Reconceptualizing Sovereignty in the Post-National State:

Statehood Attributes in the International Order

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Table of Contents

Chapter 1: Evolution of the Concept of Sovereignty in International Law

Chapter 2: Institutions and the Concept of Sovereignty

Chapter 3: The Federalist Tradition and the Concept of Sovereignty

Chapter 4: The European Union and the Concept of Sovereignty

Chapter 5: Sovereignty in a Post-Westphalian World

Abbreviations

BIT	BilateralInvestment Treaty
BVerfG	(Bundesverfassungsgericht) Federal Constitutional Court
CMLR	Common Market Law Review
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EU	European Union
FCC	Federal Constitutional Court
GATT	General Agreement on Trade and Tariffs
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IGT	Interest Group Theory
IL	International Law
ILC	International Law Commission
IR	International Relations
MERCOSUR	Southern Common Market (*Mercado Común del Sur*)
NAFTA	North America Free Trade Agreement
NIE	New Institutional Economics
OIE	Old Institutional Economics
PCIJ	Permanent Court of International Justice
QMV	Qualified Majority Voting
TEU	Treaty on the European Union

TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
US	United States
USSC	United States Supreme Court
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Treaties and Legislation

Covenant of the League of Nations, 1919.

Declaration on Principles of International Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 1970.

Dispute Settlement of Understanding (DSU) or Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994.

German Basic Law, 1949.

Montevideo Convention on the Rights and Duties of States, 1933.

Statute of the International Court of Justice, 1945.

Swiss Constitution, 2000.

Articles of Confederation, 1777.

Treaty of Lisbon, 2007.

Treaty of Rome, 1957.

Maastricht Treaty, 1992.

United Nations Charter, 1945.

United States Constitution, 1787.

Treaty of Versailles, 1919.

Vienna Convention on the Law of Treaties, 1969.

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New York *v*.United States, 505U.S.144 (1992).

Printz *v*. United States, 521 US 898, (1997).

Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion of April 11th, 1949, ICJ.

S.S. *Lotus* (France *v*. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

S.S. *Wimbledon* (United Kingdom, France, Italy and Japan *v*. Germany), 1923 P.C.I.J. (ser. A) No. 1 (June 28).

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Abstract

The Aims of this thesis are to understand the changes of the concept of sovereignty in the international system considering the role of regional and functional arrangements and the contribution of federalism as a political theory.

Federal theory is particularly important to the concept of sovereignty, particularly if one considers the diversity of federal political systems and their different historical experiences. Thus the thesis examines the federal experience of the United States throughout history and the European tradition of federalism. The present research is an attempt to emphasise the diversity of federalism as a legal and political concept and to demonstrate that federal political systems can be applicable beyond the modern state.

The EU is a paradigmatic case of a regional arrangement, 'proto-federal' that challenges the notion of sovereignty as an exclusive statehood attribute. The thesis examines the recent decision of the German Federal Constitutional Court concerning the Treaty of Lisbon, which can be seen as an archetype of the challenges posed to European integration. Moreover, the thesis analyses the concept of subsidiarity, considered by some as a potential replacement of the concept of sovereignty.

A theory of institutions is required in order to understand the mechanisms of international cooperation between states, this means that sovereignty should take into account international institutions and their constitutive role on state behaviour. Furthermore, the reconceptualization of sovereignty should consider at least three different factors: the rise of regional and functional legal orders, the different understandings of sovereignty offered by the federalist tradition and the processes of 'deterritorialization' and disaggregation of authority.

Introduction to the Thesis

1. Research Objectives

The research objectives of this thesis are:

1. To develop theory on the changes of the concept of sovereignty in the international order.
2. To explore the impact of international and supranational arrangements in the redefinition of the concept of sovereignty.
3. To construct a new understanding of the contribution of federal arrangements in the reconceptualization of sovereignty.

The thesis examines the concept of sovereignty in International Law considering that it is the ordering principle of the current international system. The United Nations Charter recognises the principle of sovereign equality of its members (Article 2/1). The thesis identifies the principle of sovereignty as part of the constitutive or 'constitutional' rules of the international system. The constitutional rules of the international system include rules of membership, rules of behaviour and meta-rules (secondary rules). Furthermore, the thesis examines the challenges to sovereignty by regional and functional arrangements. The role of the mechanisms of international governance is also important, considering the growing institutionalisation of the international system. Particularly important is the contribution of the federalist tradition to the concept of sovereignty considering that federalism sees sovereignty as a pluralistic concept as opposed to the understanding of the dominant tradition associated with the modern territorial state.

The European Union is presented as an example of a regional arrangement where sovereignty has evolved to accommodate the claims of member states and the Union. As such, European integration presents opportunities to understand the impact of global governance mechanisms in challenging state authority and reconceptualizing sovereignty.

The thesis is guided by the following research questions:

1. The extent to which competing concepts can accurately be substituted for sovereignty, such as the principle of subsidiarity.
2. Whether sovereignty remains relevant to the notion of international order, characterised by increasing institutionalisation, and if so, to what extent.
3. The nature of the role of international institutions in the redefinition of the concept of sovereignty.
4. The contribution of federal arrangements to the study of sovereignty.

2. Methodology and Methods

The thesis follows a multidisciplinary approach and is informed by research in the social sciences, particularly by International Relations and Institutional Economics. International Relations theory is particularly relevant, considering the different approaches to the study of international institutions, specifically Neo-Institutionalism and Constructivism.

The thesis starts with the legal approach, which implies the use of international legal sources defined by the Article 38(1) of the Statute of the International Court of Justice as: International Conventions, International Custom, and General Principles of Law, Judicial Decisions and the Writings of International Publicists.

The limitations of the legal approach particularly in explaining the reasons for international cooperation and the rise of mechanisms of global governance, has led the thesis to use a multidisciplinary approach.[1] Social science research is concerned with social facts, the way the world *is*, not necessarily how the world *ought to be*, as Monahan and Walker argue: 'Law, in contrast, is normative. It does not describe how

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[1] On the limitations of the legal approach and the need for multidisciplinary approach, Reza Banakar and Max Travers 'Law, Sociology and Method,' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research*, Oxford: Hart Publishing, 2005.

people do behave, but rather prescribes how they should behave'.[2] This means that the social sciences allow Law to escape from a 'restricted methodological vision'.[3]

The European Union is chosen as a paradigmatic case (the most salient) of the changes of the concept of sovereignty in the international system. European integration is an example of the disaggregation of authority, and as such, offers valuable lessons about the changes of sovereignty in a world composed of multiple institutional arrangements (regional and functional) that challenge sovereignty as an exclusive attribute of the modern state.

3. Structure of the Thesis

The thesis consists of five chapters. Chapter 1 examines the evolution of the concept of sovereignty in history since the Peace of Westphalia of 1648. Additionally, it outlines the dichotomy between two philosophical traditions in understanding the concept of sovereignty: the tradition that begins with the works of Jean Bodin and Thomas Hobbes, and the federalist tradition, inaugurated by Johannes Althusius.

Chapter 2 analyses the roles institutions and institutional theory play in the understanding of the concept of sovereignty. The chapter discusses the need for an interdisciplinary approach to studying international affairs. Furthermore, it provides an explanation for the design and evolution of international institutions, and their impact on sovereignty.

Chapter 3 examines the contribution of federalism as a legal and political theory to the study of sovereignty, following the federalist tradition. In the chapter there is a

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[2] John Monahan and Laurens Walker, 'Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law,' *University of Pennsylvania Law Review*, vol. 134, No.3, 1986, p. 489. Law is essentially normative, and as such, is concerned primarily with rules and the legal system.

[3] Geoffrey Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and the Social Sciences,' in Hoecke, Mark van, *Epistemology and Methodology of Comparative Law*, Oxford: Hart Publishing, 2004, p. 73.

discussion of the different historical experiences of the United States, Germany and Switzerland, and the possibilities of federalism beyond the state.

Chapter 4 analyses the European Union as a salient case of a federal political system, in which the concept of sovereignty is reframed into a new paradigm. The chapter provides a discussion of some of the innovations introduced by the Treaty of Lisbon, and discusses the recent decision of the German Federal Constitutional Court as an archetype of the challenges to European integration, posed by the different national Supreme and Constitutional Courts of the member states.

Chapter 5 concludes the thesis by discussing the concept of sovereignty in a post-Westphalian world where authority is challenged by multiple institutional arrangements. Moreover, the chapter discusses the phenomenon of 'deterritorialization' of authority. It looks at the notion of global legal pluralism as an alternative to either monism or dualism in International Law, as a theory of the articulation of legal systems, with multiple claims to ultimate authority or sovereignty. The chapter concludes with the adoption of the Althusian framework of sovereignty.

Chapter 1

Evolution of the Concept of Sovereignty in International Law

1. Introduction

The concept of sovereignty has been the cornerstone of International Law and of the international system since at least the Peace of Westphalia (1648), and the history of its origins and evolution is relevant to its reconceptualization, particularly if one sees sovereignty in the context of the rise, and perhaps the wane, of the modern territorial state at the beginning of the twenty-first century.

There are two historical traditions in the concept of sovereignty: one that sees sovereignty as an absolute concept of the modern territorial state, beginning with the works of Jean Bodin, hereinafter the 'Bodinian tradition', and the other that sees sovereignty as an attribute of different polities sharing a federal arrangement, the 'Althusian tradition', by reference to its earlier exponent Johannes Althusius. This chapter examines the origins and evolution of the concept of sovereignty by reference to these two traditions, since the Peace of Westphalia, to the current international system.

Concepts of social science arise to further explain and describe certain aspects of the reality, offering simplified descriptions or explanations of a larger phenomenon. This applies also to the concepts within the social sciences, 'Indeed concept formation lies at the heart of all social science endeavour'.[1]

Thus, concepts are not just words that define and explain reality, but in many ways they denote simplifications of reality itself, a fact explained by the need of parsimony, a necessary condition for the explanatory power of a concept.[2] This explains why

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[1] John Gerring, 'What Makes a Concept Good? A Criterial Framework for Understanding Concept Formation in the Social Sciences,' *Polity*, vol. 31, 1999, p. 359.

[2] John Gerring, *Social Science Methodology: A Criterial Framework*, New York: Cambridge University Press, 2001.

concepts are bound by their historical specificity;[3] why a history of concepts must first address the formulation of a concept at a particular historical period against its institutional and cultural background, and why 'Conceptual changes need to be understood in terms of the people who create and change their representations of nature and the practices they use to do so'.[4]

Consequently, the study of sovereignty has been bound by the formulations and the concepts of different authors, at different historical periods, since the emergence of modern territorial state, and for this reason, it is a concept that has been in constant mutation in the legal-political narrative.[5] The concept of sovereignty is a political and legal concept used to describe and explain the legal attributes of a political territorial entity, called the State,[6] as Hinsley argues: 'To understand the origin of this concept it

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[3] The term, 'historical specificity', is borrowed from Geoffrey Hodgson. It means that concepts are bound and defined in their historical and cultural milieu and, therefore, a reconstitution of the history of a particular concept needs to account for concepts in the way they were understood in their historical and cultural pedigree. As Hodgson reminds us, 'The problem of historical specificity addresses the limits of explanatory unification in social science'. Geoffrey Hodgson, *How Economics Forgot History: The Problem of Historical Specificity in Social Science (Economics as Social Theory),* London: Routledge, 2001, p. 23.

