



Sovereignty – Constitutional State¹

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Abstract. The basic categories of our times, including sovereignty and the constitutional state have undergone major contextual changes during the last two centuries. In this paper, the following aspects of this question will be analysed: the balance of power in Europe (I), the contextual changes of sovereignty (II), some contemporary dilemmas concerning sovereignty (III), the insubstantiality for sovereignty (IV), and, finally, the definitions of *Rechtsstaat*, of constitutional state and of the rule of law (V).

Keywords: balance of power, sovereignty, *Rechtsstaat*, constitutional state, rule of law

I. Balance of Power in Europe

The economic, legal and administrative literature all agree to the Nietzschean formula, that is “*Die Zeit war reif für Europa, aber Europa war nicht für die Zeit*”.

The basic categories of our times, including sovereignty and the constitutional state, have undergone major contextual changes during the last two centuries. In case we believe in the masterpiece construction of the international law, we have to accept that there was a balanced system of states in 19th-century Europe. This situation was preceded by the peace negotiations with Talleyrand in the centre who, in his Memoirs published in 1891, by defining usurpation and legitimacy, the rules of legitimacy in adjudicating and surrendering power – either by deducing from inheritance or the principle of election in the Western world –, unequivocally proved the now trivial thesis that “a government is legitimate if the power is conferred and exercised according to principles and rules accepted without question by those who must obey, and those who give orders respect that”.² The essayistic arguments of the memoirs explain everything that is essential to the Western world from the French Revolution to

1 The revised version of the paper presented at the Csíkszereda Campus of the Sapientia Hungarian University of Transylvania on 20 April 2012.

2 Ferrero 2002, 56–57.

the present. The tack of exercising power serves the protection of the nations. But no matter how legitimate the power is, those who exercise the power have to adapt to their times. And the times require that in the leading, civilized states the supreme power is exercised through bodies formed from among the governed. And this requires guarantees. These are: the inviolability of personal freedom, the freedom of the press, the independence of the judiciary, justice exercised by the public administration in certain cases, ministerial responsibility, only responsible persons can participate in advisory bodies etc.

This was the essence of Talleyrand's theory: legitimacy of state power is guarded by public law, public order and freedom. That is why Ferrero, Professor of the University of Geneva, in his cited monograph, claims that everything that has happened since 1789 was a huge, successful adventure that finally led to the Big Fear, the wars of the 20th century. Analysing this statement, German publisher Theo Sommer said that World War II had closed a period of 500 years, during which the fate of the whole world was decided in Europe. After that, Europe is no longer a global player, but only a regional actor.

With the American Grand Strategy at the end of the 20th century – the end of the bipolar world –, the West is the guarantee of prosperity, the guarantee of personal freedom. The sovereignty of the countries emerging from the Eastern bloc constitutes the real dilemma of unifying Europe and revolves questions around the future direction of the legitimacy of power such as the right to disagree or the unrestricted right of free elections. Is it really the end of the European balance-of-power politics, of the classical European model? Can the regional actor of today be successful on its path to a federal Europe?

II. The Contextual Changes of Sovereignty

1. The hypothesis of one of the main advocates of European integration – though it also indicates the negation of his statement that “it is impossible to solve Europe's problems between states that obstinately insist on retaining their full sovereignty” – has not yet been proven. Nevertheless, if we have a quick look at the key steps of the integration process, we may see the problems. The first stage is the establishment of the Economic and Monetary Union in 1992 and of the fiscal union in 2001 – with 11 states by the introduction of the common currency, the euro. As the leading economists put it – referring to Professor Ch. Goodhart (London School of Economics) –, the euro was the result of the collapse of the exchange rate mechanism emerged from the death of the European “currency snake”. But political motivations also played part in these developments. The common currency, which was a prerequisite of the French-German agreement, was not only the price for the German unity. It may be also viewed as a defensive

“foreplay” that enables the Western states to form a qualitatively distinct group from the Eastern states joining with future enlargements.

