[31] Political sovereignty is more related to the notion of constituent power, whereas juridical sovereignty is more related to constitutional amending power.[32] While the former rests more on legitimacy and facticity, the latter depends more on legal procedures and authority.

Distinguishing sovereignty in *ordinary times* from sovereignty in *extraordinary times*

The doctrine of the sovereignty of the law seems to work better in ordinary times than in those extraordinary times when the constitution and the legal order are strongly challenged or transformed. The previous Constitution may be disregarded and a new Constitution may be the final product of the dispute. In this vein, according to Schmitt, sovereignty is the political power that is exercised and prevails over the others in existential conflicts and exceptional moments, warning that these political conflicts cannot be resolved in a judicial procedure.[33] In times of peaceful order, however, people's expressions of sovereignty are rare and unnecessary. The silence of the holder of constituent power may signify the enduring consent to the existing constitution.[34] In extraordinary times, claiming constitution-

exercising it. All States, including those that are liberal, are coercive legal orders. KELSEN, H. *Teoría General del Estado*, § 20.G.

30 As Article 16 of the 1789 French Declaration of the Rights of Man and Citizen famously proclaimed: "Any society in which the observance of rights is not assured, nor the separation of powers defined, has no constitution".

31 See SCHMITT, C. *Constitutional Theory*, §§ 8, 11.

32 Indeed, several authors claim that the constituent power should be distinguished from the constituted power to amend the constitution. See SCHMITT, C. *Constitutional Theory*, §§ 8, 11. MUÑOZ MACHADO, S. *Vieja y nueva Constitución*, p. 191.

33 SCHMITT, C. *Constitutional Theory*, p. 389.

34 *Ibid.*, p. 132.

making power, the people may awaken to re-write the Constitution and re-shape the constitutional order.[35]

Distinguishing *national* sovereignty from *popular* sovereignty

As seen, many liberals used to designate the constitution as sovereign. Since the idea of the sovereignty of the law may not have convinced the revolutionary masses, national sovereignty could be more compatible with it than popular sovereignty. Nation is a more abstract idea than people. While national sovereignty is in a sense compatible with the constitution as the sovereign, popular sovereignty is more inclined to grant broader powers to the people. It confers, in particular, transformative power on the people to depart from and change the current legal order. Hence, the demand for and the rise of democracy substituted national sovereignty for popular sovereignty. On the other hand, national sovereignty has taken other usages in constitutional law such as: the concentration of sovereignty and especially of constituent powers in the hands of the whole nation (rather than minority nations, self-governing units or other sections of it); the prevention of certain power-sharing arrangements between the State (as a nation) and other territorial units; and finally the articulation of rights and processes of self-determination and secession of sub-State minorities.[36] In short, national sovereignty has been used to identify which people(s) are sovereign.[37]

"In extraordinary times, claiming constitution-making power, the people may awaken to re-write the Constitution and re-shape the constitutional order"

35 For a similar doctrine but within a contemporary liberal democratic approach, see ACKERMAN, B. *We the People.*

36 "A process of national assertion has gained ground in a way not seen in Europe for a long time; a form of national sovereignty that precludes power-sharing with higher or lower authorities has been sought or proclaimed, in particular in states born out of secession, and the growth of nation-states has been unprecedented for such a short period." VENICE COMMISSION, *Self-Determination and Secession in Constitutional Law*, 1999. See KRAUS, P.A. "Democratizing Sovereignty".

37 In this vein, ALBERTÍ, E. "Sobirania i autonomia en el sistema constitucional espanyol", in FOSSAS, E. (dir.) *Les transformacions de la sobirania...*, pp. 308-9.

Distinguishing *formal* sovereignty from *material* sovereignty

The material concept of sovereignty attempts to identify a catalogue of basic competences and powers related to (or derived from) sovereignty such as the power to write and re-write the constitution, the power to legislate, the power to set main political objectives, the power to lead the public administration, the power to conduct international relations and to make and unmake international treaties, the power to declare war and states of emergency, the power to adjudicate, and so forth. In contrast to this more functional, pragmatic approach to sovereignty, the formal concept of sovereignty aims to grasp the essential idea beneath this catalogue, namely that sovereignty implies a juristic and political order that is supreme, effective, consistent, complete. It is also the final source of internal validity of all particular competences and powers.[38]

Distinguishing the *subject* from the *object* of sovereignty

Some constitutional historians and theorists believe it was and still is of paramount importance to distinguish the power holder (subject) from the nature of that power (object). When the debate focused on the idea of sovereignty (i.e. the object), the possibility of discussing who the holder of that power should be (i.e. the subject) opened up.[39] Beyond history, this distinction might provide conceptual and deliberative clarity. If the debate focuses on who the sovereign is, the answers seem (more inclined) to presuppose the existence of a final, absolute, independent, indivisible political power. In contrast, if the debate is more concerned with what sovereignty is, the answers could (be more inclined to) question the mentioned attributes and inquire about the existence and nature of such power and perhaps qualify, relativize and distribute it. Likewise, focusing on the object rather than the subject of sovereignty may favour juridical conceptions of sovereignty.[40]

38 See KELSEN, H. *Teoría General del Estado*, § 20.H.

39 ARBÓS, X. "Orígens i evolució del concepte de sobirania", in FOSSAS, E. (dir.) *Les transformacions de la sobirania...*, p. 33.

40 Having said that, one may end up reaching similar approaches when focusing on the subject as when focusing on the object.