[4] Nancy Nersessian, *Creating Scientific Concepts*, Cambridge, MA: Massachusetts Institute of Technology, 2008, p. 5.

[5] Sovereignty is also an essentially contestable concept, meaning that sovereignty is a normative concept that expresses a certain state of affairs; that of the modern territorial state. However, it is also a concept, which is disputable by different users. See Samantha Besson, 'Sovereignty in Conflict,' European Integration Online Papers (EIoP) vol. 8(15), 2004:http://eiop.or.at/eiop/texte/2004-015a.htm [Accessed 21.12.2010]. Similarly, Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005, pp. 3–5. On the essential contestability of normative concepts see Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford: Hart Publishing, 2005, p. 72.

[6] The etymology of the word State first appears in relation to Italian city-states to describe a 'state of affairs', which in Italy, was known as *Stato*, from the Latin root *Status*, and which later came to describe the legal entity of the polity we have come to understand as the State. See Johan Kaspar Blunstschli, *The Theory of the State* (First published in German, *Lehrevom Modernen Stat*,1875), Ontario: Batoche Books, 2000; Philip Bobbitt, *The Shield of Achilles,*

is necessary to distinguish between the emergence of the state as a distinctive institution and, on the other hand, the extent to which the state is recognised and extent to which its rule is effective'.[7]

Sovereignty as a concept continuously changes according to the different foundational periods of a given 'international system'.[8] As Fowler and Bunck argue, 'Sovereignty thus brought to mind somewhat different notions for people in different centuries'.[9] As a concept, sovereignty has been used to describe an attribute of statehood as an issue of ultimate political authority, but as a concept, sovereignty does not retain a fixed meaning;[10] it is not an irreducible concept, although some aspects of it are irreducible. What is understood by this is that sovereignty as a legal concept can be defined and attributed with having the supreme power and authority within a territory, the *summa potestas*. This supreme authority is given to the State, and as such, sovereignty can be seen as an absolute category in that a state cannot be more or less sovereign. Sovereignty, as will become clear in the subsequent sections, is an attribute derived from statehood, although this does not mean that as an attribute of statehood[11] sovereignty is a static concept, rather, as will be explored below, it is a flexible concept that has been stretched to apply to different foundational moments of a particular international system.

War, Peace and the Course of History, London: Penguin Books, 2002, p. 87; Kenneth Dyson, *The State Tradition in Western Europe*, Oxford: Martin Robertson, 1980.

[7] F. H. Hinsley, *Sovereignty*, Cambridge: Cambridge University Press, 1986, p. 21.

[8] For this definition of an international system, see Hedley Bull, *The Anarchical Society*: *A Study of Order in World Politics*, London: Palgrave Macmillan, 2002, p. 9.

[9] Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State*, Pennsylvania: Pennsylvania State University Press, 1995, p. 6.

[10] As Krasner recalls, the concept of sovereignty as it is used has at least four different meanings: domestic sovereignty, interdependence sovereignty, international-legal sovereignty and Westphalian sovereignty. See Stephen Krasner, *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press, 1999, p. 9.

[11] The attribute, Statehood, is an inherent concept of the modern territorial state, which claimed ultimate political authority in all affairs, religious and secular, in a demarcated political territory.

1. Origins of the Concept of Sovereignty

The first author to describe sovereignty in the modern sense[12] was the French writer Jean Bodin, who described it as the 'absolute and perpetual power of a commonwealth'.[13] In order to understand the concept of sovereignty, however, it is necessary to understand the institutional background of the international system in the sixteenth century.

The European continent contained a multiplicity of political authorities that were not modelled on the territorial State system. Authority was not completely territorialised in the hands of a 'Leviathan',[14] but was divided into a vast range of overlapping claims by different polities. For this reason, a theory of sovereignty was not possible without a paradigmatic change of the medieval worldview. Medieval political theory was still populated with the persistence of the ideal political community of the *Respublica Christiana*,[15] with the secular authority of the Holy Roman Empire and the religious authority of the papacy.[16] In this sense, all political authority, although based

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[12] As Hinsley argues: 'Although the word "sovereignty" had gained currency by the beginning of that century Bodin in his *Les Six Livres de La République* of 1576 was perhaps the first man to state the theory behind the word'. Supra note 6, Hinsley, op. cit., p. 71.

[13] Jean Bodin, *Six Books of the Commonwealth* (*Les Six Livres de la République*), first published in 1576 (trans and edited by Julian H. Franklin), Book I, Chapter 8, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, Cambridge: Cambridge University Press, 1992, p. 1.

[14] Thomas Hobbes, on the role of the state: *Leviathan*, first published in 1651 (edited by R. Tuck), Cambridge: Cambridge University Press, 1996.

[15] Christian Commonwealth.

[16] As the historian, James Bryce, argued 'Thus, the Holy Roman Church and the Holy Roman Empire are one and the same thing, in two aspects: and Catholicism, the principle of the universal Christian society, is also Romanism; that is, rests upon Rome, as the origin and type of its universality; manifesting itself in a mystic dualism which corresponds to the two natures of its Founder. As a divine and eternal, its head is the Pope, to whom souls have been entrusted; as human and temporal, the Emperor, commissioned to rule men's bodies and acts'. James Bryce, *The Holy Roman Empire*, fourth edition, New York: Lovel, Coryell &

on feudal lines, was ultimately subjected to the Empire, albeit with nominal authority. This clashed with the claims to authority of all the other different political authorities[17] in temporal affairs, and in their claims of *jure* independence attesting to their *de facto* autonomy; and was further exacerbated by the breakdown of religious unity with the Protestant Reformation. As one author points out: 'The Protestant and especially the Calvinist interpretation of the Bible confirmed their commitment to a disintegrated Europe of wholly independent states, in some of which at least they would be free to enforce their religion and institute their form of society'.[18]

The pre-Westphalian system was not based on a notion of territorial states alone: it was grounded in a pluralistic political order composed of different political authorities, which usually overlapped, such as a league of cities (the Hanseatic league is a prime example), city-states, principalities, duchies, bishoprics and other autonomous polities, against the background of the persistence of the Holy Roman Empire, and its nominal claim to universal authority. As Spruyt argues:

> Systems of rule in the early Middle Ages had vastly different characteristics. They were non-territorial, and sovereignty was, at best disputed. Yet it would be wrong to think that these systems of rule did not control a particular geographical space. As Robert Dodgshon argues, all forms of organization – hunter-gatherer tribes, nomadic kinship structures, empire, and states – occupy a certain space. The question is whether the system of rule is predicated on and defined by fixed territorial parameters. The medieval period lacked not only exclusivity but also territoriality. Even in the feudal system of rule, where lords

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Company, 1886, pp. 100–101; on the Holy Roman Empire, Peter H. Wilson, *The Holy Roman Empire 1495–1806*, Basingstoke: Macmillan Press, 1999.

[17] Especially the claims of the French Monarchy that claimed complete independence from the Holy Roman Empire, and which provided the background for Bodin's normative theory.

[18] Adam Watson, *The Evolution of International Society*: *A Comparative Historical Analysis*, London: Routledge, 1992, p. 170.

might have jurisdiction over manors and lands granted to them, territoriality was not the defining trait of that logic of organization.[19]

Thus, all those modes of political organisation were, in a way, an antithesis of the 'ideal-type'[20] of modern territorial state. Authority was diffused and overlapping, and no single centre or particular political community was able to claim ultimate supreme authority, as the sovereign state had done after the Peace of Westphalia. Consequently, Bodin's work on sovereignty had a normative character, for he was not describing the state of affairs of an empirical reality he witnessed, but was making the case for the concentration of the ultimate legal authority of the sovereign territorial state.[21] Nevertheless, this perspective was decisive in changing the modern accepted view of the concept of sovereignty as Beaulac stresses:

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[19] Hendrik Spruyt, *The Sovereign State and its Competitors*, Princeton: Princeton University Press, 1994, p. 35.Tilly identifies three types of polities: tribute-taking empires and systems of fragmented sovereignty, in which he includes city-states and national states. See Charles Tilly, *Coercion, Capital and European States, AD 990–1992*, Oxford: Blackwell, 1992, p. 21; See also Charles Tilly, 'Entanglements of European Cities and States,' in Charles Tilly and Wim P. Blockmans (eds), *Cities and the Rise of States in Europe AD 1000 to 1800*, Oxford: Westview Press, 1994.

[20] Here the 'ideal type,' is used in the Weberian tradition, meaning not a 'real type', but an idealised type of what a certain category is supposed to be. As Max Weber reminds us: 'An ideal type is formed by one-sided accentuation of one or more points of view and by synthesis of a great many diffuse, discreet, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasised viewpoints into a unified analytical construct. In this conceptual purity, this mental construct cannot be found empirically anywhere in reality. It is a utopia. Historical research faces the task of determining in each individual case, the extent to which this ideal construct approximates to or diverges from reality.' Max Weber, Edward Shills and Henry Finch (ed. and trans.), *Methodology of the Social Sciences*, Illinois: Free Press, 1949, p. 90.

[21] The concept of the 'Nation-State' is rejected, primarily because it is a concept associated with an idealised territorial community that represents a particular nation based on an ethnic or religious homogeneity, and secondly, because it is a concept that appears only after the French Revolution. See Philipp Bobbitt, *The Shield of Achilles*, 2002, op. cit., pp. 178–204 and Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, London: Verso 2006.

The enlarged hermeneutic context of *Six Livres* in which its discourse existed and has since been existing, supports the proposition that the word 'sovereignty' was used by Bodin for a particular purpose; namely to place the ruler at the apex of a pyramid of authority. Accordingly, the sovereign prince should enjoy the most supreme power in the hierarchical organisational structure of society, that is, the highest unified power, free from any temporal authority. Internally, the Parlament of Paris, the Estates-General, officials, magistrates and commissioners would fall under the overarching authority of the monarch. Externally (that is, internationally), the French King would be fully independent of any other political entity, be it the Holy Roman Empire, the papacy, or a foreign country.[22]

Bodin did not invent the concept, but he certainly gave it a precise meaning in his theory; a normative theory of how power and authority should be assigned, rather than a description of how authority worked in sixteenth-century France. His work was seminal in the sense that: 'Reflecting the spirit of his party and the political conditions of his time, Bodin, in his masterly work, became the framer of the theory of sovereignty upon which the French monarchy was to rest, upon which, in fact, modern political science was to build'.[23]

Let us not forget that in Bodin's work, sovereign power was also limited by what he saw as the limits of Natural Law and Divine Law, following the medieval understanding of it: 'Hence just as a sovereign prince is not bound to the Laws of the Greeks or any other foreigner whatever, so also with the Roman laws, to which he is

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[22] Stephane Beaulac, 'The Social Power of Bodin's Sovereignty and International Law,' *Melbourne Journal of International Law*, 2003, vol. 4, No. 1; see also, Stephen Krasner, *Sovereignty: An Organized Hypocrisy*, 1999, op. cit., p. 22.

[23] C. E. Merrian Jr., *History of the Theory of Sovereignty since Rousseau*, New York: Kessinger Publishing, 1900, pp. 13–14.

bound even less than his own, except in so far as they conform to natural law, to which law, says, Pindar, all Kings and princes are subject'.[24]

Thomas Hobbes was also influential in the history of political ideas, in the sense that he laid out a political theory that justified the emergence of the modern territorial state, by proposing a theory in which people subjected themselves to the authority of the state[25] in order to overcome the problems of security. However, it is important to point out that Hobbes is mainly concerned with the dimension of internal sovereignty and authority within the state, and not with the problems of international legal sovereignty.[26] Hobbes is also part of the Bodinian tradition, in that he also ascribes ultimate authority, or sovereignty, to the monarch as a representative of the state, arguing 'From this Institution of a Commonwealth are derived all the Rights, and Faculties of him, or them, on whom the Sovereign Power is conferred'.[27] For Hobbes, sovereignty assumes a unitary and indivisible aspect, as with Bodin, in that he only recognises the authority of the state in which the citizenry gives its consent or acquiescence.

