On Sovereignty and Post-sovereignty[1]

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This article reconstructs the conceptual development of sovereignty in political theory from the point of view of continuous criticisms and repeated attempts to get rid of the concept. These attempts, I argue, are derived from the essentialist interpretation of sovereignty in terms of the absolute, unitary, and law-less exercise of power. Contemporary debates on human rights, legal pluralism, and transnational governance seem to complete the task of rendering sovereignty obsolete for the explanation of legal and political authority in modern politics. I argue, contrary to these attempts, that a "de-absolutization" of sovereignty is possible and that liberal democracies are in fact dangerous enterprises without sovereignty because sovereignty secures the link between democratic politics and the rule of law – a much needed connection especially in the context of transnational regimes of soft law with democratic deficit or of transnational emergency regimes of economic steering and military interventions.

Key words: Sovereignty – Post-sovereignty – Globalization – Constitutional pluralism

Many thinkers believe that we are now on the threshold of a great transformation of the modern world. Moving beyond the international order of sovereign states is what allegedly characterizes these epochal changes. Sovereign statehood, a distinguishing feature of modern politics, is said to have been rendered obsolete by new patterns of global governance, forms of transnational integration, cosmopolitan law, and fragmented rule-making that break the frame of the constitutional state. The reflection and the embracement of these novel institutions requires, it is argued, that we finally drop the idea of sovereignty and acknow-

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ledge that we are now living in a "post-sovereign" era (Held 1995; Archibugi, Held, Kohler 1998).

The suggestion to abandon sovereignty is a bold one given the fact that sovereignty is, without doubt, one of the most central categories of modern political theory. Sovereign statehood is a distinguishing organizational feature of modern political order expressing the territorial and jurisdictional nature of the modern state. Sovereignty underlies the notion of political authority, both in domestic and international realm. The notion of sovereignty dominates our understanding of the discourse of power and lies at the heart of our experience with the coerciveness of the modern social order. It expresses our apprehension about the globe and its territorial division into sovereign states. Sovereignty is indispensable for the knowledge of history and for the understanding of the evolution of the relationship between the state and society. In fact, there is hardly a more fundamental concept in modern political theory. And yet, there has never been much sympathy for this concept among political thinkers.

Sovereignty and its Discontents

Sovereignty has been contested ever since its inception as a concept that implies a supreme omnipotent power located in a single source and unrestrained by law. It was with Jean Bodin and Thomas Hobbes, the first modern thinkers who organized the theory of the state systematically around the notion of sovereignty, that the terms of the dominant understanding of sovereignty were set for centuries to come (Bodin 1955). Hobbes, in particular, defined sovereignty as a supreme authority instituted by individuals through the social contract and embodied in a singular person who makes law by his command. To highlight the novel concept of a supreme political authority and its unity with law enactment and enforcement, Hobbes characterized sovereignty in terms of the unity, indivisibility, unconditionality, and unlimitedness of an absolute power unbound by the covenant which institutes it (Hobbes 1985).

Hobbes's theory gave rise to an interpretation of sovereignty as the absolutist exercise of power by someone who himself is not subject to law. What Hobbes, just as Bodin before him, wanted to convey, however, was rather a new idea of political supremacy that was conceived of in legal terms and expressed in law. In doing so, Hobbes and Bodin captured the very essence of the modern political order framed in the jurisdictional and territorial notion of the sovereign state – a singular, unified, and exclusive political unit circumscribed within a territory and endowed with a legally defined supreme political authority. What was novel and modern in this conception was, firstly, that it created a new kind of political unity bridging the social and religious plurality of nascent modern society through the

rule of law, and, secondly, that the supreme political authority exercises its power through law that derives its validity not from customs, tradition, or religion but from the sovereign's command.

Yet, from the outset of its conceptual history until now, sovereignty has been generally associated with the unlimited and indivisible exercise of power, the command theory of law, and the unified monopoly of the state over coercion and control. This absolutist paradigm was transmitted into different traditions of legal and political theory, all of which operated with following assumptions: 1) the idea that sovereignty is located in a single and unitary organ of the state or is embodied in a person; 2) the idea that the coherence and unity of a legal system have to be traceable back to the will of the sovereign who is *legibus solutus*, i.e. above the law; 3) the view that law ought to be obeyed merely because it is the command of the sovereign; and 4) the view that sovereignty is linked to a specific set of prerogatives which also include the *jus belli* (right to war) which renders sovereignty incompatible with autonomous international law. In any case, limited and divided (or shared) sovereignty seemed an oxymoron (Cohen 2012, 27–29).

