

CONCEPTUAL EVOLUTIONS OF SOVEREIGNTY - A CONSTITUTIONAL ATTRIBUTE - IN THE CONTEXT OF GLOBALISATION

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Abstract

The state is not weakened in the conditions of globalisation and integration, but is only changed, as an institutional structure in terms of its functions and ways in which it acts.

Regarding the variety of meanings that sovereignty presents, the difference between sovereignty seen from an internal point of view and sovereignty seen from an external point of view is highlighted. In this context, it is shown that sovereignty developed at the same time as the emergence of national states and the exclusive right to govern within territorial borders.

Theoretically, the sovereign equality of states was proclaimed, sovereignty having the role to justify the territorial delimitation and to be the basis for negotiation between states, as well as to help enforce an order, other than that based on force, an order based on trade and, in general, on interactions between states.

From a conceptual point of view, we may say that globalisation represents a phenomenon which expands the ways of communication between states and communities and has as an effect the fact that the internal legal order of a state extends to a new concept, that of worldwide legal order.

Keywords: *sovereignty; globalisation; state; sovereign equality; sovereign rights*

JEL Classification: [K 40]

1. Introductory elements

Speciality papers (Gruia, 1939, p. 272) have presented sovereignty as the supreme power to command from within, as independence from the outside and as that reality of the state based on which it has the right to freely resolve, based on its own evaluation, the internal and external problems, and to fulfil its functions, without breaching the sovereign rights of other states and the rules and principles of international law.

The internal and external sides of sovereignty are indissolubly connected and cumulatively necessary for its existence.

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In order to move to certain historical considerations, we may mention an author (Bodin, 1993, p. 27), a supporter of the absolute power of the monarch, who identified sovereignty as the supreme, independent, indivisible, inalienable and indefeasible power of the monarch over the subjects, subordinated only to divine power.

In its fundamental work, an author (Rousseau, 1957, p. 27) set the bases for the theory of the sovereignty of the people, aimed against absolutism.

The great historian Nicolae Balcescu believed that sovereignty must be the sovereignty of the people, which consists of (...) *enforcing the power of all limited by the boundaries of justice and following a spirit of brotherhood*. At the same time, he also thought that the republican form of government was that necessary to ensure the sovereignty of the people, the dissolution of any limitations to the sovereign rights of the state, inside and outside its borders.

Simion Bărnuțiu (Bărnuțiu, 1867, p. 87), said that: *The Romanian Republic must be sovereign, as the majesty of the Romanian people is the supreme authority itself to which it is entitled and only within its entire territory, its national goals and negations*.

The theory of the sovereignty of the people was abandoned, being replaced with various theories, as that of Blackstone (Blackstone, 1970, p. 44), appearing the 18th century in England, under the name *The theory of parliamentary sovereignty*. This theory was subsequently declared obsolete and in the end abandoned by most lawyers.

H. Kelsen (Kelsen, 1928, p. 223) criticised the theory of the parliamentary sovereignty, showing that we cannot speak of the sovereignty of an organ of the state, even though the sovereignty of the entire state order is accepted.

H. Kelsen's theory of the sovereignty of the rule of law identified the state with the rule of law and defined sovereignty as a property of the rule of law, an order arising from the fundamental rule, independent of the national particularities and state borders.

In the 20th century, Hegel developed the theory of the absolute sovereignty of the state. In his view, the monarch personified sovereignty, having unlimited power.

The famous sociologist (Duguit, 1908, p. 146) labeled sovereignty as a fictitious notion which does not correspond to reality. As the author of the theory of social solidarity, he envisaged the establishment of a state order in which the notion of sovereignty would completely disappear.

Apart from evidently or subtly nihilistic theories, new theories appeared in the 20th century. As an example, we may mention the theory of relative or limited sovereignty, according to which this type of sovereignty does not mean abandoning certain sovereign rights, but merely suspending their exercise.