It is not the purpose of this research to develop an exhaustive historiography of the concept of sovereignty, but it is important to identify in history the different changes in the concept of sovereignty, in both the legal and political scholarship. In order to understand the transformations and changed meanings of sovereignty, it is also necessary to understand the emergence of the territorial state as the most important political entity in the international system. This was a process that occurred slowly, and although scholars point out foundational moments of the current international

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[24]Bodin, op. cit. Book I, Chapter 8, (396), p. 38. For a detailed analysis of the philosophical implications of Bodin's thought see Quentin Skinner, *The Foundations of Modern Political Thought: The Age of Reformation*, vol. II, Cambridge: Cambridge University Press, 1978, pp. 284–301.

[25] Hobbes preferred the term Commonwealth: 'This done, the Multitude so united in one Person, is called a Commonwealth, in Latin "Civitas". This is the Generation of the great Leviathan, or rather of that Mortall God, to which we owe under the Immortal God, our peace and defence.' Part II, Chapter XVII, op. cit., p. 120.

[26]Raia Prokhovnik, *Sovereignty, History and Theory*, Exeter: Imprint Academic, 2008, p. 56.

[27]Ibid., Part 2, Chapter XVIII, p. 121.

system, such as the Peace of Westphalia in 1648, the fact is that modern territorial states evolved gradually before and after the settlement achieved in Westphalia, as Strayer argues: 'But the change is usually so gradual that the process is hard to document; it is impossible to say that at a certain point on the time scale loyalty to the state becomes the dominant loyalty'.[28]

2. The Peace of Westphalia

Much has been written about the settlement achieved at Westphalia, which ended the Thirty Years' War,[29] and is considered the foundational moment of the modern territorial system. The traditional account considers Westphalia as the moment that inaugurates the modern state system by defining the rights and duties of states as having the supreme authority in their own territorial jurisdictions, as Philpott points out: 'In the wake of Westphalia, states were the chief form of constitutional authority in Europe, and their authority faced no serious rival in the Holy Roman Empire'.[30] The claim is that Westphalia is not just a 'moment', but the settlement that in itself is

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[28] Joseph R. Strayer, *On the Medieval Origins of the Modern State*, Princeton: Princeton University Press, 1970, (2005, Forward by C. Tilly and W. J. Jordan), pp. 9–10. Similarly, Gunn: 'State growth, however was not as linear a process as it may have appeared, whether to its proponents or its enemies.' Steven Gunn, 'War, Religion and the State,' in Euan Cameron (ed.), *Early Modern Europe: An Oxford History*, Oxford: Oxford University Press, 2001, p. 123.

[29] A conflict that lasted from 1618 to 1648, it determined the fate of Germany, included all major European powers, and settled the wars of religion in Europe. It included the Peace Treaty of Münster between the Holy Roman Empire and France, and the Peace Treaty of Osnabruck between the Holy Roman Empire and Sweden. The Peace settlement included most of the European countries involved in the conflict, and considering the nature of the war, it was truly Pan-European. Randall Lessafer, 'Peace Treaties from Lodi to Westphalia,' in Randall Lessafer (ed.), *Peace Treaties and International Law in European History*, Cambridge: Cambridge University Press, 2004, p.10; Randall Lessafer, 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648,' *Grotian*, vol. 18, 1997.

[30] Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, Princeton: Princeton University Press, 2001, p. 84.

constitutive of a new international system, based on the modern territorial state that excludes other international actors such as city-states, League of cities and the Holy Roman Empire.

For this reason, 'Westphalia refashioned each of the three faces of sovereignty; its legacy is the persistence of this refashioning over the following three centuries. At Westphalia the state became the legitimate polity within Europe, while the Holy Roman Empire virtually lost its sovereign prerogatives'.[31] Sovereign statehood,[32] in this sense, is intrinsically related to the emergence and evolution of the state system at Westphalia, and is seen by many as a 'constitutional' proto-charter of the international community.

This, however, has been contentious, mainly because although Westphalia still remains as a symbolic marker of the new world inaugurated by the modern territorial sovereign state which consecrated the principle of '*Cuius regio, eius religio*'[33] it was a Treaty that disciplined the internal constitution of the Holy Roman Empire and contained different polities to the modern territorial sovereign state.[34]

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[31] Ibid., p. 90.

[32] To use the modern terminology.

[33] The principle consecrated the rule that the ruler can choose and define the religion in its domain or territory following the Peace of Augsburg in 1555. The Peace of Westphalia recognises the power of the rulers in the multiple political authorities, especially in Germany, to define the religion in its domain, settling the wars of religion in the European continent. See Leo Gross, 'The Peace of Westphalia 1648–1948,' *American Journal of International Law*, vol. 42, No. 1, pp. 20–41.

[34] The settlement achieved is not one that excludes different political actors, other than the sovereign state such as the Holy Roman Empire, but one that works as a symbolic representation of a new age. 'Westphalia is not a literal moment of political transformation, but, rather, the symbol of that change. After Westphalia the language of international justification gradually shifted, away, from Christian unity and towards international diversity based on a secular society of sovereign states'. Robert Jackson, Introduction, *Sovereignty at the New Millennium*, Oxford: Blackwell Publishing, 1999, p. 17. On the importance of Westphalia as a symbolic, defining moment, see also Antonio Cassesse, *International Law in a Divided World*, Oxford: Oxford University Press, 1986, pp. 34–53.

Historically, Westphalia should not be seen as a meta-historical moment that encompasses the notion that all polities before the Peace were not sovereign states, and after the settlement, suddenly became sovereign states. It is a settlement that marks a dramatic change, not in the way the sovereign state actually emerges, but in the way this emergence is perceived in the legal and political literature. The shift was symbolic, and should be seen from this perspective – not as a real shift – although there is agreement with those that say: 'The Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old to the new world'.[35]

This new international system was to be based on the principle of exclusive territorial authority of the state, as clarified by Kratochwil: 'Sovereignty became a distinct institution when the claim to supreme authority was coupled with a specific rule of allocation for exercising this authority'.[36] It appears that, suddenly, it is the beginning of the end for pluralism in legal and political authority in the European State system, while at the same time, a gradual empirical centralisation of authority towards the sovereign state and its rulers ensues. Sovereignty becomes the legal expression to denote the *loci* of centralised and exclusive political power in the state externally in international affairs, and internally, within the state;[37] as Jouvenel – writing about the centralisation of power in the hands of the monarch – puts it: 'The *plenitude potestatis* became the goal towards which the kings moved consciously. To reach it, a long road stretched before them, for it was necessary to destroy all authorities other than their

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[35] Gross, op. cit., p. 28.

[36] Friedrich Kratochwil, 'Sovereignty as Dominium,' in Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? Sovereignty and International Intervention*, Baltimore and London: John Hopkins University Press, 1995, p. 25. On the exclusive authority over territory of the modern state Pierson, *The Modern State*, London: Routledge, 1996, p. 12.

[37] Internal sovereignty means that states have the monopoly on legitimate use of force within a given territory, to use Max Weber's expression, thus enjoying the exclusivity of authority in a given territory.

own. And that pre-supposed the complete subversion of the existing social order. This slow revolution established what we call sovereignty'.[38]

2.1. Constitutional Rules of the International System

If one sees Westphalia as a foundational moment of the international community composed of sovereign territorial states, it is necessary to identify the foundational principles, norms and rules that created this particular system. The foundational or 'constitutional' rules[39] should identify at least three types: rules of membership, rules of behaviour and secondary rules.[40] The rules of membership determine the types of polities that are legitimate in the international system. In the international system inaugurated after the Peace of Westphalia, the sovereign territorial state is only one of the many types of polities accepted, although after Westphalia, it becomes increasingly the only acceptable political form; the waning of the Hanseatic League is a good example of how Westphalia contained a strong bias against polities other than the modern territorial state, as Duchhardt argues:

> The restriction of the active part in international law to the sovereignty
> holders is also mirrored in the fact that (for a long time 'international')
> alliances of cities such as the Hanseatic League in the middle of the
> seventeenth century gradually disappeared from the international
> scene. This first of all had to do with the fact that the League itself did
> no longer function and that in 1629 it handed over the authorisation to
> act on behalf of the whole association to the three northern German

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[38] Bertrand de Jouvenel, *An Inquiry into the Political Good*, Indianapolis: Liberty Fund, 1997, p. 208.

[39]'Constitutional rules,' are meant as 'constitutional' in the material sense, as a set of rules that discipline a particular society or community; in this case, the international society. See Christian Reus Smit, 'The Constitutional Structure of the International Society,' *International Organization*, vol. 51, No. 4, 1997, p. 566.

[40] Primary rules are those that regulate behaviour and conduct, secondary rules are those from which primary rules are created, extinguished or altered. See Herbert Hart, *The Concept of Law*, Oxford: Clarendon Press, 1997, p.94.

'Hanseatic' towns. But it had primarily to do with fact that the Hansa simply no longer fitted into a system of sovereign states and could no longer justify its existence as a league with a specific purpose, aiming at nothing else than optimising and securing its trade, within a system of sovereign states.[41]

The rules of behaviour determine what is or is not acceptable behaviour; they also establish the rights and duties of the different polities. It is in this framework that sovereignty must be understood, as a concept within the constitutive rules of each international system; in Westphalia, sovereignty starts to emerge from those foundational rules, as a concept attributed to the modern territorial state.

After the settlement of Westphalia, a new understanding of the Law of Nations slowly emerges – a 'secular' political[42] order – where states have no authority above them and in which political power emanates solely from states' consent. This new international system is increasingly secular, focused on the idea of equality between states, and freed from the previous paradigm and its imperial and religious connotations. The medieval dreams of the *Respublica Christiana* are dashed to the ruins of history; 'The *Imperium Mundi*, which rose above the Sovereign States, had evaporated into an unsubstantial shadow, and at any rate, was stripped of the character of a State, even when its bare existence was not denied'.[43]

The chief exponent of this new order, disciplined by the new Law of Nations is Hugo Grotius,[44] who saw sovereignty as the power 'whose actions are not subject to the

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[41]Heinz Duchhardt, 'Peace treaties from Westphalia to the Revolutionary Era,' in Randall Lessafer, (ed.) *Peace Treaties and International Law in European History*, Cambridge: Cambridge University Press, 2004, p. 48.

[42] As Bluntschli, states on the nature of the State: 'The modern idea of the State is not religious,' op. cit., p. 60.

[43]Otto Gierke, *Political Theories of the Middle Age* (first edition 1900, trans. F. W. Maitland), Cambridge: Cambridge University Press, 1968, p. 97.