4 Is sovereignty a vanishing idea in international law and politics?

A definition of sovereignty under international law

James Crawford understands sovereignty as "the plenary legal competence that States prima facie possess" under international law.[41] Sovereignty is, therefore, not the origin of the State, but the legal consequence of statehood. Such plenary competence shall be in accordance with international law, which has the specific function of establishing the spheres of validity (territorial, personal, material and temporal) of the legal orders of the various States.[42] This is meant to ensure that the plenary legal competence is exercised within its jurisdiction, with due respect for the jurisdiction of other sovereign States. In a less juristic fashion, one may say that sovereignty is a question of status within the international society.[43] This is to say that sovereign States are the main subjects and, *par excellence*, legislators of the international society.

A definition of State under international law

For Kelsen, a State is a group of individuals living on a definite territory organized under an effective and independent government. Therefore, a State has three essential elements: population, territory and an independent effective government. A government is independent if it is not under the control of the government of another State and is effective if it is able to procure obedience to the coercive order it issues.[44]

Sovereignty under the United Nations

Article 2 of the Charter of the United Nations provides that the Organization and its Members shall act in accordance with "the principle of the sovereign equality of all its Members". Yet, the UN Charter stipulates other principles, norms and rules that ought to be balanced with that principle. What is more, note that by

41 CRAWFORD, J. *The Creation of States in International Law*, p. 89.

42 See KELSEN, H. *Principles of international law*, part III.

43 In similar vein, WTE/JHR "European Sovereignty".

44 KELSEN, H. *Principles of international law*.

qualifying sovereignty as *sovereign equality* of all UN Members, the Charter prevents an interpretation of State sovereignty that could override the sovereignty of other States. By implication, State law shall respect international law, for the latter regulates the range of State sovereignty. The Resolution of the UN General Assembly 2625 (XXV), on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, reaffirms "the basic importance of sovereign equality" and stresses that "the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations". Hence, the United Nations upheld sovereignty in a relative sense.

> "Article 2 of the Charter of the United Nations provides that the Organization and its Members shall act in accordance with 'the principle of the sovereign equality of all its Members' "

Principles of international law

Sovereignty is, according to Cassese, one of the fundamental principles of international law together with the principles of non-intervention, of self-determination of peoples, of prohibition of illegal use of force, of peaceful settlement of disputes, of co-operation, of good faith and of respect for human rights.[45] Accordingly, the principle of sovereignty shall be balanced especially with these other principles.[46] Interestingly, if due weighting is reached, it can make the principle of sovereignty more alive and attractive in contemporary

45 CASSESE, A. *Self-Determination of Peoples*, pp. 333-7. See, in similar vein, Articles 1 and 2 of the Charter of United Nations.

46 Westphalian sovereignty, for instance, assumed two behaviours that should not be compatible with a due balance of those principles. In the inner sphere, that the sovereign State could treat its citizens and minorities the way it deemed appropriate, even if this entailed human rights violations. In the outer sphere, that a sovereign State could wage war for reasons of self-interest such as an expansion of power or extension of territory. As a result of the tragic external and internal events surrounding the World Wars, sovereignty has been qualified.

"While in international, European and constitutional law it may fall into disuse, in political theory and discourse it may enjoy renewed emphasis"

law and politics. State sovereignty may be more alluring if it is conceived in a more temperate and gradual fashion which considers, for instance, that just States ought to enjoy higher levels of sovereignty than unjust States.[47]

Changing is not vanishing

Sovereignty is a mutable, vague, ambiguous idea but it does not seem to be disappearing. As constitutional history shows, flexible, open and even ambiguous constitutional clauses are generally more resistant to the passage of time. This is to say, the word may remain as long as the concept is capable of including novel conceptions and adapting to new phenomena. Notwithstanding the changes and transformations, sovereignty continues to be a powerful idea. A classic but updated international law treatise reads as follows:

> Despite repeated suggestions of the 'death' of sovereignty –or its irrelevance– its normative basis within international law remains. Indeed, *the system is ordered such that entrenched ideas are unlikely to succumb, as distinct from being modified through practice or through the accretion of new ideas and values*. Such modification or accretion is at the present time dependent on the will of states, and it is not difficult to predict that sovereignty will retain its hold on the international plane for the foreseeable future.[48]

Perhaps some aspects of sovereignty will endure while others not.[49] Perhaps the idea will persist in some fields more than others. While in international, European and constitutional law it may fall into disuse, in political theory and discourse it may enjoy renewed emphasis. Having said that, public law and politics are so close in their apexes that in the long run they tend to converge and mingle.

47 See BEITZ. C.R. *Political Theory and International Relations*, part 2.

48 BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, p. 13. Emphasis added.

49 See KRASNER, S.D. *Sovereignty*.

5 Is the idea of sovereignty vanishing in the European Union?

A particular sphere of international law and politics where sovereignty was thought to be disappearing was within the European Union. Lately, however, distinct territorial units reclaim their sovereignty. After analysing how EU law and politics are generally elusive about sovereignty, it will be observed that sovereignty plays a role in significant legal and political texts at the State level.

