



INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

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A SOVEREIGN EUROPE AS A FUTURE OF SOVEREIGNTY

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ABSTRACT: Since the Peace of Westphalia sovereign political entities have unexceptionally been States and sovereignty has been thus long seen as entirely inseparable from the State. Does this mean that Emmanuel Macron in his calls for “sovereign Europe” is, in fact, campaigning in favor of turning the EU into a State? Or is he, in his political fervor, simply committing a category error? This *In-sight* argues that neither is necessarily the case. The EU can be sovereign, without being a State.

KEYWORDS: European Union – territorial sovereignty – functional sovereignty – constitutionalism – pluralism – sovereign Europe.

I. DIVORCING SOVEREIGNTY FROM THE STATE

The times, they are changing. The actual social practices out there are changing too, and so are the concepts through which we have grown accustomed to comprehend, indeed to make sense, of our socio-political world. One of the key concepts of political modernity, its foundational concept as a matter of fact,¹ has been sovereignty. Sovereignty has been traditionally defined as an absolute, indivisible, unitary property of a territorially delimited political entity, which ultimately autonomously governs its internal affairs and enjoys equal independence externally in relation to other political entities.² Since the Peace of Westphalia sovereign political entities have unexceptionally been states. Consequently, it has been long argued that “sovereignty is entirely inseparable from the state,”³ so much

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¹ M. LOUGHLIN, *Ten Tenets of Sovereignty*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003, p. 80.

² J. BODIN, *Les six livres de la république*, Paris: Jacques du Puis, 1576.

³ See M. LOUGHLIN, *supra* note 1, at 73, quoting from C. LOYSEAU, *Traicté des Seigneuries*, Paris: Abel l'Angelier, 1614, p. ii.4.



so that: "*L'identité entre souveraineté et forme étatique est totale: toute entité souveraine est nécessairement un Etat et tout Etat est nécessairement souverain*".⁴ Staying faithful to this traditional notion of sovereignty, does this mean that Emmanuel Macron in his calls for "sovereign Europe" is, in fact, campaigning in favor of turning the EU into a State? Or is he, in his political fervor, simply committing a category error?

This short essay argues that neither is necessarily the case. The EU can be sovereign, without being a State. Sovereignty too can be reinterpreted without altering it beyond recognition and hence committing a category error. This becomes apparent if one, as we do, subscribes to a post-traditional conception of sovereignty.⁵ Rather than conceiving of sovereignty as an immutable concept,⁶ as a quasi of natural phenomenon,⁷ or abandoning it altogether,⁸ the post-traditional concept of sovereignty situates the traditional notion of sovereignty in the present socio-political context, by reinterpreting its conventional meaning, almost in a Dworkinian way, putting it in the best possible light all things considered.⁹

II. THE POST-TRADITIONAL CONCEPTION OF SOVEREIGNTY

Accordingly, sovereignty is conceived of as a speech act.¹⁰ It is a plausible claim to the ultimate legal and political authority¹¹ in designated policy fields and over subjects and objects in an identified space. Its plausibility derives from the acceptance by the audience, existing internally and externally of the claiming entity.¹² Since it is the acceptance of the claim to sovereignty, which determines a sovereign, not only States, but other entities can be sovereign too.¹³ This opens the way to severing the allegedly in-

⁴ A. PELLET, *Les fondements juridiques internationaux du droit communautaire*, in *Academy of European Law* (ed.), *Collected Courses of the Academy of European Law*, Brussels: Kluwer Law International, 1997, p. 229.

⁵ For a more in-depth discussion see M. AVBELJ, *Theorizing Sovereignty and European Integration*, in *Ratio Juris*, 2014, pp. 344-363.

⁶ R.O. KEOHANE, *Ironies of Sovereignty: The European Union and the United States*, in *Journal of Common Market Studies*, 2002, pp. 743-765.

⁷ For a distinction between natural and political concepts, see, R. DWORKIN, *Hart's Postscript and the Character of Political Philosophy*, in *Oxford Journal of Legal Studies*, 2004, p. 1 *et seq.*

⁸ N. MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999.