[44] Hugo Grotius (1583–1645), was a Dutch lawyer and is considered the founder of Modern Public International Law. See his work, *Jure Belli ac Pacis* (*On the Law of War and Peace*, 1625), Montana: Kessinger Publishing, (2010). See also, Amos Hershey, 'History of

control of any other power'.[45] Sovereignty is an attribute of the states in a political order in which all were equal sovereigns, independent of any other political authority, and supreme in their own jurisdictions. The Bodinian[46] paradigm returns as the idea of a supreme authority only answerable to itself, although in Grotius's understanding of the Law of Nations, states are bound by Natural Law, in fact, in Grotius's philosophy of Law, he emphasised the limited character of the sovereign, saying: 'Now the Law of Nature is so unalterable, that it cannot be changed even by God Himself'.[47] For Grotius, contrary to the modern view, International Law is not purely consensual, but depends on the limits posed by Natural Law.[48] This view, however, did not lead to a return of the old paradigm of multiple political authorities under the overarching order of the Holy Roman Empire and the Catholic Church, but to a model of states as the supreme agents in the new international order, albeit limited by Natural Law as perceived by the early authors.[49]

In many ways, the development of a theory of International Law accompanies the rise of the territorial state, which came about as a result of the political and technological transformations that preceded and followed Westphalia.[50] The development was

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International Law Since the Peace of Westphalia,' *American Journal of International Law*, vol. 6, No. 1, 1912, pp. 30–69; Hersch Lauterpacht, 'The Grotian Tradition in International Law,' in *The British Yearbook of International Law*, Oxford: Oxford University Press, 1946, pp. 1–54.

[45] Grotius, op. cit., Book I, Chapter 3, VII, p. 40.

[46] By reference to Jean Bodin.

[47] Grotius, op. cit. Chapter I, X, p. 7.

[48] In Grotius's case, the doctrine on War and Peace had its origins in his understanding of the theory of a just and unjust war, which is a theme recurrent in western thought at least since Thomas Aquinas. What is new, however, is his insistence on the nature of the relations between States based also on consensus.

[49] Martti Koskenniemi, *From Apology to Utopia*, Cambridge: Cambridge University Press, 2005, p. 99. They included Christian Wolff and Emmerich Vattel; on their contributions see Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today*, Cambridge: Polity Press, 2002.

[50] The rise of the modern territorial state, as a result of transformations in warfare and the consequent expansion of the bureaucratic structures of the state –especially by means of a

gradual, but as the old world order was effectively closed, political thought reflected this shift:

> After Westphalia Western Europe came to understand itself as a world of sovereign states which, although they were unequal in terms of population, territory, military power, and economic wealth, were all equal in terms of international law and diplomacy.[51]

The factual change, from an international system based on multiple political authorities to a system based on the modern territorial states, took some centuries to be fully established after the settlement of Westphalia:

> The Treaties ending the Thirty Years' wars did not sweep aside the old political-territorial order; they did not abolish the Holy Roman Empire, nor did they eliminate all sorts of quasi-sovereign polities. But they did embody an early formalization of the idea that sovereignty was not simply a characteristic of individual states, but was also a principle that should govern relations between states.[52]

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fiscal administration created to support the means of war –was among one of the main reasons for the success of the territorial state vis-à-vis other polities. As Tilly argues: 'War wove the European network of national states, and preparation for war created the internal structures of the states within it,' Charles Tilly, op. cit., p. 76. For other accounts of the rise of the territorial state based on institutional factors, see Spruyt, op. cit. 1994, and Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe*, Cambridge: Cambridge University Press, 1997, pp. 10–19.

[51] Robert Jackson, *Sovereignty: Evolution of an Idea*, Cambridge: Polity Press, 2007, p. 66.

[52] A. B. Murphy, 'The Sovereign State as a Political-Territorial Ideal: Historical and Contemporary Considerations,' in *State Sovereignty as a Social Construct*, Cambridge: Cambridge University Press, 1996, p. 92. Westphalia represents a symbolic change only because it disciplined the internal constitution of the Holy Roman Empire, Randall Lessafer, 'Peace Treaties from Lodi to Westphalia' in Lessafer, Randall (ed.), *Peace Treaties and International Law in European History*, Cambridge: Cambridge University Press, 2004, pp. 9–10.

Nevertheless, this philosophical change – the 'Copernican revolution' – transformed the way international society was seen, although this change should not be equated with a dramatic change in 1648, because in reality, historically, the rise of the modern territorial state was a gradual process.

International Law began to reflect this change, first to resemble an order that applies to the modern territorial state, excluding other types of polities, which until then had been prevalent in the international system, and secondly, in the source of authority, excluding references to the divine. This meant that International Law was valid, because the sovereign territorial state decided to abide by the rules set, freely accepting them, and thus it was a voluntary conception, as opposed to a naturalistic conception.

This was not entirely clear after the Peace of Westphalia, but became increasingly the accepted view of International Law over a period of time. The concept of sovereignty also follows this understanding of International Law, which affirms peremptorily that Law is a product of the conscious creation of states. The concept of sovereignty is thereby completely modelled on this paradigm of an international system based on anarchy[53] where states consciously create the foundational rules of the international system, and no rule is valid unless assented by the states. Therefore, 'Here, sovereignty and anarchy are tied together ontologically, at the level of definition, the former term being logically privileged, since it signifies that which is foundational to international politics'.[54]

The element of 'international community'[55] bound by strong rules slowly disappears, and what emerges is a conception based solely on anarchy and the idea that because the rules of the international system are freely chosen by states, hence, states can opt-

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[53] Anarchy does not mean chaos, but is a feature of an international system based on the existence of sovereign territorial states that recognise no superior, op. cit., Bull, 2002.

[54] Jens Bartelson, *A Genealogy of Sovereignty*, Cambridge: Cambridge University Press, 1995, p. 24.

[55] Which presupposes a community of states bound by common principles.

out of the rules that once bound the international community. The international system is, thus, seen as a system of 'self-help' only, and states as pursuing their national interests alone.[56]

3. The Limits of the Bodinian Tradition: Johannes Althusius

Sovereignty, in the sense of this novel philosophical understanding, was a concept that was at the basis of the International Law. Following the Bodinian tradition, it is a concept defined by its indivisibility and unity, and in many respects, can be seen as a-historical, in that it fails to account for the problems of historical specificity, while also failing to address the actual changes the concept has undergone through attending to the practice of states and empirical reality.

The Bodinian paradigm of sovereignty that came to dominate the legal-political discourse on the concept is just one part of the tradition that eclipsed the Althusian[57] contribution to the debate on sovereignty. In contrast to Bodin, Johannes Althusius wrote his work in the context of the Holy Roman Empire and proposed a 'compound' theory of sovereignty. He argued that sovereignty was an attribute in which different political communities could share, and in this respect, he was arguing for a view of sovereignty in which different political communities participated, whilst forming part of a larger political community. Hence, the Althusian tradition is an early exposition of a proto-federalist tradition,[58] and his major work, the *Politica,* is therefore equal in its dignity to Bodin's work in the history of political and legal scholarship. It is important to point out, however, that the exclusive territorial authority of the state was not something Althusius witnessed in the international system of his period, lest one

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[56] This is the widely accepted view in International Relations theory, particularly with Neo-Realism, see David Baldwin (ed.), *Neorealism, and Neoliberalism: The Contemporary Debate*, New York: Columbia University Press, 1993.

[57] By Reference to Johannes Althusius (1557–1638), the 'father' of federalism, hereinafter, *Politica* first published in 1603. See also references to Althusius in Chapter 3 when the federalist tradition is discussed.

[58] The relevance of federalism and federalist theory to the study of sovereignty will be the subject of scrutiny in Chapter 3.

forget, that the rise of modern State authority was a gradual process. What it is important to retain is that the Althusian tradition emphasises a pluralistic system of governance based on consent[59] which requires him to overcome the concept of sovereignty as it was presented in Bodin's work. In Althusius's work, political communities are not based on the centralised and hierarchical understanding that emerged from Bodin's work. Althusius is a proto-federalist theorist who emphasises the role of voluntary association, seeing sovereignty as a power belonging to political communities, not an absolute and perpetual power as Bodin's theory proposed. Therefore he directs his critique to Bodin by arguing that:

> Bodin disagrees with our judgement by which supreme power is attributed to the real or universal association. He says that the right of sovereignty, which we have called the right of the realm, is a supreme and perpetual power limited neither by law (*lex*) nor by time. I recognise neither of these two attributes of the right of sovereignty, in the sense Bodin intends them as genuine. For this right of sovereignty is not the supreme power; neither is it perpetual or above law… Indeed, an absolute and supreme power standing above all laws is called tyrannical.[60]

Althusius clearly rejects a political theory that sees sovereignty as an absolute power of the king, as Bodin's theory proposed. For him, the nature of political life is based on the idea of 'symbiosis',[61] which for Althusius, means a communion of different political communities sharing and participating in the exercise of the political

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[59]Thomas O. Hueglin, 'Johannes Althusius: Medieval Constitutionalist or Modern Federalist?' *Publius: Federalism as a Grand Design*, vol. 9, No. 4, 1979, pp. 9–41; Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism*, Wilfrid Laurier University Press, 1999.

[60] Johannes Althusius, *Politica Methodice Digesta Illustratis, Sacris, Profanis*, 1603 (*Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*, (trans. F. Carney)), Indianapolis: Liberty Fund, 1995, Chapter X, 20–21, p. 71.

[61]'Politics is the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called "symbiotics" …'. Althusius, ibid., Chapter I, 1, p. 17.

power.[62] Hence, this understanding of different political communities sharing power, leads him to ascertain that sovereignty is an attribute of the realm, by which he means, the different political communities. Althusius was not writing in the context of the modern territorial state, but about the pluralistic legal order that was slowly emerging in Europe between the sixteenth and seventeenth centuries, and in light of that, it is important to keep in mind his claim that: 'Moreover, I have attributed the rights of sovereignty, as they are called, not to the supreme magistrate, but to the commonwealth or universal association'.[63] This is in opposition to Bodin's claim attributing sovereignty to the French king – in which regard, Althusius is anti-Bodinian in the tradition he inaugurated – which is opposed to that which prevailed in western political thought on sovereignty[64] as Hueglin makes clear:

> First of all, Althusius' political theory obviously constitutes a rather important, if still largely neglected, contribution to the history of political thought.[65]

The Althusian tradition did conclude with its author, but was followed up by authors such as Ludolph Hugo,[66] who writing in the federalist tradition, understood the

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[62] Sovereignty thus resides in the 'People' as a corporate body, see George H. Sabine, *A History of Political Theory*, Hinsdale: Dryden Press, fourth edition, 1973, p. 388; similarly, William Archibald Dunning, *A History of Political Theories, From Luther to Montesquieu*, London: Macmillan & Co., 1928, p. 63.

[63] Ibid., Althusius, Preface to the third edition (1614), p. 13.

[64] As Daniel Elazar states: 'In the struggle over the direction of European State building in the seventeenth century, the Althusian view, which called for the building of states on federal principles – as a compound political associations – lost out to the view of Jean Bodin and the statists who called for the establishment of reified centralized states where all powers were lodged in a divinely ordained king at the top the power pyramid or in a sovereign center'; 'Althusius's Grand Design for a Federal Commonwealth' in Johannes Althusius, *Politica Methodice*, op. cit., Chapters X, 20–21, pp. 71, p. xxxviii.

[65] Hueglin, op. cit., p. 5.