Many theories of state sovereignty as well as conceptions of popular sovereignty have operated with some or all tenets of the absolutist paradigm. Rousseau's concept of the supreme, inalienable, and indivisible general will of the unified people, which inspired the radicals of the French Revolution, is conceptualized along these lines (Rousseau 1987; Sieyès 2010). John Austin, the founder of the 19th century British analytic jurisprudence, argued that the state is a „determinate superior" which possesses the absolute legal competence to command law without being legally accountable itself (Austin 1998). In the twentieth century, the absolutist concept of sovereignty was retrieved by Carl Schmitt, for whom sovereignty denoted the capacity to make a dictatorial decision independent of any normative principles and legal procedures (Schmitt 2005).

Referring to these conceptions, sovereignty has been subject to recurrent and widely voiced criticisms. Liberal political theory, focusing on the protection of people from abuses and concentration of state power, has traditionally sought to banish sovereignty from politics through a system of checks and balances and constitutional guarantees of individual rights entrenched in a written constitution (Dicey 1964; Hayek 1960). Hans Kelsen introduced a "pure theory of law" completely separated from politics which was to dissolve the sovereign authority of a person in a self-contained hierarchical system of legal norms derived from the basic norm (Kelsen 2008). Hannah Arendt boldly declared sovereignty and tyranny to be indistinguishable from each other and suggested we focus on the reinvention of the public space of freedom, plurality through revolutionary, participatory constitution-making (Arendt 1965, 152–155). Michel Foucault's path-breaking analyses of the nature of power in modern society have given rise to an

account of alternative forms of discipline and governmentality that pervade society and escape articulation in traditional legal and political terms (Foucault 2009).

At the core of these critiques is a conceptual misunderstanding regarding both, the form and the scope of sovereign authority, as well as the neglect of the values that justify the existence of sovereignty. The absolutist sovereignty considered almost unequivocally to be the essence of the concept is derived from a historically specific interpretation of the claim to the ultimate political authority. This interpretation reflected the birth of the absolutist state out of religious and civil wars of the seventeenth century Europe. Originally, the discourse of sovereignty was deployed in favor of the absolutist prince and his struggles for political control and unity against destructive internal forces and external powers of the church and empire. As a polemical concept tied to the assertion of royal power, sovereignty was linked by early modern thinkers to the above-mentioned features and to specific competences and functions which were deemed essential (Gümplová 2011, 23–51).

Sovereignty, like many other categories of political theory, is a category with a meaningful history. There is no essentialist understanding of this concept in terms of a specific regime of sovereignty that would be unalterable with the historical development. While the core idea remains, namely the claim to a supreme political authority within a territory and external independence, the interpretation of what sovereignty means in practice reflects shifting social and political institutions. Historical variants of the institutionalization of the claim to sovereignty in different legal and political arrangements can be analyzed along two basic axes: 1) the location and the form of sovereign authority, and 2) the scope and the limits on sovereign authority. Absolutist sovereignty is a historically particular regime of sovereignty and those who assume that sovereignty must be located in a single body whose will is unlimited fall into the trap of the essentialist reading of the meaning of the modern institution of the political authority.

The alternative to absolutist sovereignty, both as a concept and the practice, is not the abandonment of sovereignty but the "de-absolutization" of sovereignty. Theoretically, it requires rethinking the relationship between law and power and accepting that divided and limited political power can be sovereign nonetheless. From the perspective of the political practice, the absolutist sovereignty has indeed been belied ever since the first modern constitutional democracy emerged in the US in 18th century based on the separation of powers, checks and balances, popular sovereignty, representative government, basic rights, and the division of powers entailed by federalism. None of these institutions imply that sovereignty is missing from the system.

Curiously, modern political theory has not categorized the process of limiting and dividing sovereign power through constitutionalism and democracy as the "de-absolutization" of sovereignty but rather as a process of the displacement of sovereignty from the political realm (Arendt 1965; Habermas 1998). However, if we refuse the essentialist interpretation of sovereignty and accept various political regimes as expressions of different forms of sovereignty, the suggestion that we dismiss sovereignty appears to amount to dismissing the very institution of the political. This is a myopic and dangerous move which can result in the depoliticization of the sources of power in modern society. There are many non-political sources of power in society – the power of the economic capital, of knowledge and technocracy, technology, and the military power have in fact increased to an unprecedented degree in contemporary society – and the ongoing challenge facing modern society is to subject these powers to legal and political constraints. A fundamental political theoretical question facing the critics of sovereignty is the following: Can we get rid of political sovereignty without an inevitable and resultant re-creation of sovereignty-like power in another system of social relations? (MacCormick 1999, 126)

