

# SOVEREIGNTY: CONSTITUTIONAL AND HISTORICAL ASPECTS

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**Abstract:** *This article aims to analyse the concept of sovereignty under its historical and legal dimensions. Having evolved from the medieval dogma of divine right to the modern system of representative government, the concept of sovereignty legitimates the form of polity widely spread today, thus being recognized as the key constitutional foundation of statehood. While any organized society requires a supreme authority capable of wielding the prerogatives of state power, its nature as well as the source of its legitimacy remains a matter of great debate. Several philosophers have worked to provide answers to this, leading to significant changes in political theory with regard to the concept of sovereign and supreme power.*

**Key words:** *sovereignty, statehood, authority, social contract, constitution.*

## 1. Introduction

In terms of constitutionality, the concept of sovereignty can be regarded as the foundation of the contemporary polity: states all around the world are centred on the idea that a sovereign entity is wielding supreme authority over society. Such a paradigm originated in the development of modern statehood, going back to the so-called sovereign states endorsed by the Peace of Westphalia (1648), which in turn was heavily influenced by the works of certain philosophers renowned for writing on the social contract and natural law.

The notion of sovereignty was used to describe the manifestation of state power, in balance with the concepts of statehood, sovereign and society. The sovereign, either an individual or a collective body, wields the ruling power over a certain state and its corresponding society, under the strict terms

of a social contract. Thus, the term “state” can be defined as a community of people which permanently inhabit a determined area over which a sovereign power exerts its authority through the means of a political structure, known as government. In other words, it is now generally accepted that the people and territory that form the respective state are under the jurisdiction of the state itself, embodied under the guise of a sovereign entity led by a governing body legitimated by a social contract, signed in democratic times between the electorate and the elected.

Despite being attributed various meanings throughout history, some authors have understood the essential definition of sovereignty as being that of “supreme authority within a territory” [10]. It has been rightfully argued that this simple definition encompasses the three primary features of sovereignty: authority,

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supremacy and territoriality. Authority is possessed solely by the holder of sovereignty, which is invested with “the right to command and correlatively the right to be obeyed” [14]. Being exclusive in its nature, the holder of sovereignty wields supreme authority over all institutions whatsoever. However, the sovereign is bound to wield its supremely authoritative powers within the borders of the state he rules, thus sovereignty is also distinctively territorial in its nature. The subjects that form the population of a state are not to be confused with the citizens or nationals of the respective entity, as only those settled within the borders are concerned, ignoring any notion of identity.

In contemporary times, some authors view sovereignty as a component of the state [3], providing the constitutional framework for wielding the state power. In this respect, the Montevideo Convention on the Rights and Duties of States (1933) codified the main four criteria required for defining a state in international law: a defined territory, a permanent population, a government and a capacity to enter into relations with other states. However, the concept of statehood is independent of its recognition by other states. Moreover, the Arbitration Commission of the Conference on Yugoslavia (1991) considered “that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty”.

Another key dimension of sovereignty resides in its manifestation through two distinct, yet coexistent aspects. On the one hand, internal sovereignty refers to the supreme authority which invests the state with the right to establish and maintain a public order based on law. Consequently, this manifestation of internal supremacy can be expressed through the aforementioned right to request respect for law, either by

peaceful, benevolent compliance, or by the means of coercive enforcement.

In this regard, the absence of sovereign power gives reason to argue that notions such as ‘state’ or ‘law’ would be entirely different in meaning, if at all. As previously shown in literature, the concept of law has the meaning of a “set of rules of conduct in social relations”, while the notion of justice comprises “all jurisdictional bodies in a state” [13]. In this respect, it can be argued that sovereignty is a prerequisite condition for the rule of law, as the constitutional pillar of any democracy and contemporary legal systems. In simpler words, statehood cannot exist in the absence of sovereignty, therefore law and legal order cannot exist either in the absence of internal sovereign authorities that legitimately exert such prerogatives.

On the other hand, sovereignty must also deal with interferences from beyond the borders of the state. External sovereignty corresponds to the notion understood under international law provisions, therefore it manifests in relation to other sovereign entities. The state can manifest itself freely, independent of any foreign pressures, but with respect to other subjects of international law. Some authors define this dimension as the state’s freedom from influence on its fundamental prerogatives [3], while others refer to its limited, core meaning of “establish[ing] relationships with other states” [11].

Sovereignty may also be analysed from the perspective of its absoluteness, in relation to the concept of *ultima ratio*, meaning the “last resort” of the state’s powers involved in a governance process [9]. Some authors, such as Bodin and Hobbes, view sovereignty as unlimited and above law, based on divine right, while contemporary authors consider absolute sovereignty to be impossible, giving the European Union as an example of limited (or relative) sovereignty [10].