[66] Ludolph Hugo (1630–1704), dealt with the constitution of the Holy Roman Empire in his work, *Dissertatio de statu regionum Germaniae et regimini principum summae imperii reipublicae aemulo* 1661, (*On the Status of Regions of Germany*); see H. H. F. Eulau,

relationship between the Holy Roman Empire and the territorial states in federal terms, and thus, the concept of sovereignty.[67] Hugo saw the possibilities of different polities other than the territorial state,[68] particularly in the context of the Imperial Constitution accepting the territorial division of the Empire. This position was anathema to authors writing under the framework of the Bodinian tradition, such as Puffendorf,[69] who saw the territorial division of the Empire as 'monstrous' and 'irregular' because, in his view, sovereignty as the reserve of territorial states and a federal system was just an alliance of the states, 'which reserved all final authority to themselves'.[70]

Another author following in the Althusian tradition was Leibniz.[71] He removed the idea of supremacy from the concept of sovereignty, and offered a minimalist definition of the concept of sovereignty based on the idea of territorial superiority, by affirming: 'Sovereign is who he is a master of a territory'.[72] This led him to conclude and admit the territorial authority of different political communities other than the state,[73] which, as Riley states: 'Leibniz' weakening of Sovereignty had the great merit

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'Theories of Federalism under the Holy Roman Empire,' *The American Political Science Review*, vol. 35, No. 4, 1941, p. 650.

[67] Ibid., Eulau, p. 653.

[68] He identified three types of polities, the confederal league, decentralised unitary governments and what is now called federal government. For a more detailed and refined argument of his theory see P. Riley, 'Three 17th-Century German Theorists of Federalism: Althusius, Hugo and Leibniz,' *Publius*, vol. 6, No. 3, pp. 7–41.

[69] Samuel Puffendorf (1632–1694), German Lawyer and political theorist. His relevant work for the purposes of the discussion is *De Jure Naturae et Gentium Libri Octo* (*Of the Law of Nature and Nations*), 1672.

[70] Riley, pp. 19–20.

[71] Gottfied Wilheem Leibniz (1646–1712), a German philosopher and scientist, the work relevant to the discussion is *De Suprematu Principum Germaniae*, 1677, *G.W.L., Political Writings*, (ed.) P. Riley, Cambridge: Cambridge University Press, 1998.

[72] In Riley, 'Three 17th-Century German', op. cit. p. 26; Leibniz equated territorial hegemony with sovereignty, Chapter X, op. cit., Leibniz, pp. 115–116.

[73] Riley, pp. 28–29.

of allowing him to see federal government as something more than an alliance, even though this cost him a realistic appraisal of the modern states-system'.[74]

The Althusian tradition, albeit forgotten, is still of importance, if one wants to grasp the complexities of sovereignty and the rise of the territorial state.

The Peace of Westphalia inaugurated a new period for the international system in which territorial states assumed the primacy as actors in the international sphere. A new theory was, therefore, required to embody these changes: the Bodinian tradition assumed pre-eminence by excluding the Althusian tradition, which was relegated to the annals of history, until its rediscovery by German scholarship in the nineteenth century, especially by Otto Van Gierke.[75] Notwithstanding this, the prevailing understanding of the theory of sovereignty in the Bodinian tradition was found in authors such as Vattel[76] who identified the legal category[77] of sovereignty as belonging to different states, regardless of their power or size, and it is here that equality in International Law is linked to the rights of sovereignty:

> A dwarf is as much a man as a giant is; a small republic is no less
> sovereign than the most powerful Kingdom. By a necessary
> consequence of that equality, whatever is lawful for one nation, is

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[74] Ibid., p. 29. As one author demonstrates: 'He not only admitted the possibility of the theoretical limitation of sovereignty, but he also found, in the examples of the Empire, the Helvetic Confederation and the United Provinces, that several territories may be united into one body politic without detriment to the territorial supremacy (*superioritas territorialis*) of any single of them', see Eulau, op. cit. p. 655.

[75] Elazar, p. xxxxix.

[76] Emmerich de Vattel (1714–67), was a Swiss Lawyer. Referring to his magisterial work, *Droit des Gens ou principles de la Loi Naturalle apliques a la conduite et affairs des Nations et des Souverains*, 1758 (*The Law of Nations, or Principles of the Law of Nations Applied to the Conduct and Affairs of Nations and Sovereigns*, trans. Joseph Chitty, 1853), Philadelphia: T. J. W. Johnson, Law Booksellers.

[77] Sovereignty appears increasingly, in the legal scholarship as a legal category.

equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.[78]

Political thought on the legal attributes of the state becomes more and more sophisticated to reflect the political reality, and the early exponents of International Law following the Bodinian tradition, begin to develop the doctrine of sovereign equality to reflect these changes, as Simpson states:

> To summarise, then, sovereign equality arose over a long period of time in European history. The primary political roots of the principle can be found in the slow dissolution of the Holy Roman Empire and its replacement by a system of territorial separatism and the state.[79]

Regardless of the importance one attributes to Westphalia the fact is that the transformation of political thought begins to reflect the rise of the modern territorial state, in the centuries that followed the Settlement up until the great cataclysm of the modern period; the French Revolution and its aftermath, the Congress of Vienna.

The death of the Holy Roman Empire came about in 1806 as a result of the success and transformations of the territorial state and the innovations borne out of the French Revolution, as Blanning points out: 'In this brave new world of power-politics there was no room for such a soft polity as the Holy Roman Empire'.[80] Notwithstanding the dissolution of the Holy Roman Empire, it is important to stress what is interesting – not the dissolution – but its pervasiveness in an international system composed of sovereign states and the settlement that had been achieved in Westphalia.

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[78] Vattel, ibid. Preliminaries 18, also mentioned in Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge: Cambridge University Press, 2004, pp. 31–2.

[79] Simpson, op. cit., 2004, p. 34. The principle of sovereignty allied with the principle of equality found its expression in the Hague Peace Conference of 1907. See Frederick Charles Hicks, 'The Equality of States and the Hague Conferences,' *American Journal of International Law*, vol. 2, No. 3, 1908.

[80] Tim Blanning, *The Pursuit of Glory, Europe 1648–1815*, London: Penguin Books, 2008, p. 285.

The successors of the Imperial crown of Charlemagne could no longer hold on to the title, 'Kings of the Romans', or aspire to universal supremacy in Europe in the system of sovereign states, which was now much more efficient and effective in waging war and building up an alliance between society and rulers.

4. The Congress of Vienna

There is good reason for studying the Peace Conferences that created the rules for each international system since Westphalia: 'when we are concerned with understanding the European system as a whole, and the politics of its component autonomous actors, peace conferences are evidently among the best sources of the relevant kind of political discourse, especially peace conferences where the fate of the system as a whole was at stake, or at least the fate of important parts of the system'.[81]

The importance of the Congress of Vienna[82] to the history of International Law cannot be overstated. It was convened by the Great Powers of the time, and as with Westphalia, included the most important states of Europe, all of which had agreed to map and set out the 'constitutional rules' that would govern the international order for the next century. After Napoleon's failure to forge a European Empire based on French hegemony, the Congress of Vienna was truly pan-European, settling issues in relation to dynastic successions and those concerned with the rise or fall of new states, from the shores of Portugal's Atlantic Coast to the Baltic Sea. It was in Vienna that the 'balance of power'[83] was consecrated as an organising principle of the international system that was to be maintained by the Concert of Europe, a coalition

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[81] Andreas Osiander, 'Talking Peace: Social Science, Peace Negotiations and the Structure of Politics,' in Randall Lessafer (ed.), *Peace Treaties and International Law in European History*, Cambridge: Cambridge University Press, 2004, p. 314.

[82] In 1815 following the defeat of Napoleon Bonaparte.

[83] Although the origins of the balance of power as a concept can be traced back to the Italian city-states of the sixteenth century, see Bobbitt, op. cit.

of the Great Powers, which included the victors of the Napoleonic wars.[84] The legal status attributed to the Great Powers at Vienna and the subsequent Treaties that were concluded throughout the nineteenth century was at odds with the Bodinian tradition of sovereignty because of the 'legalised hegemony'.[85]

This caused many authors to dismiss the concept of sovereignty as irrelevant, it was seen to be at odds with the practice of the Great Powers, and was viewed as an 'Organised Hypocrisy'.[86] The Congress of Vienna was significant, because it was the first time that the international system of territorial states – based on the principle of sovereign equality – accepted in its constitutional rules the primacy of Great Powers and recognised that asymmetries of power are not irrelevant in the international legal order. It was clearly a departure from the strong anti-hegemonic principle established at Westphalia,[87] although it was driven by concerns for security, aware of the need to avoid another Pan-European war.

The concept of sovereignty under the constitutional rules agreed at Vienna must be understood not as an immutable concept, but as a flexible one, which assumes a new face in the context of the constitutional rules agreed in Vienna by the Great Powers, and legalised hegemony as part of those constitutional rules. The claim is that in foundational moments of a new international order, such as those agreed at Westphalia and at Vienna, the concept of sovereignty is flexible enough to

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[84] The Quadruple Holy Alliance: Russia, Austria, Prussia and England. France joined in 1818; the Concert of Europe.

[85] Simpson's definition of the legal status of privileges attributed to the Great Powers, creators of the constitutional rules and principles that establish a system of equal sovereign states, but reserving for themselves a legal position of authority, Simpson (2004), p. 68, for a definition of legalised hegemony. The Congress of Vienna started a 'moral pentarchy' between the five Great European Powers. As British Lawyer Westlake, commenting on the Congress of Vienna argued, 'Such was the commencement of what during a long succeeding period was described as the moral pentarchy of Europe, pentarchy because France was readmitted to it at the Congress of Aix-La-Chapelle in 1818'. John Westlake, *Chapters on the Principles of International Law*, Cambridge: Cambridge University Press, 1894, p. 96.

[86] Stephen Krasner, *Sovereignty: Organized Hypocrisy*, 1999, op. cit.

[87] Adam Watson, op. cit., 1992, p. 182.

accommodate changes in the constitutional rules of the system, and in Vienna, this implies the accommodation of the legal status attributed to the Great Powers as a kind of a *Primus inter Pares*[88] in the community of the sovereign territorial states. The concept of sovereignty, therefore, does not provide a universal category that is applicable at all moments of history since Westphalia, but it is in fact a time-bound category.

5. The Settlement of Versailles

The Peace of Versailles[89] can be considered as one of the most important foundational moments of the international community; the Treaty of Versailles completely changed the borders of Europe. The settlement led to the creation of new European states, on the ashes of three Empires,[90] inspired in part by the nationalist ideals and the reorganisation of the European continent along the lines proposed by the American President Woodrow Wilson in the Fourteen Points.[91] The Treaty of Versailles itself partially laid out the constitutional rules of the international system until World War II. It contained provisions relating to the creation of the League of Nations, which was

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[88] First among Equals.

[89] The Peace of Versailles was achieved as a result of the Paris Peace Conference of 1919. The Conference included the Versailles Treaty, which dealt with peace in Europe after the end of World War I; the dismemberment of the former enemy states and the Covenant of the League of Nations, essentially a 'constitutional' of the international system. Available at: http://avalon.law.yale.edu/subject_menus/versailles_menu.asp [Accessed 16.12.2010].

[90] The dissolution of the German, Russian, Ottoman and Austrian-Hungarian Empires was a consequence of World War I. In the aftermath of the war, new states were formed based on nationalism and the principle of self-determination.