Rethinking Sovereignty

What is the core idea of sovereignty? As Jean Cohen has aptly put it, the concept of sovereignty involves a claim to supremacy of the political authority and its exclusive jurisdiction over a population within a territory. Internally, sovereignty involves supremacy, that is, the claim to supreme authority within a territory over its inhabitants construed as members of a polity. This claim is materialized in a coherent, unified, independent, and territorially circumscribed legal system. There are no equal or autonomous powers within the polity with independent claims to jurisdiction or political rule. The correlative of domestic supremacy is external independence, i.e. political autonomy and self-determination of the domestic constitutional order and political regime vis-à-vis outsiders and foreign powers (Cohen 2012, 26–27).

The most important aspect of the modern idea of sovereignty is that of the unity of a particular legal and a political order based on the co-originality and mutuality of power exercise and law enactment and enforcement. Sovereignty has two inseparable and mutually constitutive dimensions – legal and political. *Political* sovereignty, embodied in the apparatus of the modern state, means the capacity to exercise political power and make fundamental decisions regarding the conditions of life in a polity, welfare, and the distribution of economic resources. *Legal* sovereignty denotes the existence of a unified and exclusive hierarchy of legal rules and jurisdictions within a territory traceable back to a constitution. From a

legal perspective, sovereign power is that which is enjoyed by the holder of a constitutional power to make law or, seen from a revolutionary perspective, by the holder of the authority to create a new constitution.

Unfortunately, much of the debate about sovereignty in legal and political theory up to date has revolved around the question whether legal or political sovereignty has priority. Many thinkers have assumed that ultimate political power ought to precede legal authority because the search for the ultimate source of the authorization of law compels us to interpret the sovereign's legitimacy in a substantive sense. If sovereignty were conceived of in legal terms, the search for a legitimizing authority would never come to an end. This debate resulted in the following deadlock: sovereignty is either constituted by law (and hence never truly politically autonomous and thus non-existent), or sovereignty is above the law (and thus, in the end, unlimitable by law). In other words, there is political sovereignty that stands above the law or there is, strictly speaking, no factual sovereignty at all. Hans Kelsen famously reconstructed the problem of sovereignty in terms of this dilemma and dismissed sovereignty in favor of the idea of the ultimate basic norm (Kelsen 1920).

One of the ways to resolve this dilemma is to accept the seeming paradox that sovereignty expresses both the power that enacts law and the law that constitutes and restrains power – and make it crucial for understanding the concept (Walker 2003, 20–21). On this view, as Habermas put it, political power is not conceived of as externally juxtaposed to law. It is rather presupposed by law and is itself established through a legal code and constituted in the form of basic rights. Law creates and legitimates political power which, in turn, makes use of law as a means of organizing political rule. The co-original components of law and politcal power join up in the institutionalization of the state, which exercises the political authority through the capacity to make legally binding decisions (Habermas 1998, 134–143).

Situated at the intersection of politics and law, modern sovereignty can thus be defined as a dynamic process of the mutual constitution and containment of law and politics. As Neil Walker suggested, the paradox of sovereignty, namely that the sovereign is both politically supreme and legally constituted, is precisely the key to understanding the concept of sovereignty (Walker 2003, 21). What underlies this dynamic approach is an expanded meaning of the political aspect of sovereignty. Political sovereignty cannot be understood in the narrow sense of the supreme decision-making capacity of the state. As I mentioned above, the development of the absolute monarchy is one of the processes in the context of which the modern discourse on sovereignty emerged. Another process, equally relevant to the birth of modern sovereignty, was the differentiation of society and the state. The state is a political entity that institutionalizes a distinct political *relationship* between the government and the citizens. As Martin Loughlin rightly

stressed, political power is derived from and legitimized through this relationship between the government and the citizens only (Loughlin 2003, 65).

The concept of sovereignty thus articulates the reciprocal containment of the legal and the political order, in other words, the ultimate dependence of political power on a valid, public legal order for its authority, and simultaneously the political context of law-making which is crucial for law's claim to legitimacy. An ideal type of liberal democratic state expresses this de-absolutized, dynamic understanding of sovereignty. In constitutional democracy, sovereignty is constituted by the constitution and limited by the principles of the rule of law and constitutionalism (basic rights, checks and balances, division of powers, federalism). The democratic principle of popular sovereignty locates the ultimate source of the legitimacy of political power in the people, thus dividing sovereignty further between the deliberating public sphere embedded in associational structure of civil society (the people) and the formal political sphere of the state which makes decisions based on the deliberative power formed in the public sphere.