Subsequently, the Eastern enlargement of 2004, the financial crisis of 2008 and the internal crisis of the Union all contributed to the crisis of integration. This – with a slow reaction – resulted in a fiscal union with intergovernmental agreements in 2011. According to the analysis of András Inotai, professor of economics, three solutions may arise from this derivative crime:

– community control of the budgetary policy (this has already been realized by the supranational supervision system in 2012);

– ending the differences in competitiveness among the EU member states by transfer mechanisms in the benefit of the weaker periphery (at the moment, the EU allocates 1% of the national incomes to this end)

– further curtailing of functions of the nation-state towards the United States of Europe (USE).³

We have to note, however, that besides the scientific arguments there are also theories based on political interests. One outstanding example is the statement by British Nigel Farage from the Europe of Freedom and Democracy Group of the EP, who says that we have to help the periphery members to be able to leave the periphery. It is noteworthy that the English do not want to live in a Europe dominated by the Germans: “we have no economic or political interest to be a member of the European confederation”.⁴

2. Current developments make unavoidable the revival of the dogmatic concern on sovereignty. I do not intend to debate the extremely rich political science literature of the topic, but to elaborate on some conceptual elements only to discuss the needs justifying the reconsideration of the original meaning. The controversies surrounding the notion are also marked by the uncertainties around its origin. According to some political scientists, the “present tense” category dates back to the 16th century. For others – including myself – the right direction in searching the origin of the concept stems from professor R. C. von Caenegem from Gent, who originates the legal term “sovereignty” from the 12th century, when jurists declared that “*rex est imperator in regno suo*”. Any royal government is sovereign only within its own realm and no authority is above the authority of the emperor.⁵

Browsing the latest literature in political science, hereafter we rely on the *Államtan (Political Science)* by professor Péter Takács. This work uses a disciplinary approach for highlighting the scientific history of the legal nature of state and of state power. A dominant 19th-century German theory says that the subject of sovereignty is not a body but the nation as a whole. At the same time, constitutionalism has divided sovereignty among the different state institutions (bodies).

3 Inotai 2011.

4 Magyar Hírlap, 12 November 2011.

5 Caenegem 2008, 32–33.

Another approach is that of John Austin, who proclaimed the unrestricted nature of the sovereign power. This is extended even further by Dicey, who – in legal terms – describes it as a legally unrestricted legislative power. “In political terms, a body is sovereign in case the citizens follow its will as ultimate” – says Péter Takács in his summary.⁶

3. Finally, we quote the value judgement of F. A. von Hayek, who stresses the misinterpretation of the concept. According to Hayek, such misinterpretation is related to the connection of the concept to the sovereignty of the people. He says that the importance of the sovereignty lies not in its enjoyment by the people but in its unrestricted nature. Sovereignty is based on the preconception that it is an agreement consisting of voluntary subordination, since no power can exist without that.

It can be therefore concluded that the origins of connecting sovereignty and the state comes from the 20th century, from the theory of state sovereignty. It is suggested by this theory that the state is necessarily sovereign, and if it is not, then it is not a state. It follows that, according to the most recent approach, the essence of the state is not sovereignty but power. More precisely, this is about the ability to exercise the functions of the state; that is to have an aim-specific and specifically limitable general mandate. This mandate aims at the promotion of the public good, the enforcement of the public interest and – for the benefit of the citizens – safeguarding public goods, with the classic formula: *salus populi suprema lex esto*.

III. Contemporary Sovereignty Dilemmas

The German political science puts a special emphasis on this topic not only in the 19-20th century but also in recent years. The latest result of this effort is the monograph by Professor Ulrich Haltern, Director of the Institut für nationale und transnationale Integrationsforschung, Leibniz Universität, Hannover, entitled *Was bedeutet Souveränität?* For the European vision, it is essential to know this piece of writing. I will discuss the author’s two “theses”: the “liquidation” and the “ghost” of sovereignty.