[91] The Fourteen Points, presented as a Presidential Address by Woodrow Wilson on 8 January 1918 included a proposal for Peace in Europe, at the core of which was the League of Nations. See Thomas J. Knock, 'Wilsonian Concepts and International Realities at the End of the War,' in Manfred F. Boemecke, Gerald D. Feldman and Elizabeth Glaser, *The Treaty of Versailles, A Reassessment after 75 Years*, Cambridge: Cambridge University Press, 1998, p. 115; and Sir Frederick Pollock, *The League of Nations*, London: Stevens and Sons Limited, 1920. Wilson's Fourteen Points: http://avalon.law.yale.edu/20th_century/wilson14.asp [Accessed 21.12.2010].

the international organisation composed by most states in that international system,[92] and which was responsible for the maintenance of Global Peace.[93]

A manifestation of the principle of collective security in the League of Nations is Article 11 which states: 'Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations'. This was clearly an attempt to restrict the sovereignty of states, which for centuries were allowed to wage war, although respecting the rules of *Ius in Bello*.[94] It is true that during the nineteenth century and in the early twentieth there was an increase in the codification of rules governing the use of force in armed conflicts, but none of them attempted to restrain war itself as the League of Nations did, in restricting significantly the right to wage war, as Article 16 states:

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and

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[92] The United States and the Soviet Union were not part of the League of Nations.

[93] The League of Nations contained a rudimentary notion of collective security that was embodied in Article 10 of the Covenant, which stipulated obligations to respect the principle of territorial integrity and political independence of all members, although collective security was still in its 'infancy'. See Antoine Fleury, 'The League of Nations: Toward a New Appreciation' in Manfred F. Boemecke, Gerald D. Feldman and Elisabeth Glaser, *The Treaty of Versailles: A Reassessment after 75 Years*, Cambridge: Cambridge University Press, 1998, p. 509.

[94] It is important to retain the two distinctions: *Ius in Bello* (Laws in War) and *Ius ad Bellum* (The Right to Wage War).

the nationals of any other State, *whether a Member of the League or not.*

Note that membership, or not, of the League was irrelevant for the purposes of the severe restrictions on war.[95] For that reason, the Covenant of the League of Nations contained constitutional rules for the international system inaugurated in Versailles, but the system was not flawless, as Cassesse points out: 'Recourse to force was prohibited except for a limited number of cases'.[96] This meant that war was not prohibited outright in the Covenant, only subjected to time restrictions pending a judicial decision. The provisions of the Covenant contained rules of membership embracing the modern territorial State, and its ideal, the 'Nation-State';[97] rules of conduct that considered matters of war and peace as the Leagues' responsibility, and secondary rules, which remained, in part, customary and, in part, written, a good example of which is Article 20 that explicitly states:

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se, which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

[95] See Cassesse, op. cit. pp. 60–64, aggressive war was forbidden only in 1928 with the Briand-Kellog Pact during the Versailles system, formally known as 'General Treaty for the Renunciation of War', it is still in force and 'prefigures the legal regime of the Charter' of the United Nations. See Ian Brownlie, *Principles of Public International Law*, Oxford: Oxford University Press, 2008, pp. 729–30.

[96] Op. cit., pp. 60–61. Similarly, Hersch Lauterpacht, *International Law*, Vol. 2, 'The Law of Peace,' Part I, Cambridge: Cambridge University Press, 1975, p. 150.

[97] The mythical Romantic idea of one nation – with one language, ethnic group and common history within a territorial state – considering that only a few states are actually nation-states and that most states are composed of different nationalities and languages. See Sylvia Walby, 'The Myth of the Nation-State: Theorizing Society and Polities in a Global Era,' *Sociology*, vol. 37, No. 3, 2003, pp. 529–530; Benedict Anderson, 20006, op. cit.

The Covenant of the League was, therefore, establishing a form of hierarchy by explicitly accepting that the obligations of its provisions imposed certain norms on states. These obligations were 'constitutional' in the sense that they were foundational of the international system inaugurated by the Versailles settlement.

For all of the above, it is important to emphasise that the Versailles system was a break from the settlement of Vienna, in the sense that the Treaty of Versailles inaugurated an era where conflicts were supposed to be settled peacefully, and, if not, all the members of the League were supposed to police the international order by adhering to the rules laid out in the Treaty and to defend global peace in common. For the peaceful resolution of conflicts and disputes, the League provided an International Court which was to be the supreme arbiter in judicial disputes, the Permanent Court of International Justice.[98] In this new world order, some voices expressed a healthy optimism for the new system to be governed by International Law, as Oppenheim stated:

> The universal demand for a new League of Nations accepting the
> principles that every judicial dispute amongst nations must be settled
> by International Courts and that every political dispute must, before
> the parties resort to arms, be brought before a Council of Conciliation,
> demonstrates clearly that the Community of States must, now
> deliberately give itself some kind of organisation, because without it
> the principles just mentioned cannot be realised.[99]

The concept of sovereignty in the new international system was transformed by these new constitutional rules, which restricted warfare among states – old and new – even

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[98] Hereinafter also called the PCIJ.

[99] Lassa Oppenheim, *The League of Nations and its Problems: Three Lectures*, London: Longmans, Green and Co., 1919, p. 35. However, the Versailles system had very weak enforcement mechanism as Chadwick argues: 'the league "peace programme" rested in large part on arguably non-binding recognition of the need to reduce armaments, and on unenforceable security obligations', Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies*, The Hague: Kluwer Law International, 2002, p. 112.

though armed conflicts would eventually test the power of the League, and lead to its irrelevance, and eventual dissolution. Restrictions of sovereignty were also enshrined in the Treaty of Versailles, limiting the sphere of action of states by the rules of protection of minorities in former enemy states or states emerging from the dissolution of empires, and by imposing other obligations on states such as gradual disarmament.[100]

The PCIJ[101] in interpreting the rules and principles of the system of Versailles, had a very 'constitutional' view of the new rules of Treaty, in the sense that often in its decisions it deemed Versailles' rules as hierarchically superior to other rules, which were also part of the general principles of International Law, although not always explicitly. A good example of this is seen in the *Wimbledon* case.[102] Thus the concept of sovereignty in the Versailles system should be seen in the framework of the foundational rules of the system; consequently, an absolute definition of sovereignty was untenable. Concerning the concept of sovereignty, in the case of *Island Las Palmas*,[103] the sole arbitrator Max Huber argued that:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of International Law, have established this principle of exclusive competence of the State in regard to its own territory in such a way as to make it the point of

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[100] Ian Brownlie, op. cit., p. 554.

[101] Permanent Court of International Justice (PCIJ) established by the League of Nations in 1922, Ian Brownlie, op. cit., pp. 707–8.

[102] See infra, section about the *Wimbledon case*.

[103] Arbitration award judged by the Permanent Court of Arbitration between the Netherlands and the United States regarding their claims to the Island Las Palmas (Miangas), Island Las Palmas, Perm. Ct. 4rb. 1928. See also, Koskenniemi, *From Apology to Utopia*, op. cit., p. 241.

departure in settling most questions that concern international relations.[104]

Nevertheless, in this description of the concept of sovereignty of states in its dual dimensions – independence and supremacy – it did not follow that states had an unlimited freedom of action in the international system or even in their own domestic jurisdictions, as the PCIJ declared in the *Nationality Decrees* case:[105]

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.[106]

For many commentators, the concept of sovereignty as an attribute of statehood begins to assume a non-absolutist tone during the Versailles system; and some even propose the abandonment of the concept, such as the French lawyer Georges Scelle[107] because of its absolutist connotations, which he argued:

> It is a vain task to want to build law and international law, in particular, on the notion of sovereignty. In practice this concept only leads to the

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[104] Available at: http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf [Accessed 16.12.2010].

[105] Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J, Advisory Opinion by the PCIJ about a dispute between France and the United Kingdom regarding decrees about nationality.

[106] See Para. 40, available at

http://www.worldcourts.com/pcij/eng/decisions/1923/1923.02.07_morocco.htm [Accessed 16.12.2010].

[107] Georges Scelle (1878–1961), was a French lawyer and the author of a book that is relevant here, *Precis du Droit de Gens: Principe et Systematique*. He was also one of the main contributors to the theory of federalism. See Tierry Hubert, 'The Thought of Georges Scelle,' *European Journal of International Law*, vol. 1, No. 1, 1990; Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dedoublement fonctionnel*) in International Law,' *European Journal of International Law*, vol. 1, No. 1, 1990.

release of governments' will from the grip of law, to destroy the notion

of competence, and with it the notion of legality.[108]

Scelle understood the concept of sovereignty as *Kompetenz-Kompetenz*[109] in that because states have the power to determine their own powers they are limited only by the rules they accept for themselves, but for him, this was unrealistic because he believed that the environment always constrains states, and in his view, sovereignty was 'anti-legal'.[110] It is for all of these reasons that Scelle is seen as part of the Althusian tradition.[111]

5.1. The *Wimbledon* Case Revisited

The *Wimbledon* case[112] is paradigmatic of the misunderstanding into which traditional legal scholarship entered when analysing International Law in the Versailles system and the relationship between different international obligations in International Law.

The case illustrates the tensions between different interpretations of International Law and shows the interactions between Law and International Politics. The case was adjudicated before the PCIJ. The facts were these: the British steamship *Wimbledon*, chartered by a French company, was a boat full of military supplies heading to Poland and was denied passage in the Kiel Canal by the German Government. The Germans

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[108] Scelle, in Tierry, op. cit., p. 201.

[109] Competences of Competences, the power to determine its own powers: see Chapter 4 of this thesis for a discussion of the concept in the context of European Union Law.

[110] Tierry, op cit., p. 201.

[111] On Scelle, see also Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge: Cambridge University Press, 2001, pp. 327–348.

[112] S.S. *Wimbledon* (United Kingdom, France, Italy and Japan *v*. Germany), 1923, P.C.I.J, (ser. A) No. 1 (June 28). Available at:
http://www.worldcourts.com/pcij/eng/decisions/1923/1923.08.17_wimbledon.htm [Accessed 16.12.2010].

refused passage on the grounds of neutrality under the terms of neutrality orders issued by the German Government. The United Kingdom, Italy, France and Japan brought the dispute before the Court and accused Germany of unlawfully refusing passage to the steamship and demanded compensation.

The Court considered all the arguments of the involved parties and the provisions of the Versailles Treaty applicable, from Articles 380 to 386, particularly Article 380, which established that the Kiel Canal should be maintained open and free to all vessels, merchant or war, of all nations at peace with Germany. The Court decided then to accept Germany's arguments and the rights of Germany to deny passage to enemy vessels, but since the vessel was British, and because Britain was a country at peace with Germany, it followed that Germany was in violation of the Treaty of Versailles and the argument of neutrality did not hold. The Court argued that 'the provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained'. This meant that as a special regime of International Law its rules applied instead, and the Court rejected the argument that these rules amount to 'servitude' in International Law.[113] Moreover, it stated that these rules did not amount to limitations on sovereignty on the part of Germany, and stated that:

> The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of state sovereignty.[114]

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[113] On international servitudes as restrictions in sovereignty under International Law, see Fowler and Bunck, op. cit., p. 99.