Viewed from the ideal-typical perspective of constitutionalism and democracy, ongoing tendencies to displace sovereignty from politics correspond not to the project of defending political autonomy in the face of power politics, arbitrary bureaucratic administration, and state violence, but rather to the marginalization of political self-determination of the people through law and democratic legitimacy of law. Modern autonomy, self-determination, and legitimacy cannot be defended without the concept of sovereignty. Those who insist otherwise would have to respond to two fundamental questions: 1) what are alternative modern forms of political self-determination and autonomy of a collective? and 2) how are sovereign-like powers that inevitably emerge in modern society constrained and legitimized?

As international political theory has revealed lately, there is an unprecedented rise in rule-making beyond the state, by transnational institutions that are neither constituted or constrained by law nor accountable to constituencies or deliberating public spheres (Keohane 2002; Fischer-Lescano 2005; Kumm 2009). In the face of such an expansion of law-making and new forms of power on a transnational scale, a critical international political theory should be concerned with coupling lawmaking and power exercise with legitimizing practices occurring in democratically constituted and representative publics. Sovereignty, as an institution expressing both power enacting law and law constituting and restraining power, is an indispensable institution in such a project.

A Post-sovereign World Order?

At the beginning of the twenty-first century, sovereignty is yet again subject to a serious challenge. It allegedly no longer provides an adequate explanatory framework for a global pluriverse of legal and political regimes and subsystems of the world society in which sovereign states are becoming obsolete. Ironically, as Jean Cohen rightly pointed out, the discourse about the demise of the sove-reign state emerges right after the international system of sovereign nation-states based on principles of sovereign equality and non-intervention was finally universalized in the aftermath of decolonization and the collapse of the Soviet Union (Cohen 2012, 2).

Discourse about the final retreat of sovereignty entails several arguments. One argument is concerned with showing that the states no longer represent discrete communities and autonomous legal-political units. The process of globalization and technological progress gradually dissolves states into a complex structure of relations, networks, flows of goods, ideas, and people, and regimes of transnational governance which replace states in their primary function of making rules for the people living within their borders. David Held has named several "external disjunctures" which erode sovereign states – international law, world economy, transnational decision-making regimes, international security structures, globalized culture etc. (Held 1995, 100–130). In the same vein, Saskia Sassen has argued that the growth of the global economy in conjunction with the spread of communication technology has profoundly reconfigured and destabilized the institutions of governance and accountability traditionally used by the modern state – citizenship, central banks, monetary policies etc. (Sassen 1996). Anne-Marie Slaughter has suggested that states as discrete and centralized entities were replaced by a web of vertical and horizontal government networks which epitomize the true locus of governance and rule-making in today's world of „disaggregated sovereignty" (Slaughter 2005).

These and many other similar claims made by globalization thinkers are focused on the dramatically changing scope of control by the state over its territory, borders, population, and the economy. To be sure, the process of globalization is changing the scope of state control and targets of governmental power. However, a full and absolute state control could never be taken for granted in any area of social life at any point in the history. The states have always struggled to manage completely the flow of goods, services, the people, and information. International trade, the flow of capital, migration, and the spread of culture were as significant in earlier periods as they are now (Keohane, Nye 2000; Krasner 2001; Gilpin 2001; Wallerstein 2004). In the postwar period, there was a shared optimism that the national economy could be subjected to extensive political control. Western liberal democratic states created fiscal strategies and social welfare policies

which cushioned the impact of international trade (Streeck 2009, 2011). To be sure, end-of-the-century globalization has altered, to varying degrees, the scope of state power, especially in social and economic sectors (Crouch 2004; Streeck 2009). Yet the decline of the regulatory welfare state has not resulted in lesser control of the state over the populace. Extensive means of control and surveillance within various security regimes have replaced traditional governmental functions, such as defense, public health, education, communication and transportation (Wolin 2008).

The assumption made by theorists focusing on processes of economic and cultural globalization, growing interdependence of the world, and the emergence of the world society is that the changing scope of control by the government over society's internal affairs and the loss of the capacity to regulate trans-border movement imply the the loss of legal and political sovereignty of the state. This is a conclusion based on a misunderstanding of the concept of sovereignty. State sovereignty does not require closed and impermeable political entities capable of exercising full control over the affairs affecting the people within their borders. Sovereignty is, as Jean Cohen put it, a "negative" concept pertaining to internal supremacy and external autonomy, not a list of definite prerogatives and positive competences. Border control does not essentially belong to the prerogatives of the sovereign. The only "positive" competence is the capacity for self-determination of the legal rules that articulate and delimit a polity's own internal sovereign powers (Cohen 2012, 30).