It is well known that after 1918, following the failure of the antagonistic peace system of the Treaty of Versailles and the nearly fatal destruction of WWII, new, integrative forms were being slowly created: the EEC and the European Union. It is an interesting duality that the first beneficiaries of the plans of world leaders were the national market economies. In these nation-states, they defined a post-political order based on the symbiosis of interest and rationality, which is very different from sovereignty.

⁶ Takács 2011, 144–172.

⁷ Haltern 2007.

On the other hand, at the time of the first integrations in 1961, the European Court of Justice realized that the legitimacy deficit of the new power structure – the exclusion of popular sovereignty – can be smoothly compensated by the solution that the subjects of community law are not only the member states but also the individuals, who have not only obligations, but also rights. Therefore, a discrepancy arose gradually between the new legal order and the legal order of the nation-states. As a result, the traditional law-making and jurisprudence was forced to the background. What is more, with the preliminary ruling procedure, EU citizens may enforce the community law at their national courts as well. I subscribe to Professor Haltern's view: "Legislative competencies migrate nearly unobstructed from the member states to the centre. (...) The theory of supranational law – according to which the freedom of the state must be restricted as little as possible – has turned upside down with this practice and, as a result, the member states became only the trustees of community law... The primacy of community law shows clearly that sovereignty in the community became <common>, <fragmented> and eroded, or maybe completely disappeared?"⁸ It is not surprising that the reactions of the national constitutional courts are the only chance to stop the unconstitutional practices. For that matter, there are only few national constitutional courts that unconditionally accept the primacy. The rest accept the partial transfer of sovereignty subject to legal control (Germany, Belgium, Great-Britain and Hungary).

1. Finally, the so-called identity control has to be emphasized. This is very important in the case of the German constitutional court since it can refuse the enforcement of community regulations in case they contradict the provisions of the national constitutions. Professor Bogdandy, Director of the Max Planck Institute in Heidelberg, refers to the dual-function version of *Identitätskontrolle*, emphasizing that one of the conceptions of democracy, namely the state-centred approach, excludes democracy beyond the scope of state. Therefore, the German position is that it is contrary to the constitution if Europe transforms into a kind of federal state. At the same time, the individualist approach – by accepting the amendments to the treaties – tends to consider the creation of a European-level democracy feasible and promotes it as a contemporary dictate. The same opinion prevails in the French constitutional practice. Oliver Dutheillet de Lamothe, member of the French Constitutional Council, pointed out that the Constitutional Council set out the constitutional constraints in 2006, in which the measures transposing community law may be declared unconstitutional. The dogmatic reasoning behind this is that the Union respects the identity of its member states. Therefore, the constitutional values in the national identity are the barriers to the European integration.⁹

8 Haltern 2007, 98–100.

9 Cf. Somssich 2011, 761–768.

2. It is not surprising, therefore, that the constitutional courts have an aim-specific relationship with the triad of the national courts, the European Court of Justice and the Court of Human Rights. Nonetheless, their intermediary role may be more articulate in case they would adopt the recommendations of the 5th European Jurists' Forum held in Budapest. In 2011, the role of the European Public Prosecutor, cross-border crime, consumer protection and commercial law were discussed, together with the problems of modern sovereignty. A recommendation suggested the establishment of the Chamber for the Delegates of the National Constitutional Courts. This body would deal with the legal problems arising between the given member state and the institutions of the Union, and would disclose its legal solutions in resolutions. A problem of this scale would be laying down the detailed criteria for the primacy and the applicability of the community law. This professional forum would become a valuable resource in the creation of the common European legal area; but so far the relevant leaders of the Union have not shown interest in it.¹⁰

IV. Insubstantiality for Sovereignty

Ulrich Haltern summarized with “irreplaceable logic” and style everything we now call the EU project. I will make an attempt to highlight four characteristics and four consequences.¹¹