## 2. Early Views on Sovereignty

The Peace of Westphalia in 1648 had an everlasting effect on the European polity, marking the start of a steady change towards the modern configuration of sovereign states not only throughout the ‘old continent’, but at a global scale. It is worth mentioning that some authors suggest that Westphalia should not be credited with the creation of this system, although it marked the transition from Christendom to the modern “reason of state” [6]. In order to fully understand the historic context that led to these changes in the European polity, some essential considerations are to be made.

Medieval Europe was severely divided, being “negatively” decentralized by a political and military concept called feudalism. Practically, nations were divided into small provinces ruled by noblemen, while the sovereign had no real power apart from the influence gained in time by the Pope and the Holy Roman Emperor. Kings found themselves bound by the interests of the nobility, and in turn, the Emperor himself had no supreme authority over these monarchs.

By far and large, the Holy Roman Empire was a conglomerate of feudal possessions ruled by princes called electors, which had the prerogative of electing the Emperor.

Through a policy of strategic marriages, the House of Habsburg managed to bring under its influence a great number of territories, eventually claiming and retaining the Imperial title for centuries, apart from some short “interregnums”. Consequently, the Holy Roman Empire functioned to an extent as some sort of predecessor to the Austrian Empire.

In fact, the policy of the Holy Roman Empire soon became largely aimed at the establishment of a “universal monarchy” led by the Habsburgs [5], as well as

supporting a corresponding “universal Church”, fuelled by the Papacy’s desire to wield both temporal and spiritual authority over Europe.

However, the Papacy and the Habsburgs were soon to be contested by a succession of cultural and political movements that ultimately separated the state from the Church. One by one, the Renaissance and the Reformation and the Enlightenment marked a steady change in the school of political thought – the transition from a Church-led Europe to a system of sovereign and secular states as envisioned at the Peace of Westphalia.

Some philosophers did not directly write on the subject of sovereignty, but nevertheless had a certain contribution to its modern configuration.

Machiavelli, for instance, believed that the prince should not follow natural or canon law, but be invested with supreme authority over his territory in order to secure the interests of his republic’s wellbeing. Although not directly defining sovereignty, Machiavelli applied the general meaning in relation to the city-states of Renaissance Italy, foreseeing Hobbes’ *Leviathan*.

Martin Luther, on the other hand, criticized the Catholic Church and its desire to rule over both religious and political affairs. Luther considered that the Church should only have an ecclesiastical vocation, rather than the temporal and spiritual authority envisioned by both the Pope and the Holy Roman Emperor. This position eventually corresponded to the system of Westphalia, which ultimately led to the creation and spread of the secular state.

In this respect, the separation between the state and church can be considered a central pillar in the process of transition from Medieval times to the Modern vision of a more democratic, representative and responsible use of political power.

### 3. Modern Visions on Sovereignty

Beyond the writings of Machiavelli and Luther stand the first direct approaches to sovereignty, showcasing a slow transition from the medieval domination of the Church to the Age of Enlightenment. As we are about to see, Bodin and Hobbes had a conservative position, while Locke and Rousseau had a more radical, liberal outlook. Consequently, it should be considered appropriate to divide this period of great advances in terms of political thought into two relatively distinct schools of thought: the traditional view that saw the sovereign as having a divine right to rule, and the liberal finding that the people are the main source of legitimacy and sovereign power. Nevertheless, the two visions share a common origin and are solely differentiated by the temporal role attributed to divinity.

The first philosopher to tackle with the notion of sovereignty was Jean Bodin. In his book, not only did Bodin coin the word “sovereign”, but he also founded a new political perspective. At the time of the religious war between the Roman Church and the Calvinist Protestants, Bodin looked for a way to establish an order, blaming the medieval system that turned his country into a segmented society: France was divided by the three so-called Estates-General, the clergy, the nobility, and the commoners. In Bodin’s perception, the sovereign is by no means “the vassal of temporal [authority], but the lieutenant of divinity on earth” [9]. Under this perception, the sovereignty was to be absolute and virtually unrestricted, albeit bound by divine and natural law.

However, this political thinking was soon to be changed. As previously shown, the Catholic Church held great power in medieval times through their claim of divine right to dominate society. Back then the clergy claimed to be entitled to both a

temporal and a spiritual authority. As Ernst Kantorowicz pointed out in the past [4], at some point over the course of the Middle Ages, a distinction was made between the “Body natural” and the “Body politic” of monarchs. While the “Body politic” corresponds to a metaphorical manifestation of sovereignty, the author also questions whether this duality has anything to do with the “two bodies of Christ”, a concept which distinguishes between the priests as consecrated hosts (*corpus naturale*) and the administrative hierarchy of the Church (*corpus mysticum*).