There is another set of claims which is much more challenging for the concept of sovereignty. These claims focus on the emergence of a new world order out of the practice of global governance and global law-making by the institutions and organs of the international community, which are aimed at making states meet universal standards of justice. This universal standard of justice is embedded in the existing international legal system and human rights represent its core principle (Buchanan 2004). Both in theory and in international law, human rights are conceived as rights protecting the basic rights that all persons have by virtue of being human. They are universal; that is, they are valid and binding on all individuals and societies whatever their religion, tradition, or culture.

Human rights have had a profound impact on state sovereignty. As most human rights thinkers agree, an essential feature of human rights is that they protect the universal features of human personhood against the state. Human rights have been created as a regime of international law and governance whose primary function is to provide universal standards for regulating the behavior of states toward those people under their jurisdiction. As such, human rights thus impose constraints on states and on those acting in their name. In his path-breaking study *The Heart of Human Rights*, Allen Buchanan has argued that these constraints go far beyond protection against severe political, legal, and social

abuses such as genocide, slavery, and torture. On the one hand, human rights affirm and protect the equal moral status of all individuals; on the other hand they assign responsibility to states not only to uphold political, liberty, and equality rights, but also to carry out basic welfare functions such as health care and education (Buchanan 2014, 28–36).

Developing steadily since 1948, through multilateral treaties and declarations, through the work of international and regional courts and monitoring bodies and also through the advocacy work of NGOs and through domestic constitutional changes, human rights provide the key justification for the existence of an international system of sovereign states; they supply the key principle of political legitimacy of state power; and they also provide a source of international concern with human rights violations and supply a justification for remedial action by the global community. There are countless accounts of how the post-World War II international legal order based on the sovereign equality of states and international law based on consent is being complemented by a new system of global governance by the international community and intergovernmental networks addressing issues of human rights and security (Fischer-Lescano 2005; Teitel 2011; Sikkink 2011). This transformation affects a profound normative shift in the international legal order from prioritizing state security to protecting human security. Centered around the United Nations, the UN Security Council and Charter system whose reach has expanded significantly since 1990s, the emerging system of international governance engages in tasks that go beyond its traditional functions – humanitarian interventions, sanctions, transformative interim administrations of occupied territories, and the imposition of obligations for states to prevent and combat terrorism (Fox 2008).

It is beyond doubt that the concept of sovereignty has changed over time in light of this new global principle of legitimacy, namely the respect for human rights. Human rights provide a normative source of limits on the prerogatives of sovereign states and governments' power. A potentially momentous transformation is at stake in this respect. As Cohen rightly remarked, the international community might not only articulate but also enforce moral principles and legal rules regulating the conduct of governments toward their own citizens (Cohen 2012, 2).

Obviously, one of the most profound questions for international political theory is whether this international system of governance – which does indeed consist of legal and political regimes gaining an impressive autonomy – replaces or develops alongside the international society of sovereign states and whether this is a desirable trend. Cosmopolitan theorists of diverse backgrounds (moral, institutional, legal) insist that the state-based model of international society is in fact rapidly disappearing and argue that it should be replaced by cosmopolitan global political and legal community which is better tailored to the needs of world society and of the individual who is the ultimate unit of moral concern. There are

two dominant discourses which argue that the concept of sovereignty is useless as an epistemological tool for understanding the cosmopolitan world order and that it is, moreover, normatively pernicious: global constitutionalism and legal pluralism.

The advocates of global constitutionalism maintain that international community already exists now and that the global constitutional order is unified, universal, and supreme vis-à-vis domestic legal orders. They refer to several developments in international law: the individualization of the subjects of international law, the dramatic increase in juridification since 1945, the emergence of "higher law" that can void international treaties (*jus cogens* norms), the proliferation of rules which apply to all states whether or not they signed a treaty (*erga omnes* rules), the expanding reach of international human rights, and the development of global remedies in the form of supranational courts which decide on violations of *jus cogens* norms (Macdonald, Johnston, 2005; de Wet 2006; Klabbers, Peters, Ulfstein, 2009).