The main premises:

- The initial attempt to move from the Europe of sovereignty towards the Europe of markets can be defined as a success story. The move from existentialism to consumerism has created the possibility to shift towards money as the only transmitting channel (e.g. the “derivative success”).
- The root of civilization was the money exchange, and along this parallel the world may be narrowed down to the strategy of satisfying our needs.
- Money, as an abstraction, wipes out the process, ignores the identity, the historical narratives.
- It enforces a model based on mobility (mobility of goods, capital, workers); and the obstacles are handled by the Court of Justice, the supreme European judicial forum.

The reality through the spectacles of consequences:

- In the Union, there is an observable lack of social legitimacy, and the democratic deficit is prominent.
- The modern state has moved from the concept of sovereign people and the supplier state communication replaced the substance of the community with the form of community.

¹⁰ Máthé - Paczolay 2009, 349.

¹¹ Haltern 2007, 101–109.

– Europe has become uncertain in its values, in its foundation. The failure of the institutional reforms, the ill-thought steps towards integration prove that the European model is not to be followed in the rest of the world.

– The narrative surrounding the legal framework of the integration turned out to be an unhistorical fiction. It must be seen that more law induces more reforms, and more reforms require more justification. The present institutional framework and public goods are in the hands of experts who create a world where function may define identity instead of sovereignty. Therefore, it seems that outside law there is no room for violence either.

But the realities of international relations justify just the opposite. There is a scope of violence that cannot be influenced by law.

According to Haltern's approach on the relationship between the sovereign right and violence, "When dealing with the questions of sovereignty and the state, there are two things that are pragmatically sovereign: the judge and the soldier. Sovereignty gives the two sides of the modern constitutional state: law and violence. It is no surprise that the modern constitutional state is the world of comprehensive legal regulation and unprecedented violence at the same time. The Enlightenment views law as the tool for abolishing violence, but in reality law and violence exist simultaneously and to the same extent. They do not work against each other, law does not precede violence (...); they are both present everywhere. The reason behind that is that the modern state embraces both the Catholic and the Jewish tradition. The Catholic vision creates the idea of the mythical unity, which is the result of the mystery, the miracle and the ritual of the victim and the violence. The Jewish tradition creates the theory of law that is the sacred text from God's sovereign will that takes over the role of prophecy and marks God's alliance with the chosen people. The modern state continuously reproduces both: the mythical unity and the law. We might say that this reflects the duality of the divided substance of the ruler. On the one hand, the sovereign makes the law exist: the law is always the result of the sovereign's political actions; the word of the sovereign always exists. This has changed: the sovereign does not become embodied in the law. The judge is not the embodiment of the sovereign. If the judge dies, the law and the sovereign state live on. Sovereignty is much more embodied in soldiers. They do not take on sovereignty as a law but as power that is ready to kill and die. Everybody can be involved in this, everybody may embody the state".¹²

Finally, we make it clear that the sovereignty of the people has taken on the form of the democratic constitutional state. Therefore, sovereignty is not only an expression strongly tied to the Enlightenment but a concept that connects state, law, identity and politics into a functioning system. In case we consider the democratic and interfering state and the militarized state, it is unquestionable that

¹² Haltern 2007, 111–112.

we are always between law and war. The experiences of our present world also confirm that we cannot leave the categories of the saint and the victim behind. The short decade of the new century suggests the same: the world of sovereignty is not disappearing despite the bid for a new power project.

V. Rechtsstaat – Constitutional State – Rule of Law

1. It is an axiom in legal science that the legal state means that its substance is defined by the law. In the doctrine of *Rechtsstaat*, every activity can be expressed legally. The *Rechtsstaatlichkeit* tries to achieve its aim by a comprehensive regulation, building up the guarantees for everything it wants to protect by its rules. Here and now, it is worth to have a look at the transatlantic version of the constitutional state (rule of law). The core idea of the English-American system is justiciability. They institutionalize the idea that every case with legal relevance can be brought before the judicial court, which gives the final answer of the law.