Primary EU law

The founding treaties, especially the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), are the prime source of EU law. In them there is no mention of the words *sovereignty* or *sovereign*.[50] Article 1 of the TEU provides that the High Contracting Parties establish among themselves a Union "on which the Member States confer competences to attain objectives they have in common". Three ideas can be inferred from this: (1) that the Member States, self-proclaimed *High Contracting Parties* in capital letters, are unanimously constituting the Union – the Union is thus not constituting itself from any act of self-determination; (2) that competences, meaning legal powers, are attributed to the Union to pursue *their* common objectives – these seem to be the common goals of the High Contracting Parties more than the general interests of the Union and its citizens; (3) that these legal powers attributed unanimously to the Union by its Member States seem quite distant from the mentioned "plenary legal competence" that international law presumes in the hands of States. The Union would still be, according to this, an international organization based on the international norm *pacta sunt servanda*. Member States retain much of their sovereignty by means of their primordial status within the Union, keeping the position of *masters of the Treaties* (in the terms of the German Constitutional Court) and having a decisive seat in Council. In a less juristic approach, sovereignty exercised from the Union level may even strengthen some Member States' powers and authority.[51]

50 Following the tendency of previous founding Treaties, with few irrelevant mentions.

51 In similar vein, GRASA, R. "Globalització, sobirania i interdependència", in FOSSAS, E. (dir.) *Les transformacions de la sobirania...*, pp. 246-7.

Secondary EU law and political resolutions

The words *sovereignty* or *sovereign* found are often related to third States, such as in resolutions, decisions or regulations concerning the need for respecting the sovereignty of Ukraine. For example, in January 2015, the European Parliament expressed its "full solidarity with Ukraine and its people" reiterating "its commitment to the independence, sovereignty, territorial integrity, inviolability of borders and European choice of Ukraine".[52] In other instances, the Union requires third countries to respect the sovereign rights of one of its Member States, as Parliament did in November 2014 when it urged Turkey "to refrain from any violations of the sovereign rights of the Republic of Cyprus".[53] In other circumstances, EU directives and regulations specify that their provisions will respect the sovereign rights of the Member States over a particular field.[54] In these cases, sovereignty may work as a limit to an eventual expansive interpretation of the scope of EU law. In some proposals to advance European integration, sovereignty may also be mentioned to defend the compatibility of further integration and State sovereignty.[55] These are some noteworthy uses of the terms sovereignty and sovereign detected in the laws and political resolutions of the Union.

EU case law

In the 1964 *Costa v ENEL* case, the European Court of Justice ruled the following:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a *limitation of sovereignty* or a transfer of powers from the States to the

52 European Parliament resolution of 15 January 2015 on the situation in Ukraine. In similar vein, COUNCIL DECISION 2014/145/CFSP and COUNCIL REGULATION (EU) No 269/2014, both of 17 March 2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

53 European Parliament resolution of 13 November 2014 on Turkish actions creating tensions in the exclusive economic zone of Cyprus.

54 COUNCIL DIRECTIVE 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply stipulates in the preamble that "the sovereign rights of Member States over their own natural resources are not affected by this Directive".

55 European Parliament resolution of 15 December 2015 on Towards a European Energy Union.

> Community, *the Member States have limited their sovereign rights*, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. (...) The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a *permanent limitation of their sovereign rights*, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[56]

In this case, the Court affirmed the *definitive* (in the French, Italian and Spanish versions) or *permanent* (in the English version) limitation of the sovereignty of the Member States resulting from the foundation of the European Community or their integration into it. Although the limitation was deemed definitive or permanent, it does not necessarily mean perpetual or eternal.[57] Definitive as permanent seems to refer to the lack of any predetermined temporal limits, but not to the impossibility of terminating or withdrawing from the Union. In this respect, there is no perpetual transfer of sovereignty like that ruled by the US Supreme Court in *Texas v. White*:

> But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States. (...). The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. *The act which consummated her admission into the Union was something more than a compact; it was the*

"The Court affirmed the 'definitive' (in the French, Italian and Spanish versions) or 'permanent' (in the English version) limitation of the sovereignty of the Member States resulting from the foundation of the European Community"

56 Emphasis added.

57 BOSSACOMA, P. *Secesión e integración en la Unión Europea*.

> *incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States*. There was no place for reconsideration or revocation, except through revolution or through consent of the States.[58]

In any case, the Treaty of Lisbon, signed in 2007, provided for the first time that Member States hold a right to withdraw from the Union (Article 50 of the TEU).[59] The Treaty did not only recognize this right, but it also regulated the exit procedure, submitting the separation to a consensual procedure up to a certain period of time after which the Member State may leave without having reached an agreement with the Union.[60] If there is an option to exit, with or without the consent of the Union and its Member States, this may imply that there is an option to terminate the Union. If the Union is not perpetual regarding the withdrawal of an individual Member State, neither does it seem to be perpetual in relation to a collective decision to terminate the Union. Whilst the Union cannot destroy its Member States, the latter can exit and terminate the former.

Member State basic laws, doctrines and opinions

The first article of the Italian Constitution provides that "sovereignty belongs to the people, who exercise it in the forms and within the limits of the Constitution". Article 11 consents, "on conditions of parity with the other States, the limitations of sovereignty that may be necessary to an order ensuring peace and justice among Nations". The Italian Constitutional Court (Judgement 183 of 1973) held that Italy and the rest of the founding Member States conferred and recognized certain sovereign powers to the European Economic Community, which

"The Treaty of Lisbon, signed in 2007, provided for the first time that Member States hold a right to withdraw from the Union (Article 50 of the TEU)"

58 Emphasis added.

59 Article 50 of the TEU is clearly inspired in Article I-60 TCE of the failed Treaty establishing a Constitution for Europe.

60 See HILLION, C. "Leaving the European Union, the Union way". BOSSACOMA, P. *Secesión e integración en la Unión Europea*, § 3.

was constituted as an institution characterized by an autonomous and independent legal order. With this consideration, the Italian Court acknowledged the previous ruling of the European Court of Justice in *Costa v ENEL*. These limitations on sovereignty, according to the Italian Court, find the corresponding powers acquired within the larger Community of which Italy is part. This last statement illustrates the changing but preserved Italian sovereignty by means of a primordial status within the Union. The passage from an individual to a collective exercise of sovereignty.