A counter-discourse on global legal pluralism also abandons sovereignty as anachronistic and authoritarian insofar as it has always been used to deny the legal quality of non-state normative orders and non-sovereign polities. However, legal pluralists object to the tendency to transpose the hierarchical sovereignty mindset to the global domain. According to them, the constitutionalization of the global political system is neither a feasible nor a desirable response to the new forms and bids for power, for it would threaten the diversity, autonomy, and legitimacy of competing normative and political orders and projects. The plurality of overlapping legal orders is deemed a more desirable option (de Soussa Santos 2002; Fassbender 2003; Fischer-Lescano 2005; Krisch 2010).

Both camps agree that the concept of sovereignty is useless and dangerous. For legal cosmopolitans, the constitutionalization of public international law and politics represents an opportunity to finally get beyond the bellicose power politics (allegedly inherent in the sovereignty paradigm) and establish cosmopolitan principles of justice and human rights. Legal pluralists maintain that the heterogeneity of the global system is a desirable antidote to the hegemonic imposition that may occur either through a powerful sovereign state or in the name of the universal global law. In any case, states are becoming part of a global constitutional order and as a result they lose their sovereignty.

To be sure, we are witnessing the transformation of the international order. How should international political theory then characterize the changes with regard to the concept of sovereignty? Are we entering a much-hailed "post-sovereign" world order? Is such an account empirically plausible and normatively desirable? Isn't the demise of sovereignty a cause for concern? If sovereign states are disappearing, what happens to the postwar international legal principles of sovereign equality, non-intervention, self-determination and political indepen-

dence, domestic jurisdiction, non-domination and the prohibition of military and economic colonialism? Are these normative aspirations of an international world order irrelevant? Can they or should they be replaced by other arrangements and norms of a world order? If not, does not it appear necessary for international political theory to accommodate the de-absolutized (constitutionalized and democratized) notion of state sovereignty into its conceptual apparatus?

In response to both global constitutionalists and global legal pluralists who herald the end of sovereignty and the emerging supremacy of the global legal order vis-à-vis domestic legal orders, a critically minded international political theorist should clarify, first, whether the global order replaces or develops alongside the system of sovereign states. Second, she should ask whether global governance institutions really embody the global rule of law and a global constitutionalism that tames sovereign power. Constitutionalism and the rule of law require a set of institutions such as division of powers, checks and balances, accountability and representation mechanisms, independent judiciary etc. Are global executive authorities constrained by clear legal rules, and do they employ representative decision-making procedures? Are global legal authorities subject to judicial review? For if this is not the case, then an international political theorist needs to ask what prevents global authorities from authorizing the forms of (predatory) sovereign power, hegemony, and imperialism that they originally intended to displace.

Jean Cohen, a self-described disenchanted international political theorist critical of an all-too-fast embrace of post-sovereignty, warns that it may very well be the case that new practices resulting from the war on terror, humanitarian interventions, transformative occupations, and targeted sanctions cannot be considered an ex-pression of justice-oriented cosmopolitan law, but rather are an expression of a differrent attempt, based on power politics, to restructure the international system in terms of neo-imperial domination and the hegemony of great superpowers who hide their interests in the discourse of human rights and the war on terror (Cohen 2012, 3–4).

Returning to sovereignty, one question remains unanswered. In the face of the growing significance of an emerging global legal order based on human rights norms, doesn't the concept of post-sovereignty provide a plausible account of the reality of the new globalized world? The discourse propelled by global constitutionnalists does indeed pose a hard question for the concept of sovereignty. For the real dilemma of sovereignty, as Cohen rightly argues, is not that it cannot be self-binding, but that it seems to entail the impossibility of two autonomous valid legal orders operative within the same territory or regulating the same subject matters and persons (Cohen 2012, 8). When two legal orders – a transnational legal order and a domestic legal order – regulate the behavior of persons in the same space and time, can we still speak of sovereignty?

In order to resolve the issue of the overlap of the global legal order and domestic legal order, a closer look at the case of the European Union could be illuminating. The EU is a transnational entity with an autonomous and independent legal order which is recognized as valid, directly applicable, and binding to member states. Legislative power resides in the European Parliament and in the Council of Ministers, and executive power is held by the European Commission. The European Court of Justice which has the supreme, ultimate authority to interpret European law, guarantees that its own law is the relevant law taking effect in the member systems. As scholars such as MacCormick and Walker argued, the coexistence of two valid legal orders within an EU member state does not have to be interpreted in terms of clear-cut supremacy and hierarchy (MacCormick 1995; Walker 2002). The EU order and the order of a member state mutually recognize each other, partially overlap, and interact in a non-hierarchical manner. Vis-à-vis claims made by the EU order to supremacy, the member states continue to claim their distinct and autonomous legal orders with constitutional quality.