2. Conceptual elements

From a conceptual point of view, we may say that globalisation represents a phenomenon which expands the ways of communication between states and communities and has as an effect the fact that the internal legal order of a state extends to a new concept, that of worldwide legal order. The science of law, of all subjects, is that most affected by this process of continuous unification of the world, because the science of law must be continuously updated, so that it can cover as many of the aspects of contemporary social life as possible, because new spaces and areas of the law, new practice methods and strategies or regulating techniques are permanently created, so that we may reach the situation where many of the ones which in the past were fiction, can now become an *acquis* even regarding strictly constitutional attributes which belong to nations, such as the attribute of sovereignty.

In a succinct conceptual analysis of sovereignty, we may retain some views which can be considered significant, as follows.

Therefore, in a first view (Le petit Larousse illustre, 2007), sovereignty is characterised as a *supreme authority* and as a *supreme power*, belonging to the state, which involves the exclusivity of its competence on its national territory and its international independence, area in which it is not limited but by its own commitments.

In an English law dictionary (Campbell & Minn, 1991, pp. 970-971), *sovereign power suverana* or *sovereign prerogative* are defined as that power existing in a state, to which no other power is superior or equal and which includes all the specific mandates necessary for achieving the goals of government. The term of *sovereign right* is also connected to the issue of sovereignty, and it is characterised in the aforementioned dictionary as the right that only the state itself or one of its organs may have or which it has, based on its sovereign character and for the general benefit. Due to its sovereign right, the state can fulfil its own functions. The sovereign right is different from other rights, such as the right to property, the owner of which can be the state as well as a private individual.

Also in the same dictionary, sovereign states are described as those the subjects or citizens of which obey by habit and who are not subjects of any other state or any other sovereign state, in any respect.

Furthermore, it is also stated that a state is said to be semi-sovereign and not sovereign, when it is liable in every respect, being controlled by a superior authority.

At the same time, it is also added that, in international relations, certain states are independent from others and can perform all the acts that can be performed by any state, in this area. They also have the same self-governing power, that is, independence from other states, in terms of their own territory

and its citizens who do not live abroad. No foreign power and no foreign right may exercise control over sovereign states, except for the case in which conventions are signed. The power to act independently in internal and external relations represents complete sovereignty.

Sovereignty can have the following meanings:

1. the supreme, absolute and uncontrollable power which governs any independent state;
2. the supreme political authority;
3. the supreme will;
4. the supreme control of the constitution and of the framework of government and administration;
5. a self-sufficient source of political power out of which all the specific political powers arise;
6. the international independence of a state, combined with that right and attribution to regulate internal affairs, without foreign orders;
7. a political society or a state which is sovereign and independent.

In conclusion, sovereignty is presented as the power to do anything in a state, without justification; to draft laws; to execute and apply them; to set and collect taxes; to declare war or make peace; to sign treaties of alliance of trade with foreign nations, and other similar ones.

It is necessary to explain the notion of national sovereignty which belongs to the people and which represents the principle of public law according to which the sovereignty previously exercised by the king is now exercised by the representatives of the people. (Micu, 2016, pp. 21-22) The sovereign people is defined as the political organism made up of the entirety of the citizens and voters, who, based on their collective capacity, hold the specific powers of sovereignty and exercise them through their chosen representatives.

The state was defined by reference to three components: population; territory and public power or sovereignty.

Nicolae Popa (Popa, 1994, pp. 92-93) shows that, regarding a certain territory, the state sets its relations with its citizens, structures its mechanisms, and sizes its sovereignty.

Dealing with the components of the state, another author (Vonica, 2000, pp. 135-136) highlights that public power or state power is sovereign. Sovereignty is defined by the quoted author as an essential attribute of the state, which means the right of the state power to rule the society, being supreme within the state, the right to not recognise another power above it, and the adaptability to other states, being independent from them.