[114] *Wimbledon* decision, Para. 35. The Court adhered to the doctrine of auto-limitation of sovereignty, and as Steiner makes clear: 'In the *Wimbledon* case this was made clear with respect to the German neutrality order: no matter what rights Germany may have had to protect her neutrality under normal conditions, she could not assert this right if her international obligations prescribed a different course'. See H. Arthur Steiner, 'Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of

Similarly, the rules of the Suez and the Panama Canals also contain rules that impose restrictions upon the exercise of sovereignty.[115] The Court presumed the willingness of Germany, in 'freely' accepting the provisions of the Kiel Canal in the Versailles Treaty in order to reach the conclusion that those rules should apply instead of the rules of neutrality, invoked by Germany. Hence the Court declared German actions as violations of the Treaty by stating that 'From the foregoing, therefore, it appears clearly established that Germany not only did not in consequence of her neutrality, incur the obligation to prohibit the passage of the *Wimbledon* though the Kiel Canal, but on contrary, was required to permit it'.[116]

The Court's decision in this case might seem straightforward, a simple case of the application of the rules of Versailles ostensibly agreed by Germany. Nonetheless, a more careful examination of the Court's arguments might lead to a different conclusion. The dissenting opinions of Judges Anzilotti and Huber in the case also will help in understanding better the decision and its importance for the scrutiny of the concept of sovereignty in the international system.[117]

International Justice,' *The American Journal of International Law*, vol. 30, No. 3, 1936, p. 433.

[115] Suffice to say that the willingness to enter into international Agreements regarding Panama had to do with US promotion of Panama's independence against Colombia. In the Hay-Varilla Treaty and in the case of the Suez Canal, the British influence in Egypt gave Britain control of the Canal. In both cases, Power politics imposed on a weaker state a set of rules, that states 'formally' accepted, but in practice, had no freedom to choose something different. Issues of bargaining power, information and transaction costs and asymmetries between states in the conclusion of international agreements cannot be overlooked when analysing how International Agreements and International Treaties are created. Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford: Oxford University Press, 2005. On the legal aspects and the history of the Kiel Canal, the Panama Canal and the Suez Canal, regarding Great Power Politics and the limitations of sovereignty partly derived from constraints on the states involved, see, R. Jennings and A. Watts, *Oppenheim, International Law*, ninth edition, vol. 1, Parts 2–4, Harlow: Longman, 1992, pp. 591–599.

[116] *Wimbledon* Decision, Para. 48.

[117] Paras 65–85.

The Court, as previously indicated, assumed a positivist stance of international obligations based on the 'mythical' idea of freedom to enter into international legal obligations.[118] Positivist, because it assumed that Germany's obligations were valid because Germany signed the Versailles Treaty without coercion, therefore, in a purely syllogistic argumentative conclusion, it must follow that those obligations were binding, as an emanation of the legal principle of *pacta sunt servanda.[119]*

The Court, for unknown reasons, because there is only the case report to refer to, analysed the nature of the legal obligations arising out of the Versailles Treaty by reference to the idea that those rules are self-contained.[120] Thus, special Law (*lex specialis*) applies instead of general law, following the principle that *Lex specialis derogate legi generali*.

This understanding would not, however, explain the Court's outright rejection of the laws of neutrality invoked by Germany, and the possibility of the inconsistency of the Versailles Treaty with the traditional laws of neutrality.[121] In that case, simply invoking the rule of self-containment would not be enough; the Court would need to justify the reasons by appealing to other arguments. On the other hand, the Court, besides dismissing the arguments laid out by Germany, easily signalled its willingness to restrict the exercise of sovereign powers in the Canal by assuming Germany's

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[118] Koskenniemi calls the Court's decision 'pure psychologism,' Martti Koskenniemi, *From Apology to Utopia*, op. cit., (2005), p. 425.

[119] The general principle of Law that states that all obligations voluntarily accepted are binding.

[120] On self-contained regimes, International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission,' finalised by Martti Koskenniemi, A/CN.4/L682, 2006, available at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement [Accessed 22.12.2010].

[121] On the Laws of neutrality, see Elizabeth Chadwick, *Traditional Neutrality Revisited*, op. cit.

'freedom to choose'[122] the dispositions of the Versailles Treaty, and particularly the rules concerning the Kiel Canal.

In the discussion on the nature of the rules invoked, the Court overlooked the provisions of the Treaty. This meant that the Court strictly adhered to a positivist understanding of International Law without referring to the precedence of the rules of the Versailles Treaty over the rules of neutrality.

The account offered here assumes a 'constitutional' interpretation of the rules of the Treaty. This means that the rules laid out in the Versailles Treaty are applicable to the case, not because Germany willingly accepted the rules of the Treaty, but because these rules are part of the foundational rules of the Versailles system in the sense that they are 'constitutional' and are, therefore, applicable to the international community of states as a whole.[123] The Treaty had a 'constitutional character', because it laid out some of the foundational rules of the future system, and the provisions of the Kiel Canal are part of those foundational rules.

The Court also failed to demonstrate the 'freedom' of Germany to choose and negotiate the Treaty of Versailles, as now historiography shows that the Treaty was a *Diktat* on Germany and its allies; as Tomuschat argues: 'As has already been hinted, the making of the Versailles Treaty followed a different course. Germany had no say whatsoever in the elaboration of the texts'.[124] This constitutional interpretation of the

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[122] This is related with the notion of asymmetries of power and bargaining power. Let us not forget that Germany was defeated, thus forced to accept, the Versailles settlement.

[123] See the infra section on what is meant by the 'Constitutional Rules' of the international system.

[124] Christian Tomuschat, 'The 1871 Peace Treaty between France and Germany and the 1919 Treaty of Versailles' in Randall Lessafer, (ed.), *Peace Treaties and International Law in European History*, Cambridge: Cambridge University Press, 2004, p.388;Alma Luckau, 'Unconditional Acceptance of the Treaty of Versailles by the German Government, June 22–28, 1919,'*The Journal of Modern History*, vol.17, no.3, 1945.

decision of the Court is, in the view of the current thesis, far more consistent with a coherent interpretation of Law at the time, than the account chosen by the Court.[125]

The consequences of this case for the study of the concept of sovereignty are significant. This is because this case demonstrates that, contrary to the Court's arguments, sovereignty was not restricted freely by Germany's acceptance of the Treaty of Versailles, because the Treaty was the constitutional Charter of the post-World War I international system. Its dispositions were, therefore, foundational of the system and thus were applicable before any other rules, generally speaking, because also it might be assumed that certain dispositions of Versailles could be contrary to International Law, particularly in the rules regarding neutrality.[126] This appears to be the opinion of the dissenting Judges Anzilotti and Huber. However, as Clabber contends: 'Instead of being plagued by the sovereignty dilemma, the *Wimbledon* Court had managed to make a virtue out of a vice'.[127]

The Versailles system further legitimates the notion of the Sovereign territorial State. The *Montevideo Convention on the Rights and Duties of States*[128] defines a State under International Law as a legal person that 'should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with the other states'.[129]

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[125] Germany was in effect 'neutralised' by the Versailles settlement. S. W. Armstrong argues that 'At the Peace Conference the position of Germany was comparable to that of a condemned criminal sentence', see S. W. Armstrong, 'The Doctrine of Equality of Nations in International Law and the Relation of the Doctrine to the Treaty of Versailles,' *The American Journal of International Law*, vol. 14, No. 4, 1920, p. 553; 'The doctrine of equality of states gives way to the primacy of Great Powers,' S. W. Armstrong, op. cit., p. 556.

[126] See Jan Klabers, 'Clinching the Concept of Sovereignty: *Wimbledon* Redux,' *Austrian Review of International Law and European Law*, vol. 3, No. 3, 1999, see also, O. Spiermann, 'Judge Max Huber at the Permanent Court of International Justice,' *European Journal of International Law*, vol. 18, No. 1, 2007.

[127] Jan Klabbers, op. cit., p. 30.

[128] Signed on Montevideo on 26 of December of 1933 by the American States.

[129] Article 1.

This legal instrument demonstrates that under international legal scholarship the territorial state contrary to the Westphalian system is the legitimate and, increasingly, the sole acceptable political polity under International Law excluding other polities. Considering that since Versailles, most multinational empires were dissolved and that no other polities such as a league of cities, confederations or other polities are considered to have attributes of sovereignty – and thus enjoy the privileges of the modern territorial state – in effect, thereby, the state assumes a monopoly in the international system as it never did before.

The Montevideo Convention also manifests the concept of sovereignty by stating that 'States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law'.[130] The concept of the legal equality of states, as a corollary of sovereignty regardless of the asymmetries of power or capabilities of states, is enshrined in International Law. The norm of non-interference in domestic affairs is also enshrined by stating that 'No state has the right to intervene in the internal or external affairs of another'.[131] The Convention is interesting, because it incorporates a strong norm of sovereignty in the Bodinian tradition, in which States enjoy political independence and political supremacy in their jurisdictions, and contains a strong norm of non-interference.

The optimism of the interwar period did not lead to the promises of a new international Utopia. Kissinger points to the failures of collective security in Versailles: 'The concept of collective security was so general as to prove inapplicable to circumstances most likely to disturb the peace; the informal Franco–English cooperation which replaced it was far too tenuous'.[132] The collapse of the system was already apparent in the late 1920s, and the terms of the punitive peace[133] imposed on

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[130] Article 4.

[131] Article 8.

[132] Kissinger, op. cit., p. 246.

[133] This is manifest in the harsh norms of the Versailles Treaty imposed on Germany regarding territorial adjustment, financial obligations and so on. This new *spirit d'époque*, the

Germany, and the isolationism of the United States and the Soviet Union, allied to the economic problems prolonged by the Great Depression, eventually led to the shattering of the Versailles system.

6. The United Nations System

The international system in place today is governed by foundational rules that created the United Nations[134] and its Charter. The United Nations system created an international organisation which was created as a result of the San Francisco Conference in 1945.[135]

The UN was modelled partly on the League of Nations, its founders attempting to overcome the deficiencies of the League of Nations. The founders of the UN called for an international organisation responsible for peace and security in which the Great Powers (the US, Russia, the United Kingdom, France and China) would enjoy a degree of hegemony,[136] but at its core, the system was based on the idea of sovereign equality of states enshrined in Article 2(1) of the UN Charter.

The Charter incorporated the notion of 'legalised hegemony' by assigning the victors, as Great Powers, permanent seats in the Security Council (Article 23, 1).[137] The

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attribution of culpability to Germany and the utopian desire for peace maintained by a League of Nations, are manifest in much of the post-war literature, for example, 'We were in bondage of international anarchy, to the superstition of the state, and the fraud of the balance of power. Only a League of Nations will free us from our fears, give us liberty from our bonds'. See A. F. Pollard, *The League of Nations: An Historical Argument*, Oxford: Clarendon Press, 1918, p. 22.

[134] Hereinafter the UN.

[135] For further analysis of the San Francisco Conference, see Leland M. Goodrich, Edvard Hambro and Anne Patricia Simmons, *Charter of the United Nations, Commentary and Documents*, New York: Columbia University Press, 1969, pp. 1–17. The Dumberton Oaks Conference in 1944 set the stage for the UN Conference in San Francisco.

[136] Simpson, op. cit., p. 169.

[137] As Shineda argues: 'It is fair to say that the structure of the United Nations remained open to these two aspects: the constitutional sovereignty of great and small states and the national

Security Council[138] was the body primarily responsible for maintenance of peace and security (Article 24, 1). The Charter also forbade the *Jus ad bellum*[139]in which constitutes a severe limitation of the traditional view of sovereignty.[140]

The Great Powers were to be responsible for the balance of the system, among themselves, and between themselves and the lesser powers, considering their privileged position as states with superior material capabilities and, of course, as Victors. The reason for this was to design a system with its basis in empirical reality, hence the need for legal equality to coexist with legalised hegemony, considering the role that Great Powers traditionally enjoy in international politics. As Simpson recalls, 'This combination of parity and hegemony became a mark of the new international legal order'.[141]

The UN system also contains an International Court of Justice[142] (Article 92) designed to settle disputes peacefully as in the previous system, and although it does not enjoy compulsory jurisdiction, it has been one of the main contributors to the development of International Law and the interpretation on what sovereignty means under the constitutional rules of the present international system.