⁹ R. DWORKIN, *Law's Empire*, Cambridge: Harvard University Press, 1986.

¹⁰ N. WALKER, *Late Sovereignty in the European Union*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003.

¹¹ *Ibid.*, p. 18.

¹² A. JAMES, *The Practice of Sovereign Statehood in Contemporary International Society*, in *Political Studies*, 1999, p. 462; also G. SØRENSEN, *Change and Continuity in a Fundamental Institution*, in *Political Studies*, 1999, p. 592.

¹³ For a discussion of other functional sovereign entities under transnational law, see M. AVBELJ, *The European Union under Transnational Law*, Oxford: Hart, 2018.

herent link between State and sovereignty; as well as, and consequently, between sovereignty and territory. As a result, not only States as territorial entities are sovereign, but other functional entities, which exercise certain functions over designated fields, can be sovereign too. If territorially sovereign States recognize such a functional sovereignty on their territory, a situation, hardly imaginable in our modern political history, of multiple sovereigns on a single territory can occur. As we have argued elsewhere, we witness a move from singular to pluralist sovereignty.¹⁴

Not only is this precisely what has been taking place in the process of European integration, this post-traditional pluralist conception of sovereignty also justifies the growing number of references to a sovereign European Union in contemporary political and public discourse. A sovereign European Union, that “protects, empowers and defends”,¹⁵ is thus not necessarily a State. It might well be, but for the EU to protect, empower and defend, it does not need to adopt a statist form and divest the present Member States of theirs. The EU can be, as it presently is, a non-statist federation: a union.¹⁶ This is a pluralist legal and political form, composed of twenty-seven territorially sovereign States; of a functionally sovereign supranational level, which are all integrated into a common legal and political whole that is more than the sum of its non-exhausted constitutive parts.

III. A FUNCTIONALLY SOVEREIGN EUROPEAN UNION

The EU, hence conceived of, is a novel legal and political form, which merits the quality of sovereignty. Its dual sovereign characters, territorial and functional, are namely mutually-reinforcing. That, which can no longer be achieved by singular territorial sovereign entities: the States, can be ensured by a larger functional sovereign: the EU. The latter complements the States, indeed rescues them,¹⁷ and hence, to the objectively possible extent, safeguards the European way of life.¹⁸ As the geo-strategic balance continues to shift in favour of new powers and as the old transatlantic alliance still melts, the EU Member States increasingly experience the need for a sovereign European Union. We can therefore expect that in the future the number of competences exercised by the EU will grow. Its functional sovereignty will be hence strengthened.

As functional sovereignty is not in a zero-sum relationship with the territorial sovereignty of the States, which are not endangered, but empowered by the EU, the main question for the future is not going to be, contrary to what the concern appears to be at

¹⁴ R. BELLAMY, D. CASTIGLIONE, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe*, in *Law and Philosophy*, 1997, p. 422; see also N. WALKER, *supra* note 10, p. 18, referring to a constitutionally pluralist definition of sovereignty.

¹⁵ European Commission, Press release of 2 May 2018, EU budget: Commission proposes a modern budget for a Union that protects, empowers and defends, ec.europa.eu.

¹⁶ M. AVBELJ, *Theory of European Union*, in *European Law Review*, 2011, p. 818 *et seq.*

¹⁷ A. MILWARD, *The European Rescue of the Nation State*, Routledge, 2000.

¹⁸ European Commission, *Promoting our European Way of Life*, ec.europa.eu.

present, how to defend the remaining nucleus of the national territorial sovereignty. The question will be how to ensure the accountability of the increasingly functionally sovereign EU. As this, despite having and exercising many statist competences, is not a State, the rule of law and democracy mechanisms, indeed constitutionalism as such, cannot be simply mechanically translated from the statist environment to beyond the State.¹⁹ In the future, even more than today, we shall be thus witnessing new socio-political practices that will be giving rise to a new socio-political phenomenon of a functionally sovereign non-statist European Union. There can be no doubt that, both in practice and theory, there are exciting times ahead.

¹⁹ N. WALKER, *Post-national Constitutionalism and the Problem of Translation*, in J.H.H. WEILER, M. WIND (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, pp. 27-54.