Along with the process of secularization, which separated the Church from the affairs of the State, the political theology that dominated medieval Europe was brought to an end. Subsequently, a new concept of popular sovereignty gained recognition, based on the idea that all citizens cede part of their sovereignty, which in the Hobbesian natural ‘state’ is deemed absolute, in order to pursue a greater good, in the form of a supreme authority capable of guaranteeing a stable and secure society. This school of thinking brings us to the works of the contractarian philosophers, those which founded the concept of social contract as a way to evolve from the natural state. From the conservative approach of Hobbes to the moderate Locke and the liberal views of Rousseau, the state is unanimously called upon to ensure the common good.

Thomas Hobbes claimed that the natural state of people is one of war, for which the sovereign (called *Leviathan*) is invested with the power to establish a social order. Hobbes’ social contract requires disciplining citizens and maintaining a stable and peaceful society through what Max Weber later defined as “monopoly on [legitimate] violence” [1]. According to this theory, the natural state is perpetuated between states, represented at international

level by their sovereigns, who otherwise possess the right of life and death over their subjects. Hobbes perceived violence as an equivalent of force, sole attribute of the sovereign power. In other words, public order cannot be maintained if the use of violence is not regulated by a supreme authority.

John Locke, on the other hand, had a more liberal approach to the problem of sovereignty. While Hobbes viewed the state with unlimited control, placing the sovereign above law and ignored issues concerning representation, Locke favoured such a form of legitimacy and considered it essential against any abuse from the state [7].

Furthermore, Locke supported the idea that the natural state of man is manifested in a chaotic way, which eventually leads to every individual being his own supreme judge [8], or this would transform the natural state into a state of war, causing a *bellum omnium contra omnes*.

This is where the idea of voluntarily ceding sovereignty to the state, with the prospect of establishing a public order in which property is secured. Locke practically borrows Hobbes' idea in his plea for a sovereign power capable of guaranteeing property, but rejects the Hobbesian thesis that "the sovereign's right [is] unlimited, and his sovereignty – absolute", arguing that "[transferring all rights] to an absolute sovereign does not result in ending the state of war, but to worsen it" [7]. Thus Locke introduced the principle of representation as a method of avoiding the abuse of power.

Jean-Jacques Rousseau's vision on the state's role is clearly radical, in the sense that he conceives civilization, society in general as being the element responsible for corrupting man from his natural state, in which he enjoyed equality and freedom. Rousseau also positions himself against absolutism and the bourgeois movement, which he accused of promoting inequality.

The social contract, according to Rousseau, implies the obligation which relies on the state to ensure the fulfilling of the "General Will" and guaranteeing the prosperity of its citizens [12]. Moreover, Rousseau rejects indirect democracy and opts for a more active participation of citizens, arguing that the general will cannot be delegated. While Bodin and Hobbes envisioned a sovereign that rules above law, Rousseau considers the interest of the state as being the sole legitimate source of supreme authority in a society.

#### 4. Contemporary Constitutional Models

Sovereignty legitimates the ruling bodies to exert their supreme prerogatives over a certain society, but should this power be divided between different authorities rather than be entrusted to a single entity? Today it is a widely spread notion that power is to be shared in a so-called checks and balance system in order to prevent abuse and limit undemocratic tendencies. However, not all constitutional systems are based upon the same framework; therefore some different patterns have developed in this regard.

The classic model is centred upon the separation and balance of powers, to which a great number of countries have adhered, while another system, based upon a fusion of powers, insists upon the balance and not necessarily upon a clear separation or fully independent authorities in relation to each other. To comprehensively understand this distinction between two very similar yet different approaches, we'll have to discuss each of them in two sections.

##### 4.1. The Separation of Powers

In his *Politics*, Aristotle identified three main branches of government: the general assembly, the public officials, and the judiciary. A similar concept worked for the Roman Republic, where the public

officials, public assemblies and the senate operated in a somewhat balanced system.

In modern times, this framework was re-envisioned by the Enlightenment philosopher Montesquieu. The French political thinker proposed a system that also divided power between three branches: the legislature, the executive and the judiciary. Montesquieu thus deliberately sought to prevent the concentration of all power in the hands of a single ruler.

France and Romania, for instance, have this principle safeguarded by constitutional provisions. In this regard, Romania is very similar to the French constitutional system due to the fact that both countries belong to the same legal system, the Napoleonic civil law that “dominates” continental Europe.

The Constitution of Romania provides for a clear definition of the state given in article 1. In this respect, Romania is described as a sovereign and independent national state, a republic governed by the rule of law. Article 1 also mentions that the country shall be organized based on the principle of the separation and balance of the three powers: legislative, executive and judicial. In article 2, the fundamental law identifies the sole depositary of sovereign power: “the national sovereignty resides within the Romanian people”. The people shall exercise it by means of their freely elected representative bodies, as well as by referendum.