"In Article 79.3, the Bonn Basic Law (i.e. German Constitution) sets several limits on constitutional reform, such as federalism, human dignity, democracy and popular sovereignty"

In Article 79.3, the Bonn Basic Law (i.e. German Constitution) sets several limits on constitutional reform, such as federalism, human dignity, democracy and popular sovereignty. This eternity clause is of paramount importance to comprehend the ruling of the Federal Constitutional Court on the Treaty of Lisbon (*2 BvE 2/08*). For the German Court, accession to a European federal State would require a new German constitution, which would allow for relinquishing the sovereign statehood safeguarded by the Basic Law. Conversely, the Court considered that the EU continued to be a union under international law, built upon the permanent consent of the sovereign Member States. According to the Court, the Constitution of Germany only allows for attributing sovereign competences to the Union provided that the competence to decide on competences is not transferred to it. In other words, shared-sovereignty is fine as long as the attribution is controlled, in the last instance, by the sovereign Member States.

Article 3 of the French Constitution provides that "national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum". "No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof", continues the article. Accordingly, sovereignty lies with the French citizenry as a whole. Likewise, Article 1.2 of the Spanish Constitution reads that "national sovereignty belongs to the Spanish people, from whom all State

"According to the Court, the Constitution of Germany only allows for attributing sovereign competences to the Union provided that the competence to decide on competences is not transferred to it"

"The principle of national sovereignty has not generally been used with the same intensity upwards (to the EU) as downwards (to sub-State peoples)"

powers emanate." Although national and popular sovereignty are linked in these provisions, it has already been pointed out that national sovereignty may serve to identify which people(s) are sovereign. The principle of national sovereignty has not generally been used with the same intensity upwards (to the EU) as downwards (to sub-State peoples). For instance, the Constitutional Court of Spain has insisted for decades that because sovereignty rests with the Spanish nation as a whole, territorial units within it are only holders of a limited right to autonomy.[61] Therefore, while national sovereignty has been used to prevent the infra-State penetration of (con)federal and multinational conceptions of shared-sovereignty, it has not been used, at least with the same intensity, in relation to supra-State doctrines of transferred-sovereignty such as that of the European Court of Justice in *Costa v ENEL*.

Be aware, however, that the French Constitutional Council (Decision of 19 November 2004) ruled that some provisions of the Treaty establishing a Constitution for Europe which affected the essential conditions of the exercise of national sovereignty required prior revision of the French Constitution. Having said that, the Council considered that the enshrinement of a right to withdraw, together with other provisions such as those pertaining to the entry into force and the revision of the Treaty, meant that the Treaty establishing a Constitution for Europe maintained the nature of international treaty. The Spanish Constitutional Court (Declaration 1/2004) alluded to the right to exit to uphold the primacy of EU law over State law. *Primacy* was accepted provided that the *sovereignty* of the State and the *supremacy* of the core principles of the Spanish Constitution were respected by EU law. Although these constitutional Courts believe that the right to unilateral withdrawal tells much about the nature of the Union and its founding compact, it actually does not. On the one hand, both confederal and federal States can recognize a right to secede of some of its components.[62] On the

61 See TOMÁS Y VALIENTE, F. "Soberanía y autonomía en las Constituciones de 1931 y 1978" or "Sobirania i autonomia en la Segona República i en la Constitució del 1978", in FOSSAS, E. (dir.) *Les transformacions de la sobirania...*, ch. 2. SOLÉ TURA, J. *Autonomies, Federalisme i Autodeterminació*.

62 On the compatibility of the recognition of a constitutional right to secede with federalism, see NORMAN, W. *Negotiating Nationalism*, pp. 175-211. NORMAN, W. "From quid pro quo to modus

other hand, international law does not provide a general right to withdraw from international organizations, but leaves this to the founding treaty and the will of the contracting parties.[63]

"A fundamental doctrine of British constitutionalism stipulates that sovereignty lies with Parliament in Westminster"

A fundamental doctrine of British constitutionalism stipulates that sovereignty lies with Parliament in Westminster (or more precisely, with the Crown in Parliament).[64] This fundamental principle of the English and then British constitution was famously summarised by Dicey as meaning that the monarch in Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament".[65] This doctrine, still believed to be up to date, for a long time managed to avoid ideas of popular sovereignty and the problem of identifying the people(s) who hold it.[66] The fall of the British Empire, the devolution of

vivendi...", pp. 191-201. KELSEN, H. *Teoría General del Estado*, § 328. BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 3.1.

63 See Articles 54 and 56 of the Vienna Convention 1969 on the law of treaties. Having said that, the Praesidium of the European Convention commented the following in relation to the right to withdraw from the Union: "while it is desirable that an agreement should be concluded between the Union and the withdrawing State on the arrangements for withdrawal and on their future relationship, it was felt that such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance." (CONV. 648/03). Later the Praesidium insisted: "since many hold that the right of withdrawal exists even in the absence of an explicit provision to that effect, withdrawal of a Member State from the Union cannot be made conditional upon the conclusion of a withdrawal agreement. Hence the provision that withdrawal will take effect in any event two years after notification. However, in order to encourage a withdrawal agreement between the Union and the State which is withdrawing, Article I-57 provides for the possibility of extending this period by common accord between the European Council and the Member State concerned." (CONV. 724/1/03).