In a broad sense, a famous author (Vrabie, 1993, p. 52) shows that the state is interpreted as an organised society, having an autonomous (sovereign) leadership in relation to other powers. In the opinion of the same author, the

state, as an organisational system which exercises leadership of a society, must not be understood as a purpose in itself, but as a means to enforce the sovereign power of the people. Of the constants of the states mentioned by most lawyers and political scientists, the author mentions, apart from the territory, the population, organisations which represent public power and sovereignty.

3. Sovereignty and globalisation

The state is not weakened in the conditions of globalisation and integration, but is only changed, as an institutional structure in terms of its functions and ways in which it acts. One of the participants at the World Congress of Philosophy of Law and Social Philosophy (Helsingfors, 1993, p. 248) defined current *sovereignty* as mere legal fiction and, instead of this concept, proposed to use the concept of *state autonomy*; because state sovereignty entails its absolute prerogatives, whereas state autonomy does not. (Micu, 2007, p. 45)

Regarding the variety of meanings that sovereignty presents, the difference between sovereignty seen from an internal point of view and sovereignty seen from an external point of view is highlighted (George, 1995, pp. 130-132). In this context, it is shown that sovereignty developed at the same time as the emergence of national states and the exclusive right to govern within territorial borders. The rulers of the states claimed that they represented the supreme authority, they claimed to govern in this quality throughout the territory of the state, to resolve, as a supreme court of law, the disputes in the territory. Each state claimed, from an external point of view, its independence from other state and from any other super-national authority.

Theoretically, the *sovereign equality of states* (Gemanu, 1981, p. 131) was proclaimed, sovereignty having the role to justify the territorial demarcation and to be the basis for negotiation between states, as well as to help enforce an order, other than that based on force, an order based on trade and, in general, on interactions between states.

It is noted that claims of sovereignty, both internal and external, appeared together.

In the same opinion, the notion of sovereignty, seen from an external point of view, was built on the legal fiction of the equality of states, contrasting with the obvious inequalities between them, with the economic dependence of small and weak states to big and strong states. It is noted that sovereign independence involves legal and not absolute sovereignty, not *de facto*, but *de jure* sovereignty.

In these situations, the conclusion that can be drawn is that it would be a mistake to think that sovereignty is a static, or a clear and unequivocal concept, but, on the contrary, sovereignty should be considered a vague and variable concept, from a historical point of view.

In another conceptual sense, a distinction is made between *democratic* and *sovereign absolutist sovereignty*. With this occasion, the issue of sovereignty was associated to that of interest. Thus, an author (Tarantino, 1995, p. 142) observed that, in general, the topic of sovereignty was seen from two different angles, corresponding to different types of political organisation of civil society. The author took into account: a) the political organisation in which the personal interest of the prince prevails over the material legal system, as *jus voluntarium* and b) the political organisation in which the general interest of the country prevails, as a public interest, thus having *jus involuntarium*.

Regarding the question whether the personal will of the prince or the laws should rule, whether sovereignty is an attribute of the prince or an attribute of the laws, the author considered the aristocratic idea to be justified, according to which it is important that the laws are sovereign. But, in order for the laws to have this quality, a suitable government must exist and laws must be drafted based on the model of suitable constitutions. The final conclusion was that, when statesmen govern for the general interest and laws are drafted in accordance with suitable constitutions, the necessary conditions for laws to be sovereign are fulfilled. Otherwise, democratic sovereignty cannot exist, but, on the contrary, absolute sovereignty would.

Two aspects cannot be omitted from another, albeit restricted, conceptual analysis of sovereignty.

The first aspect assumes the fact that a correlation of state sovereignty with the sovereignty of the people is assumed within the democratic interpretation of sovereignty, because democracy is based on the idea of sovereignty of the people. Furthermore, in these conditions, the *sine qua non* condition that the will of the people must have the quality of the will of the state, a will that must be unique, arises.