The two systems represent two legal cultures. The constitutional state based on historicity, the German dogmatics, the codification, the procedural law, is also the embodiment of the classical separation of powers. Contrary to the continental approach, the English-American rule of law emphasizes the case law (the precedent) by reconsidering the principles to reach a fair solution. “Therefore, here, the general does not prevail over the individual, and the individual is not chaotic either. The individual is defined in regard to and in correlation with the different generalizations.”¹³

The two systems also differ in the separation of powers. The continental constitutional state realizes the traditional separation of powers, favours the model based on parliamentary supremacy, while the American founding fathers were influenced differently by “the oracle” Montesquieu’s masterpiece *The Spirit of the Laws*. It says that the executive power should have the means to block or control legislation. It is desired therefore to ensure the socially required balance, ergo: the delimitation between the organizational structure and the staff of the governmental bodies. We have to refer to Professor János Sári, an outstanding expert of the topic, who introduces the differences between the two systems extremely clearly. It is worth paying attention to the distinctions since in the practice and the communication of the EU there is an ever-frequent call to follow them. It is true that the US constitution calls for the separation of the institutions performing state functions, but it says exactly the opposite regarding the state functions themselves. Contrary to popular belief, the founders did not create a governmental system based on separation of powers, but they created separated systems, which mutually benefit from the power of the others, since without

13 Details in Varga 1993, 941–950.

the institutions mutually benefitting from the functions the separation of powers cannot achieve its aim. Summarizing the professor's monograph: ... "the US constitution created the governmental system of checks and balances, and not that of the separation of powers. The checks and balances as a constitutional arrangement is different from the separation of powers since it encompasses the theory that political power can and must be controlled by political power."¹⁴

2. In 1813 in Europe, C. Th. Welcker described the constitutional state as "the rational state leading towards the highest developmental stage of the forward-looking enlightenment". Therefore, in the 19th century, nation-states become the promoters of the constitutional state, with free and democratic legal order and state structure. And the forming constitutions try to ensure legal certainty by guaranteeing freedom and property as well as human and civil rights. According to contemporary belief, these constitutions are equivalent with "a powerful and honest public administration." It is not surprising that the judiciary control of the contra legem public administration became the quintessence of the constitutional state. As O. Mayer puts it: "The constitutional state is the state of the well-organized administrative law." Although it would be instructive to elaborate on the whole history of the constitutional state, the summary of the references to our present is also a good starting point for evaluating the much-used term of the constitutional state.

The certainty is the guiding principle of our constitutional state and therefore law is the benchmark of the functioning state. The constitutional state is therefore:

- a constitutional state that controls legislation;
- a state of law that controls the behaviour of the individual, creates public bodies and regulates their structure and competency;
- a defender-of-rights state that enforces compliance with the constitution and the laws by appropriate institutions.

As Professor Werner Ogris smartly puts it:

- "The elements and instruments achieving these aims do not constitute a closed canon, and they are not to be considered as *numerus clausus*, but their absence undermine the constitutional state. The determining elements are: the separation of powers; the legislator is bound by the constitution; the executive and judiciary are bound by the law; the fundamental rights and their protection are guaranteed by independent (public law) courts; the public bodies are responsible for compliance with the law; the prohibition of retroactive effect of the law; the prohibition of disproportionality; the protection of legitimate expectations; the clarity of wording and publicity of legal acts."¹⁵

3. It is a fact that the integration of the nation-states has resulted in an eclectic and complex community law, which is based on the different legal systems of

14 Sári 1995, 44–48.

15 Ogris 2010, 15–33.

the member states, complementing and later modifying them, but the theory of which is still undeveloped.