Many scholars have offered various accounts of the complex legal and political reality of the EU (Kumm 2005, de Búrca 2011, Fossum and Menendez 2011). The perspective of constitutional pluralism, however, seems to be the most plausible framework of explanation (Avbelj and Komárek 2012). Its plausibility is reinforced by the approach's focus on the dynamic processes of mutual recognition and interaction among legal and political orders of sovereign states and non-state polity in the making, thus making it possible to account for the continuing relevance of the concept of sovereignty. An explanatory framework of constitutional pluralism admits the plausibility and continuing relevance of sovereignty claims on the part of member states, and at the same time acknowledges the autonomy and constitutional quality of the legal order of the supranational entity of which they are members. The point is to account for the dynamics of mutual recognition without the need to locate the ultimate source of legal authority (Walker 2002).

From a strictly legalistic perspective, the conclusion might be that sovereignty has not passed to the EU organs; yet at the same time, sovereignty has not remained with the individual member states (MacCormick 1995). The dynamics of mutual recognition makes it impossible to locate an ultimate source of authority. On a political reading of sovereignty – which takes into account the political self-understanding of domestic actors (citizens, political representation, judges) – the constitutional quality of the autonomous domestic democratic political process and the supremacy of the domestic legal order has to be recognized. Politically speaking, EU member states continue being sovereign states and their sovereignty cannot even be meaningfully pooled or shared. Hence, the EU cannot be called a post-sovereign system (Grimm 1995).

What is the implication of this discussion for international theory's urgent task to account for the concept of sovereignty in today's globalized world order? The new global order can be described, as Jean Cohen proposed, in terms of the emerging dualistic political system composed of sovereign states (and the international law they make through consent) *and* new global governance institutions that provide global cosmopolitan legal elements derived from non-derivative human rights norms. From the perspective of constitutional pluralism (i.e. an emphasis on the dynamic interaction and mutual recognition of two legal orders) we see no paradox in the fact that sovereignty is limited by human rights. States do remain autonomous and self-determining. Yet, when a state commits genocide or enslavement or oppresses its people in radical ways, it abolishes the political and legal relationship between the state and its citizens. From the normative perspective of de-absolutized democratic sovereignty, this state forfeits its claim to be representing a self-determining political community and thus ceases to be sovereign in the first place. Therefore, it becomes subject to the international community's concern and/or potential intervention by global governance institutions justified by inviolable human rights.

References

ARCHIBUGI, R. – HELD, D. – KOHLER, M. (1998): *Re-Imagining Political Community: Studies in Cosmopolitan Democracy.* Palo Alto: Stanford University Press.

ARENDT, H. (1965): *On Revolution.* New York: The Viking Press.

AVBELJ, M. – KOMÁREK, J. (2012): *Constitutional Pluralism in the European Union and Beyond*. Oxford: Hart Publishing.

AUSTIN, J. (1998) [1832]: *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence.* Indianapolis: Hackett Publishing Company.

BEITZ, CH. (2011): *The Idea of Human Rights*. New York: Oxford University Press.

BODIN, J. (1955): *Six Books of the Commonwealth*. Oxford: Basic Blackwell.

BUCHANAN, A. (2004): *Justice, Legitimacy, and Self-Determination. Moral Foundations of International Law*. New York: Oxford University Press.

BUCHANAN, A. (2014): *The Heart of Human Rights*. New York: Oxford University Press.

De BÚRCA, G. (2011): *The Worlds of European Constitutionalism*. Cambridge, UK: Cambridge University Press.

COHEN, J. (2012): *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism*. New York: Cambridge University Press.

CROUCH, C. (2004): *Post-democracy*. Cambridge, UK: Polity.

DICEY, A. V. (1964) [1902]: *Introduction to the Study of Law of the Constitution.* London: Macmillan.