The second aspect which must be taken into consideration is the criticism aimed at the specialists in the field, that they have only taken into consideration the connection between sovereignty and power, between sovereignty and law, not taking into account that the independent organisation, implicit to sovereignty, is also specific to non-state institutions, such as economic, religious, and even illegal, mafia-type, institutions, which do not obey universal values. The idea that the institutions that obey human rights, having as the basis of their organisation freedom, and not unlimited, discretionary power, should have the status of sovereign institutions, has been proposed (Tarantino, 1995, pp. 143-144).

4. Sovereignty and human rights

A current perspective from which sovereignty is analysed is that of human rights. A conclusive approach is that which convinces the reader that, when the aim is the protection of human rights, the freedom and dignity of the human being are the bases of the supremacy which sovereignty entails. In order to support his point of view, the same author assures us that such an approach is not subject to the risk of reaching the conclusion of the supremacy of people and not that of law. This risk would exist only if freedom were conceived not as what the Romans called *libertas*, but as what they called *licentia*, that is, unlimited, discretionary power.

One of the warnings from specialists is that sovereignty represents an obstacle in protecting human rights. One of the supporters of this point of view is an author (Resende de Barros, 200, p. 443) who justifies the need for the appearance of a third generation of human rights, based on brotherhood, solidarity of all individuals and aimed against the actions and omissions which may again endanger the conservation and survival of the human species itself, as it happened during the second world war. The rights in question are requested to be legally enforced in international declarations and pacts, but, if the states do not obey their obligations undertaken through treaties, they only offer a few means of constraint, such an action being blocked by the sovereignty of the signatory states.

However, the possibility of relativising state sovereignty through super-national treaties, as a new type of treaty based on which political societies superior to national states are established, which have their own coercive power, is suggested.

The indisputable fact that modern society continues to structure itself in national states is observed, that, in the time that has passed from the beginning of the modern era, a relativisation, a super-national limitation of sovereignty has taken place, but not to the extent where it can prevent national states, especially powerful ones, to practice actions and omissions to the detriment of human rights. Finally, the quoted author concludes that, as long as a definitive institutional form, able to peacefully revitalise sovereignty, through law, is not reached, it will continue to impede the effectiveness of human rights.

Another author (Jackson, 1995, p. 74) has a partially similar position, signaling the appearance of an incipient legal and moral cosmopolitanism, resulting from the fact that the international instruments regarding human rights equally guarantee fundamental rights and freedoms to each individual, regardless of his affiliation to a certain internal legal order.

The same author shows that international human rights law is enforced by various organisms: local, regional and international, which exercise control over sovereignty and which perform the legal interpretation in principle, in the

field of human rights, and the volume of competence and the importance of sovereign authority in terms of human rights are relative, being frequently object of disputes.

Thus, sovereignty has begun to be subjected to attacks, from the point of view of morality, when it was opposed to human rights. The defenders of human rights have invoked their universal character, the fact that they extend to all people and that no government has the right to violate the rights of those within the borders of the state.

Not only the moral condemnation of such violations, but also the enforcement of legal sanctions, even direct intervention in the countries that allow such violations, has been claimed, recommending that the U.N. support the intervention.

Conclusions

The positive conclusion is that the structure of sovereignty is flexible enough to be compatible with the numerous changes caused by globalisation, in the areas of economics, communication, etc.

Nevertheless, we must not ignore the negative functions of sovereign, among which, that of being a mask - in certain respects -, to hide the true inequalities between states. On the other hand, the fact that sovereignty is erroneously considered to grant rights to states, although states are not human beings in order to own rights, that nations do not have a legal personality, is hidden.

The doctrine of sovereignty can be criticised that it is sometimes used to defend the actions of governments or tyrants, aimed against their own people and in order to avoid the intervention of the international community. The claim to sovereignty cannot, however, protect the actions of a despot, and the ones culpable for violating human rights must not be protected by sovereignty.

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