#### **4.2. The Fusion of Powers**

The fusion of powers concerns a lack of strictness in the separation of powers that leads to certain interdependency between the legislative and executive, respectively. This system is found in Britain and the Commonwealth countries that are based on the Westminster system. Such a result is the direct consequence of many centuries of continuous constitutional innovation which oversaw a gradual limitation of the

monarch’s absolute powers on one hand, and the gradual increase in parliamentary prerogatives, on the other hand.

The uncodified constitution that governs the body politic of the United Kingdom is the result of centuries of tradition, starting with *Magna Carta* in 1215 and up to recent reforms and consolidations. In regard to sovereign power, we have seen the views of Thomas Hobbes and John Locke, and also a very different approach from their French counterpart, Rousseau. In turn, Montesquieu’s separation of powers drew influence from the British constitutional system, although Locke himself proposed a different variant, dividing between the legislative (separated into several bodies, e.g. the House of Commons, the House of Lords), the executive and the federative powers, the latter two being prerogatives of the King, responsible for internal order and foreign affairs respectively, in respect with England’s colonial power.

Nevertheless, Britain presents a system based on parliamentary sovereignty. In this regard, British jurist and constitutionalist A.V. Dicey, known for popularising the notion of ‘rule of law’, considered that “Parliament means, in the mouth of a lawyer The King, the House of Lords, and the House of Commons: these three bodies acting together may be aptly described as the ‘King in Parliament’, and constitute Parliament” [2]. Although this system is based on a concept called ‘fusion of powers’ rather than a clear separation of powers, parliamentary supremacy is more or less recognised as a central pillar of Britain’s constitutional tradition.

#### **5. Conclusion**

The concept of sovereignty has evolved in connection to the evolution of political thought and society itself. Starting in the Middle Ages, the notion of having a supreme authority responsible for the very

existence of the state and the well-being of the citizens has gradually evolved from the doctrine of the sovereign's divine right to what we presently call democratic system of representative government. This transition hasn't occurred spontaneously, but as a result of the deep changes that at first affected the European society, and beginning with the twentieth century, the whole international community. Statehood as we understand it today is unarguably the global polity, acquiring its status as a direct result of centuries of political, military and philosophical contributions.

The 'states' of Medieval Europe were at first some loose conglomerates of feudal lands divided and controlled by the nobility. The only sign of unity came from the monarch, which is the reason why Machiavelli and Hobbes generally refer to a sovereign as an individual, and it is also why in contemporary times the office of head of state retains a certain degree of "sovereign resonance". The Papacy, aided, and after some time outdone by the Holy Roman Emperor, sought to unite all Europe under the divine rule of the Christendom.

Nevertheless, as some secular artistic and philosophical movements gained support across Europe, a slow but steady decline started for the Catholic Church and its main ally, the Holy Roman Empire. While the Renaissance and the Reformation came too quickly for the Papacy to efficiently repress them, the Age of Enlightenment gave a decisive blow to the Middle Ages and subsequently led to the end of feudalism and the start of the Modern period.

Among the philosophers credited as truly representative for the Enlightenment, some adhered to the school of thought that ultimately gave us the concept of a "social contract". Hobbes, Locke and Rousseau all have envisioned a construct that would essentially legitimate the understanding of sovereignty as the supreme authority

invested in order to ensure the well-being of the society. If Hobbes had a traditional view based around the concept of divine right, we saw how Locke and Rousseau had more liberal approaches, which formed the basis for the modern democracies.

In regard to contemporary constitutional models, the growing and legitimate need to limit the concentration of power in the hands of a single ruling entity or individual was met with similar, yet different models that presume some degree of separation between specialised authorities. While a great number of states, including Romania, adhere to the strict principle of separation and balance of powers, in the basic form that divides sovereign prerogatives usually into three branches (legislative, executive and judicial), an even greater number of countries use a different model based upon a fusion of powers, where a certain entity can wield powers from all branches, but usually this involves a close collaboration or interdependency between the executive and legislative powers, respectively.

In our case, however, Romania presents a tendency towards a more strict separation between powers, particularly recognising the need for an independent judiciary. The transition from the communist system to a democratic model based upon the rule of law involved many reforms in this area. It is indisputable that sovereignty works for the people solely in the framework of a democratic state that respects values such as human dignity and fundamental rights.

In conclusion, whether some countries prefer a stricter separation of powers while others prefer a fusion of powers, citing advantages such as the impossibility of a constitutional deadlock, this system of checks and balances can only work to its full extent in a democratic state. Thus, it is important to acknowledge how sovereignty has evolved from the medieval concept of absolute monarchy in direct relation to the democratic principles of the contemporary

world. This reflects the importance of the notion of sovereignty in relation to human society in all of its defining aspects.

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