FASSBENDER, B. (2003): Sovereignty and Constitutionalism in International Law. In: Walker, N. (ed.): *Sovereignty in Transition*. Oxford: Hart Publishing, 115–144.
FISCHER-LESCANO, A. (2005): *Globalverfassung: Die Geltungsbegründung der Menschenrechte*. Weilerwist-Metternich: Velbrueck-Wissenschaft.
FOUCAULT, M. (2009): *Society Must Be Defended.* New York: Picador.
FOSSUM, J. E. – MENENDEZ, A. J. (2010): *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*. New York: Rowman and Littlefield.
FOX, G. (2008): *Humanitarian Occupation*. Cambridge, MA: Cambridge University Press.
GILPIN, R. (2001): *Global Political Economy: Understanding the International Economic Order*. Princeton: Princeton University Press.
GRIMM, D. (1995): Braucht Europa eine Verfassung? *Juristenzeitung* 50, 581–588.
GÜMPLOVÁ, P. (2011): *Sovereignty and Constitutional Democracy*. Baden-Baden: Nomos.
GÜMPLOVÁ, P. (2015): Souveränität, Postsouveränität, Territorialität. In: Kreide, R. – Niederberger, A. (eds.): *Internationale Politische Theorie*. Stuttgart: J. B. Metzler.
HABERMAS, J. (1998): *Between Facts and Norms.* Cambridge, MA: MIT Press.
HAYEK von, F. A. (1960): *Constitution of Liberty*. Chicago: University of Chicago Press.
HELD, D. (1995): *Democracy and the Global Order.* Stanford: Standord University Press.
HOBBES, T. (1985) [1651]: *Leviathan.* London: Penguin Books.
KELSEN, H. (1920): *Das Problem der Souveränität und die Theorie des Völkerrechts*. Tübingen: Mohr.
KELSEN, H. (2008) [1934]: *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*. Tübingen: Mohr.
KEOHANE, R. O. – NYE, J. S. Jr. (2002): *Power and Interdependence: World Politics in Transition*. New York: Longman.
KEOHANE, R. O. (2002): *Power and Governance in a Partially Globalized World*. New York: Routledge.
KLABBERS, J. – PETERS, A. – ULFSTEIN, G. (2009): *The Constitutionalization of International Law*. New York: Oxford University Press.
KRASNER, S. (2001): Sovereignty. *Foreign Policy* 122, 20–29.
KRISCH, N. (2010): *Beyond Constitutionalism: The Case for Pluralism in Post-National Law*. Oxford: Oxford University Press.
KUMM, M. (2005): The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty. *European Law Journal* 11 (3), 262–307.
KUMM, M. (2009): The Cosmopolitan Turn in Constiutionalism: On the Relationship between Constitutionalism in and beyond the State. In: Dunoff, J. L. – Trachtman, J. P. (Eds.): *Ruling the World? Constitutionalism, International Law and Global Governance*. New York: Cambridge University Press, 258–324.
LOUGHLIN, M. (2003): Ten Tenets of Sovereignty. In: Walker, N. (Ed.): *Sovereignty in Transition.* Oxford: Hart Publishing, 55–87.

MACCORMICK, N. (1995): The Maastricht Urteil: Sovereignty Now. *European Law Journal* 1 (3), 259–266.
MACCORMICK, N. (1999): *Questioning Sovereignty: Law, State and Nation in the European Commonwealth.* Oxford: Oxford University Press.
MACDONALD, R. St. J. – JOHNSTON, D. (2005): *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community.* Leiden: Martinus Nijhoff.
ROUSSEAU, J.-J. (1987): *The Basic Political Writings*. Indianapolis: Hackett Publishing.
SASSEN, S. (1996): *Losing control? Sovereignty in an Age of Globalization*. New York: Columbia University Press.
SCHMITT, C. (2005) [1921]: *Political Theology. Four Chapters on the Concept of Sovereignty.* Chicago: Chicago University Press.
SIEYES, E. (2003): Political Writings. Indianapolis: Hackett Publishing.
SIKKINK, K. (2011): *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: WW Norton & Company.
SLAUGHTER, A. – M. (2005): *A New World Order*. Princeton: Princeton University Press.
SOUSSA SANTOS de, B. (2002): *Toward a New Legal Common Sense: Law Globalization and Emancipation*. London: Butterworths.
STREECK, W. (2009): *Re-Forming Capitalism: Institutional Change in the German Political Economy*. New York: Oxford University Press.
STREECK, W. (2011): The Crises of Democratic Capitalism. *New Left Review* 71, 5–29.
TEITEL, R. (2011): *Humanity's Law*. New York: Oxford University Press.
WALLERSTEIN, E. (2004): *World-Systems Analysis. An Introduction*. Durham: Duke University Press.
WALKER, N. (2003): Late Sovereignty in the European Union. In: Walker, N. (Ed.): *Sovereignty in Transition.* Oxford: Hart Publishing.
WALKER, N. (2002): The Theory of Constitutional Pluralism. *Modern Law Review* 65, 317–359.
WET de, E. (2006): The International Constitutional Order. *International Comparative Law Quarterly* 55, 51–76.
WOLIN, S. (2008): *Democracy Incorporated. Managed Democracy and the Specter of Inverted Totalitarianism*. Princeton: Princeton University Press.

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