64 See LEYLAND, P. *The Constitution of the United Kingdom*, pp. 45-65.

65 See DICEY, A.V. *Introduction to the Study of the Law of the Constitution*, pp. 1-137.

66 KEATING, M. *The Independence of Scotland*, pp. 26, 38. In contrast, in Scotland there is a long-standing principle of political morality that holds a sort of (ultimate) sovereignty of the people. This principle traces back to the 16th century writings of George Buchanan and it re-emerged with vigour during both the devolution process of late the 20th century and the independence process of the early 21st century. See BUCHANAN, G. *De Jure Regni Apud Scotos.* The 1988 Claim of Right for Scotland. The 2014 "Scottish Independence Bill: A consultation on an Interim Constitution for Scotland". After Article 2 of the draft bill proclaiming the sovereignty of the people, Article 3 read: "In Scotland, the people have the sovereign right to self-determination and to choose freely the form in which their State is to be constituted and how they are to be governed. All State power and authority accordingly derives from, and is subject to, the sovereign will of the people, and those exercising State power and authority are accountable for it to the people." MacCORMICK,

powers and the quest for independence in Scotland, European integration and disintegration, and the increasing use of referendums have raised debate on whether popular sovereignty ought to play a role and which peoples should have sovereign voice.[67]

Let us consider some passages of the majority opinion of the British Supreme Court in *R v Secretary of State for Exiting the European Union* (Judgement of 24 January 2017). Since it was the British Parliament that consented the primacy and direct effect of EU law, which would "only last so long as Parliament wishes", the Law Lords did not accept that the rule of recognition underlying UK laws had been modified by the European Communities Act 1972, nor would the former be changed by the repeal of the latter. The idea of sovereignty and, in the particular British case, the doctrine of parliamentary sovereignty are indeed closely related to the rule of recognition theorised by Herbert Hart, by reference to which all legal norms are validated in a specific legal system. The rule of recognition, according to Hart, identifies the sources of the law in a specific legal system and, at the same time, works as a criterion of the validity of the legal norms within that system.[68] For the Supreme Court, since the British Parliament is sovereign, it can make and unmake EU law to enjoy a status in British domestic law. This is to say, whether EU law maintains or not such attributes of internal effect and primacy is up to the British Parliament to decide. In the final analyses, the Court does not seem to condition such power to terminate the domestic effects of EU law to the right to withdraw provided in Article 50 of the TEU, but to the very doctrine of the sovereignty of the British Parliament.

In sum, a substantial part of sovereignty or of sovereign powers seems to remain in the hands of the Member States rather than in the Union's.

N. *Questioning Sovereignty*, chs. 4, 8. TIERNEY, S. *Constitutional Law and National Pluralism*, pp. 109-17.

67 See TIERNEY, S. *Constitutional Referendums*. TIERNEY, S. *Constitutional Law and National Pluralism*.

68 See HART, H.L.A. *The Concept of Law*, ch. VI.

6 Visions of sovereignty in the context of the European Union

Different visions of sovereignty may generate different visions of the Union. In this section, seven visions will be identified. The following are only ideal types which, in the real world, are rarely found in a pure form but combined in different ways.[69]

"Different visions of sovereignty may generate different visions of the Union"

1. *Statist*

Europe as a geographical space where States interact and cooperate with each other. It is a Europe of States without a political, social and cultural union. Accordingly, a European *nation of nations* is neither envisioned nor desired. Conversely, it may be compatible with a legal organization for trade and market purposes;[70] as well as with an organization for promoting peace within Europe. These were basically the main fields and objectives of the European Communities, although the word *community* may denote more ambitious aims.[71] Such statist vision has been linked to British conservativism, but it can also be traced to third countries where European integration has been rejected such as Norway and Switzerland. Lately, it has been expanded within many EU Member States, by the (often far) right and left.[72]

69 Inspired in Middelaar but with added and renewed visions. See VAN MIDDELAAR, L. *The Passage to Europe*. pp. 2-9.

70 In similar fashion to the European Free Trade Association (EFTA).

71 Notions such as society, association or organization may be more related to rational will, interest, agreement and cooperation, whereas the idea of community seems to endorse certain bonds of affection, common sympathies, shared memories or the will to live together beyond rational interest.

72 Quite surprisingly, Euroscepticism may grow by means of two apparently opposite criticisms: on the one hand, the Union has acquired too many powers and some should be devolved; on the other, the Union is submitted to the will of the States when it should have its own will.

2. *Confederal*

Europe united in a permanent round table of Member States. It is a table around which Member States are disposed to continuously agree on how to act together.[73] These agreements should be made by consent when delicate issues are at stake. This conceives the Union for the High Contracting Parties to seek their common goals, not the general interests of the Union as an entity with a separate and different will from the aggregate.[74] This vision of the Union may serve to protect or enhance the external sovereignty of the small and medium-sized Member States. Under such Union, States can safely remain the size they are or even reduce in size. If external sovereignty is understood as not only independence but also as power to influence, big Member States may gain it too (or recover what their empires once had). Nevertheless, this confederal vision of the Union has been criticized from some sub-State regions for being too biased and deferential to individual Member States' positions. The present issue concerning refugees and immigrants has raised similar complaints. Those criticisms wonder if there is a genuine will of the Union beyond the will of the Member States.