The structure integrating the Member States that first acted as *sui generis* transforms into a legal entity in relation to the national laws. It is an important thesis, therefore, that a reference to the constitutional state is always of relevance to the member state.

It is also well known that the Union is a system attached to the member states, it is organized along the international law, and its competencies are created from the transferred elements of the member states' sovereignty. Therefore, it does not have its own competence: it can be described by the *Kompetenz ohne Kompetenz* formula. There is a legal system, which is integrated into the legal systems of the member states, and it acts as if it were a federal state where the democratic deficit is combined with a constitutional deficit.

This is complemented with the already mentioned fiscal pact, which calls into question one of the attributes of the constitutional state, the competence of the national parliaments to adopt their budgets, the appropriation, by introducing a supranational control.

These phenomena are a proof for every professional involved that the European Union needs a new legal theory. Together with the creation of new constitutional notions, a new approach to separate the parallel powers is also justified.

Therefore, it is good news that the already cited Professor A. von Bogdandy calls on the nations' jurists in a manifesto entitled *A nemzeti jogtudomány az európai jogi térségben* (National Jurisprudence in the Region of European Law), where he calls for the creation of a new dogmatic system.

He described the area of European law – also in its present state – as a territory defined by the national legal orders, emphasizing at the same time that supranational norms already have a strong influence on the national legal systems. “As a result, EU-membership becomes a significant characteristic of the participating nations' statehood, and their previously closed legal orders become part of a wider legal system.”¹⁶ The initiative is welcome since due to the institutional problems of the EU the legal system should be applied differently in the new context and in the former nation-state model. The nation-state model calls for new concepts and new content. An elegant slogan of the professor's call for creating a common European legal area is: “A state, although it is part of the European legal system, is still another part of it, and shows the signs of a different development... The diversity within the European legal area requires us to accept a foreign legal order as different, and we should not interpret it exclusively according to the rules of our legal order.”¹⁷ The Professor, who had played an active part in forming the area, pointed out that “the basic structures

16 Cf. Tamás 2009, 57–74.

17 Cf. Lőrincz 2001, 8–17.

of other European legal orders should be examined from the point of view of the developing European legal area, but at the same time we should also respect their historical experiences, their stages of development, their legal and scientific style, and in that light we can improve our traditions as well”.¹⁸

4. This methodology takes into consideration the fact that Europe is a multicultural entity. It is a cliché that the coexistence, the flourishing of the cultural identities is the guarantee of Europe. If this cannot be ensured by the economy enjoying absolute priority, this culture, this civilization is doomed to failure. That is why the final conclusion of the outstanding monograph by Francis Fukuyama – on the world order of the 21st century – is so remarkable.

“What the states and only the states are able to do, is the concentration and the targeted use of the legitimate power. Those who argue for the dusk of sovereignty – let them be the pro-market right or the committed multilateralist left – have to define what can substitute for the power of the sovereign nation-state in our world. In fact, this gap has so far been filled by the mixed group of multinational companies, NGOs, international organizations, criminal networks and terrorist groups.” (And we can add the international credit rating agencies, who were able to hibernate the economy at the start of the financial crisis and onwards.)

“In the absence of a clear answer, we have no other options than turning back to the sovereign nation-state and try to understand again how it can be made strong and effective. It is still to be seen whether Europeans are better at squaring the circle than the Americans. However, it turns out that the art of state-building will be a key element of the national power, as well as the capability of traditional military deployment for maintaining the world order.”¹⁹

Conclusions

Finally, we highlight the fact that sovereignty and the constitutional state are complementary notions. But for fulfilling the dream of the core countries that are able and willing to meet the challenges of the global markets, that is the creation of a federal Europe, the persistent implementation of a decade-long legal and economic recovery programme is needed, and its two pillars, the balance-of-power politics and the legitimacy of power, must be re-established.²⁰

18 Bogdandy 2012.

19 Fukuyama 2005, 154–155.

20 Máthé 2012, 136–142.

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