3. *Multinational*

This is a vision of a sort of (con)federal Union based not only on States but on several layers of government.[75] According to this view, sovereignty is to be shared across nations, be they majority or minority nations within a particular Member State. It is a Europe of peoples – more precisely, of sovereign, partly-sovereign and even non-sovereign peoples. Article 3 of the TEU stipulates that "the Union's aim is to promote peace, its values and the well-being of its

73 See VAN MIDDELAAR, L. *The Passage to Europe.*

74 See MORAVCSIK, A. *The Choice for Europe.*

75 For MacCormick, the right to self-determination of the politico-cultural communities that have evolved as nations can and should be recognized among the principles of justice that "set the terms of shared democracy in a large-scale confederal commonwealth like the European Community". Within Europe, "further levels of system-differentiation and partial mutual independence" can be recognized under the principle of subsidiarity. "The demise of sovereignty in its classical sense" opens opportunities for subsidiarity and democracy as essential mutual complements as well as for rethinking of problems about national identity. MacCORMICK, N. *Questioning Sovereignty*, pp. 188, 135.

peoples". The TEU's preamble encourages continuing "the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". However, peoples other than Member States have minor relevance and powers in the present Union.[76] If the EU cannot offer them significant forms of recognition and accommodation, it should be understanding towards their demands for *independence in Europe*.[77]

4. *Federal*

A Europe of citizens which mirrors the EU with federations such as those of the USA or Germany.[78] Since the citizens of these federations have strong national identification with the federal level of government, European federalists hope and endeavour to build a European *demos*.[79]

76 The Committee of Regions, which also includes municipalities, is far from those holding such multinational visions.

77 This is to say, deeming secession from a Member State and integration in the Union compatible. See, in this regard, BOSSACOMA, P. *Secesión e integración en la Unión Europea*.

78 The first provision of the failed Treaty establishing a Constitution for Europe started with the following words: "*Reflecting the will of the citizens* and States of Europe to build a common future, this Constitution establishes the European Union" (emphasis added). In the speech on "Why we need a United States of Europe now" (8 November 2012), Viviane Reding, the then Vice-President of the European Commission, lamented that the once celebrated vision of a *United States of Europe* fell into disuse after the 1993 Maastricht momentum. In December 2017, Martin Schulz, former President of the European Parliament and the then Leader of the Social Democratic Party of Germany, called Angela Merkel to work together towards a "United States of Europe". According to him, such European federation would be created by means of a constitutional treaty, written by a convention that would include civil society and the people. Member States unwilling to accept it would automatically cease to be part of the EU. In April 2018, in a speech on the Future of Europe before the European Parliament, the French President Emmanuel Macron claimed the need for a "European sovereignty" stronger than Member States' sovereignty, which should not replace but complement the latter. See President Macron's initiative for *A sovereign, united, democratic Europe* http://www.elysee.fr/assets/Initiative-for-Europe-a-sovereign-united-democratic-Europe-Emmanuel-Macron.pdf

79 Just like the national-identification of citizens has been concentrated in the Federation in the USA, a similar evolution could be expected over time in the EU. Beyond national identity, Jürgen Habermas envisions a future "Federal Republic of European States" based on a *constitutional patriotism* (*Verfassungspatriotismus*). His thesis claims that democratic citizenship need not be rooted in the national identity of a people but, instead, it requires that every citizen be socialized into a common political culture. HABERMAS, J. "Citizenship and National Identity" (1990), Appendix II to *Between Facts and Norms*, p. 500. However, shared political values do not suffice for different national groups to live together. Living together in a European nation of nations seems less artificial than constitutional patriotism but nation-building takes time, especially in peaceful and democratic contexts. Objections to constitutional patriotism may be found in VERGÉS, J. *La nació necessària*, p. 48-57. BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 1.4.2.

Direct election to the European Parliament and the gradual expansion of its powers were important institutional evolutions in this direction.[80] Giving the citizens a direct voice could help to create a people, a citizenry.[81] Of strong symbolic value, EU citizenship was later established.[82] "Every national of a Member State shall be a citizen of the Union", reads Article 9 of the TEU.[83] However, while in federal States federal citizenship tends to be primary and regional citizenships secondary, in the European Union Member State citizenship is primary and EU citizenship secondary.[84] In this respect, Article 9 of the TEU provides that "citizenship of the Union shall be additional to and not replace national citizenship".

5. *Pluralist*

A Europe with a plurality of sovereigns. This multiplicity of constituent units could encompass citizens, cultural groups, private associations, municipalities, regions, nationalities, States, Euro-regions and so on. These many sources of sovereignty would be organized in predominantly non-hierarchical ways with renewed emphasis on the principle of subsidiarity. This means conceiving the Union as a mosaic

80 Turnout for European Parliament elections, however, has been gradually declining from 62% in 1979 to 43% in 2014. http://www.europarl.europa.eu/elections2014-results/en/turnout.html Before any conclusion is raised, it should be studied whether similar phenomena can be traced within the Member States or whether the decline could be partially caused by the enlargement of the Union.

81 The 1973 Declaration on European Identity, agreed by the then Nine Member States' Premiers, proclaimed that "unity is a basic European necessity to ensure the survival of the civilization which they have in common" and the legal, political and moral values they have in common. They declared, in particular, their determination to "defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights", which are "fundamental elements of the European Identity". This Declaration was an important attempt to self-definition from the political summit.

82 See Maastricht Treaty of 1992.

83 Article 3 of the TEU provides that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". According to the same provision, regarding relations with the wider world, the Union shall contribute to the protection of its citizens.

84 "The citizenship is doubtless a 'thin' citizenship, the *demos* a 'thin' *demos*, for each depend upon a pre-existing statehood and membership of the Union only via member states". MacCORMICK, N. *Questioning Sovereignty*, p. 145. Although the European Court of Justice has set some limits based on principles on the Member States exclusive competence on nationality, this has not changed the characterization of the EU citizenship as secondary or thin. See, *inter alia*, Judgements *Janko Rottmann v. Freistaat Bayern* and *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*.

with no pre-determined order, a basically non-coercive organization. An ongoing kaleidoscope ever changing, ever re-constituting itself. Unfortunately, this seems an anarchic, potentially chaotic union. Public law needs some sort of hierarchy and coordination of powers and sources, certain centralization and institutionalization, and balance between persuasion and coercion. Moreover, feelings of fraternity and solidarity, which nurture redistributive policies, tend to be weaker in contexts of radical pluralism. Many might deem this vision to be a non-realistic utopia.

6. *Cosmopolitan*

Europe as a step towards the ideal of a World Government. This is a vision of supranational integration with the purpose of weakening the sovereignty of current States, believing that they have too often been the source of international disputes with tragic recourse to force. From the very beginning, the European Communities were a peace project – by means of jointly managing the war industries of coal, steel and atomic energy.[85] Back then there was even the failed project of a European army, which could have ended up terminating Member State armies.[86] Since 2015, new proposals have been discussed to create a European Defence Union and, in particular, the European Parliament claims that such Union "should ensure the maintenance of peace, conflict prevention and a strengthening of international security, in accordance with the principles of the UN Charter".[87] The cosmopolitan vision follows the premise that it is

85 In May 1950, Robert Schuman, in his declaration proposing the creation of a European Coal and Steel Community, stated: "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations." See, in very similar words, the Preamble of the Treaty constituting the European Coal and Steel Community.

86 In Paris in 1952, the six ministers of foreign affairs signed a Treaty establishing a European Defence Community. This Treaty failed to obtain Member States' parliamentary ratification, starting with the French. The Treaty was 'supranational in character'. In this respect, most troops in European territory were to be transferred to the Defence Community. Internal reasons (e.g. an alien and multilateral commandment and the alleged threat to Member States national sovereignty) and international reasons (e.g. the NATO alternative and a perceived weakening communist threat) may explain the failure to create an European Army. See VAN MIDDELAAR, L. *The Passage to Europe*, pp. 143-51, 228-30.

87 *European Parliament resolution of 22 November 2016 on the European Defence Union*. Although national sovereignty is believed to be an obstacle to moving towards a security and defence Union,

positive to enlarge the political, legal, economic and social borders in the direction of global governance.[88] The followers of this vision should not forget, however, that the ideal World State would (need to) be, according to eminent cosmopolitans such as Kant and Kelsen, a sort of federation.[89] What is more, some have argued that a system of many small States may be more beneficial for universal peace and the progress of humanity.[90]

7. *Functional*

A Europe of offices and technocrats. A coordinating Union based on expert opinion, economies of scale and without democratic troubles – with an independent and effective government in the shadows of public opinion and the mass-media. Such Union is expected to be elusive and sceptical about sovereignty.[91] Independent regulators, specialized agencies, standardizing interventions, expertise instead of politics, etcetera. Output rather than input legitimacy.[92] This vision promotes an invisible Union, silent but active. This vision would promote *much action with no ado*. A Union claiming to develop rational, efficient and fair policies without the need for politics.

in a later resolution the Parliament stressed that a common security and defence policy in line with the Treaties would not impinge on national sovereignty, for that policy would be driven by the Member States. Moreover, Parliament is convinced that there is no greater respect for sovereignty than defending the territorial integrity of the European Union through a common defence policy. *Resolution of 16 March 2017 on constitutional, legal and institutional implications of a common security and defence policy*. In similar vein, the Commission claims that having stronger and more sovereign Member States in a globalised world requires having greater cooperation and integration within the European Union, including on defence. EUROPEAN COMMISSION. *Reflection Paper on the Future of the European Defence*, June 2017, p. 11.

88 Article 3 of the TEU establishes that the Union, in its relations with the wider world, "shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

89 See "Perpetual Peace", pp. 102-5 and "The Metaphysics of Morals", pp. 165, 171. Both in: KANT *Political Writings*. KELSEN, H. *Peace through law*, p. 5, 9-10. In similar vein, POGGE, T.W. "Cosmopolitanism and Sovereignty", p. 63.

90 KOHR, L. *The Breakdown of Nations*.

91 The Secretary General of the EU Parliament claims that the EU "needs to organise sovereignty transfers based on proven needs and not on ideology". Klaus Welle believes that in a polity not based on *demos* but on pluralism "legitimacy is dependent on outcome and not on kinship". WELLE, K. "Europe and Sovereignty".

92 See SCHARPF, F.W. *Governing in Europe*.

Slogans such as *more experts, less politicians* may be attractive in countries were the latter are deemed corrupt and foolish. This vision of an absence of political sovereignty, however, can be promoted by powerful economic lobbies for whom freedom without public regulation and intervention give them market leeway. Big corporations are well aware that the welfare-state and democracy still live in vernacular polities and politics.[93]

7 Sovereignty as a potentially transformative idea

Transformative power of sovereignty

The notion of sovereignty wields enormous political power. In this vein, Kelsen warned that the concept of sovereignty has not usually been *used* for theoretical aims, but *abused* for particular political targets.[94] Appealing to sovereignty has huge transformative power that can be both progressive and regressive, both virtuous and vicious. By way of example, revolutionary political movements often invoke some sort of sovereignty as an ultimate source of power, especially since the appeal to natural law has declined. Since sovereignty is widely believed to reside

> **"Appealing to sovereignty has huge transformative power that can be both progressive and regressive, both virtuous and vicious"**

93 Although this statement is based on a theoretical intuition more than a statistical analysis, the former seems not so far from the latter. EU citizens vote more in their State elections than in the European elections and seem to consider the former more important than the latter. EU citizens are more satisfied with the way in which their democracies work at State level. In particular, citizens of more consolidated democracies tend to believe that their democracy works better than the European. The Public Opinion Monitoring Unit links such satisfaction and its results with factors of economic prosperity. See "Democracy on the move", 2018, pp. 40-7, 58-64. Eurobarometer Survey 89.2 of the European Parliament.

94 KELSEN, H. *Teoría General del Estado*, § 20.K.

"EU norms, resolutions and institutions usually avoid specifying where sovereignty rests, if sovereign powers are shared, and who speaks the final word"

with the people, it is a democratic driver that can challenge the current legal order.[95] Although in ordinary times democracy and law should be understood as two sides of the same coin, in extraordinary moments a democratic appeal to the dormant sovereign power of the people may be used to overcome the present legal system.[96]

Sovereignty and the mixed constitution of the Union

As observed, EU norms, resolutions and institutions usually avoid specifying where sovereignty rests, if sovereign powers are shared, and who speaks the final word. Different reasons might explain why the Union is generally elusive about sovereignty. One reason could be the radically democratic power of sovereignty, since the EU mixed constitution is far from being radically democratic. In the present Union, democracy normally manifests itself in quite indirect ways. There are no European-wide referendums, but State-wide referendums that have sometimes functioned as integrating barriers.[97] The European Parliament has only shared legislative powers with the Member States ministers meeting in the Council. The European Commission does not set the main political targets. The general political directions and priorities of the Union shall be defined by the Member States Premiers sitting in the European Council. These confederal institutional arrangements tend to result in negotiations and agreements happening behind closed-doors and seeking consensual decisions (by means of unanimity requirements, qualified majorities, long negotiations, veto powers, opting ins and outs, stick

"One reason could be the radically democratic power of sovereignty, since the EU mixed constitution is far from being radically democratic. In the present Union, democracy normally manifests itself in quite indirect ways"

95 Although sovereignty in ordinary legal terms should be ruled by the empire of the law and the Constitution, there is a sword of Damocles hanging from the ceiling which threatens the legal sovereign. This sword may represent, especially in democratic regimes, the popular will. Since the sword may fall and badly injure the law emperor, this puts pressure on adopting reforms and accepting transformations. The law ruler should be wise enough to be conscious of the weight of the people's sword to preserve the law empire.

96 See BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 3.7.1.

97 See BOSSACOMA, P. *Secesión e integración en la Unión Europea*, § 4.

and carrot strategies, and so forth). For all that, the public tend to see the Union as a faraway, boring, multilingual, technocratic, polyphonic, incomprehensible not to say obscure polity.[98] European people and peoples do not (yet) feel themselves as tied to a community of *fate* but rather to a union of *convenience*.[99]

Sovereignty and European popular democracy

Another reason to elude the idea of sovereignty in the Union could be to avoid the emergence of a European people. Beyond the EU mixed constitution and the search of consensus, perhaps some reject European-wide referendums due to the potential of a direct appeal to the citizens for creating a new *demos*, a community of fate. One European *voice* can turn to one European *will* and that will can generate a European *fate*. Once the voice of European people is expressed through a Union-wide referendum it is more difficult for the Member States' governments to impose their preferences. The choice of EU citizens as expressed through a European referendum might be different from that of the round table of the Member States' Executives. And some of them may fear that a more directly democratic Union could become too unified, centralized and majoritarian. Others might fear that a less confederal and consensual Union could foster internal conflicts, withdrawals and even disintegration. They may believe that referendums are democratic instruments of and for *demos-cracy* (government of the people), whereas

"Another reason to elude the idea of sovereignty in the Union could be to avoid the emergence of a European people"

98 See VAN MIDDELAAR, L. *The Passage to Europe*, pp. 300-9.

99 See WEILER, J. "La idea de que el Estado somos nosotros ha desaparecido". WEILER, J. "The Case for a Kinder, Gentler Brexit". Although in a community of fate (under a liberal-democratic approach) there can be deep divisions and conflicts, such divisions and conflicts are to be resolved within the framework of the Union, its Member States and their peoples, for they are attached to each other beyond rational interest. A union of convenience, in contrast, is a contingent project which depends on a material balance of costs and benefits. In a community with common sympathies, with feelings of belonging and with bounds that extend over generations, fraternity and solidarity can more naturally flourish than in a union merely based on rational choice.

representation, deliberation and consensus are tools of and for *demoi-cracy* (government of the peoples).[100]

Sovereignty and legal revolution

The EU lives through and for the Member States. They are still the primary sovereigns, the masters of the treaties, the holders of the European constituent power. The *pouvoir constituant* remains in the hands of the High Contracting Parties and keeps being treaty-making power which requires their unanimous agreement.[101] In the USA, the Articles of Confederation of 1777 were superseded by the Federal Constitution of 1787 by means of a *revolutionary reform*.[102] In the EU, no Philadelphia moment has succeeded nor is expected any time soon. The Union has not seized sovereignty. Sovereignty remains a political weapon in the hands of the States and national democracies.

"Sovereignty remains a political weapon in the hands of the States and national democracies"

100 See BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 3.4. BOSSACOMA, P. *Secesión e integración en la Unión Europea*, § 4.

101 See Article 48 of the TEU.

102 See ACKERMAN, B. *We the People (1). Foundations.*

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