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sovereignty of absolutely equal states,' Hideaki Shinoda, *Re-examining Sovereignty: From Classical Theory to the Global Age*, Basingstoke: Macmillan Press, 2000.

[138] On the role of the Security Council in the maintenance of peace and security, and its implications to the concept of sovereign equality, Dan Sarooshi, *The United Nations and the Development of Collective Security*, Oxford: Oxford University Press, 2000; David M. Malone, 'The Security Council,' in Thomas G. Weiss and Sam Daws, *The Oxford Handbook on the United Nations*, Oxford: Oxford University Press, 2007.

[139] The right to wage war as an attribute of sovereignty.

[140] Rama Mani, 'Peaceful Settlement of Disputes and Conflict Prevention,' in Thomas G. Weiss and Sam Daws, *The Oxford Handbook on the United Nations*, Oxford: Oxford University Press, 2007, p. 302.

[141] Simpson, op. cit., p. 175.

[142] Hereinafter called the ICJ. The jurisdiction of the ICJ is not compulsory unless accepted by states (Article 34 of the Statute of the ICJ), James Crawford and Tom Grant, 'International Court of Justice,' in Thomas G. Weiss and Sam Daws, *The Oxford Handbook*, 2007, op. cit., p. 195.

6.1. Sovereign Equality

Sovereign Equality was the wording chosen by the founders of the UN. This principle enshrines the norm that all states are equal and enjoy the attributes of sovereignty and are, therefore, not subjected to the jurisdiction of other states. As Kelsen recalls, 'The term sovereign equality used in the Four Power Declaration probably means sovereignty and equality, two generally recognized characteristics of the States as subjects of international law'.[143] The concept of sovereignty has also been codified in the important Friendly Relations Declaration, a resolution of the United Nations Assembly General,[144] which defined the elements of sovereign equality by stating that:

> In particular, sovereign equality includes the following elements:
>
> (a) States are juridically equal;
>
> (b) Each State enjoys the rights inherent in full sovereignty;
>
> (c) Each State has the duty to respect the personality of other States;
>
> (d) The territorial integrity and political independence of the State are inviolable;
>
> (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
>
> (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

Considering this, the concept of sovereign equality had to live alongside the notion of legalised hegemony, and in this sense, is 'an inherently unstable concept, always torn

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[143]Hans Kelsen, 'The Principle of Sovereign Equality of States as basis for International Organization,' *The Yale Law Journal*, vol. 53, No. 2, p. 207.

[144] Declaration on Principles of International Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, United Nations General Assembly Resolution 2625 (XXV), 24 October 1970.

between idealist aspirations and realist concessions'.[145] The expression of the principle of sovereign equality is manifest in the development of cases before the ICJ. In the *Corfu Channel* case, the Court maintained that between territorial states respect for territorial sovereignty is an essential foundation of international relations.[146]While the Court adhered to the strict interpretation of the Charter regarding the norm of non-interference in the Bodinian tradition, present developments of International Law have not put the Court in the same position of strength in this respect, and the Court has come to be a weak representative of the Bodinian tradition. What this means is that the increasing multiplicity of legal regimes and international dispute-settlement mechanisms beyond the UN Charter – for instance in international humanitarian law (in the ICTY, ICTR and the ICC) or in the global trade system (WTO) – have put the Court in a position of having to interpret the Charter and consider the diversity of other provisions contained in a multiplicity of legal systems (regional and functional) with their own dispute resolution mechanisms, which are increasingly judicial in nature, and for these reasons the ICJ is put in a difficult position.

6.2. Constitutional Rules in the Present System

In the present system, the concept of sovereignty as an attribute of statehood has been modified by the constitutional norms set out by the United Nations Charter as Fassbender argues: 'Sovereign equality is the legal authority and autonomy of a State as defined and guaranteed by the constitution of the international community'.[147]

The Charter also contains a provision as in the Covenant of the League of Nations, stating in Article 103: 'In the event of a conflict between the obligations of the

[145] Nico Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law,' in M. Byers and G. Nolte, *United States, Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, 2005, p. 141.

[146] Corfu Channel Case (United Kingdom *v.* Albania); Merits, International Court of Justice (ICJ), 9 April 1949. See also, R. Jennings, A. Watts, (eds), *Oppenheim's International Law*, ninth edition, vol.1, Part 1, Harlow: Longman, 1992, p. 385.

[147] Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law,' in N. Walker, *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, p. 131.

Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' This gives the Charter a privilege not enjoyed by other sources of law and hence its constitutional character.[148] The constitutional character of the Charter is attested by Verdross: 'Hence the international law of the Charter tends to be not only the law of the United Nations, but a world law, binding States within the whole international community so far as the maintenance of international peace and security is concerned'.[149]

The obligations of the Charter are applicable to all states regardless of their membership, because this is a characteristic of a Charter – that it is applicable to the international community as a whole – and a 'constitutional charter' in terms of the issues of peace and security (Article 6, paragraph 2 of the Charter). It is not, therefore, simply a Treaty in which obligations derive from the adherence of states.[150] The ICJ, in the *Reparation for Injuries* case, also sees the UN Charter as a type of Constitution, and employs a functionalist method in its interpretation.[151]

The United Nations System is not static, but flexible, and its institutional development has been led by different types of institutions, such as the progressive changes led by the ICJ in the adjudicative process, but of equal importance is the political process,

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[148] Defined by Article 38 of the Statute of the International Court of Justice.

[149] Alfred Verdross, 'General International Law and the United Nations Charter,' *International Affairs*, vol. 30, No. 3, 1964, p. 347. This means that the Security Council resolutions 'trump' other norms when referring to Chapter VII purposes, which does not mean that the Security Council has a general power 'to govern', but is related to the possibility of *ultra vires* acts of the Security Council. On the nature of Security Council Resolutions see Advisory Opinion in Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, (ICJ) 22 July 2010. This point is explored in Chapter 5.

[150]Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, London: Stevens & Sons Limited, 1951.

[151] Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. 1, Oxford: Oxford University Press, 2002, p. 15; on Sovereign Equality, pp. 67–91. Reparation for Injuries suffered in the service of the United Nations Advisory Opinion of April 11th, 1949, ICJ.

particularly the role of Security Council resolutions in developing International Law, which is mandatory for the international community as a whole.[152] In this sense, it is important to stress that interpretation of the rules of the UN system and its Charter as part of the constitutional provision of the international community as a whole, needs to be seen from a perspective of institutional evolution and considered together with the different institutions, both judicial and political.

The Charter does not, according to this view, exhaust the constitutional provisions of the system, however, because there are other constitutional norms and rules that do not form part of the system of the United Nations' rules, such as rules relating to global trade or international humanitarian law. This differs from Fassbender's interpretation, in the sense that the current international system is regulated by constitutional provisions in many areas other than peace and security, and these are not found in the Charter or related Treaties. The centrality of the United Nations Charter is not being questioned, however, but the idea that its constitutional rules are all contained therein is under scrutiny. The Charter does not deal with issues related to trade or economic integration, for example, which nowadays are being institutionalised[153] in legal orders other than those of the United Nations, at the regional, as well as at the functional or specialised level: the EU and the WTO are two known examples. The Charter does not incorporate all customary International Law of which many of the foundational rules of the system are part. The same can be said about *ius cogens*[154] norms, which have arisen within the constitutional legal order

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[152] Here the Comparative Institutional Analysis approach is followed, looking at the different institutional processes, the political process led by the Security Council and the judicial process led by the ICJ as proposed by Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, Chicago: The University of Chicago Press, 1994.

[153] Institutionalisation, as the process in which rules and norms begin to govern certain behaviour and conduct, see J. Goldstein, M. Kahler, R. O. Keohane and A. M. Slaughter, 'Introduction: Legalization and World Politics,' *International Organization*, vol. 54, No. 3, 2000, p. 385. This will be further explored in the Chapter 2 with regard to institutions.

[154] *Ius cogens* are norms considered peremptory under International Law, norms accepted and recognised by the International community of States as a whole, independently of the will or acceptance of States, e.g. the prohibition of aggression, genocide and slavery are examples of

inaugurated at San Francisco. In essence, the constitutional rules in this new international legal system[155] begin with the United Nations Charter, but go far beyond it, particularly because of the development and fragmentation in multiple legal orders. As Wet argues, 'In the increasingly integrated legal order there is a coexistence of regional, and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic constitutional legal order';[156] for global purposes, one might add.

International Law is increasingly fragmented in regional and in functional legal orders, and this fragmentation accommodates an understanding of sovereignty that is variable depending on whether the modern territorial state is part of a regional and functional legal order. This means that states that are part of supranational legal arrangements (or federal arrangements) reframe their identities in a legal framework that differs from other states, and effectively see sovereignty not only from a state-centric view, but also from the perspective of their supranational political community.[157] For this reason, it is important to mention the fragmentation of

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those types of rules, Article 53 of the Vienna Convention of Law of Treaties (VCLT). On the controversy surrounding those norms, see, A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford: Oxford University Press, 2006; P. Malanczuck Akehurst, *Modern Introduction to International Law*, seventh edition, Abingdon: Routledge, 2006, pp. 57–58; C. L. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties*, New York: North-Holland Publishing Company, 1976; Alfred Verdross, '*Jus Dispositivium* and *Jus Cogens* in International Law,' *American Journal of International Law*, vol. 60, No. 1, 1966, pp. 55–63. In the *ICJ Case Right of Passage*, in Judge Alvarez' Opinion on peremptory norms and *ius cogens* where he accepts this type of norm. *Case Concerning Right of Passage Over Indian Territory* (Portugal *v*. India), [1960] *ICJ.*

[155] If it can be called a system, because International Law is not codified in a single legal instrument and is a decentralised law-making process, in an anarchical system. States can therefore adhere to different legal orders (regional and functional) that fragment the unity of International Law.

[156] Erika Wet, 'The International Constitutional Order,' *International Comparative Law Quarterly*, vol. 55, No. 1, 2006, p. 75.

[157] This will be further explored in Chapter 4 about the European Union.

International Law as a phenomenon with direct implications for the concept of sovereignty.

6.3. Fragmentation of International Law

In the present international system, the concept of sovereignty has been challenged by a plethora of multiple regimes. This is because the limitations, and sometimes expansions of the concept have been carried out during the creation or via the evolution of these different legal orders. It is for this reason that the concept of sovereignty should be seen first in the context of the constitutional rules of the international system, and second, in terms of the fragmentation of International Law in multiple regional and functional legal orders, and also in the specific challenge such orders pose to the concept of sovereignty.

In the following chapters it is necessary to explore how processes of voluntary interstate cooperation are actually redefining the way constitutional norms of the international community affect the framework of sovereignty. The evolution of these other processes may lead to 'constitutionalization'[158] of legal orders, bringing about a transformation in 'jurisdictional spaces', which in turn will challenge the territorial state authority and hence sovereignty. Sometimes, in the case of regional legal orders, the creation of new jurisdictions may lead to the formation of a new political and legal authority in a new territorial jurisdiction (regional, comprising several states), which goes beyond the national state, and in other cases, may lead to the creation of a new jurisdictional space that goes beyond territory and is functional, based on the nature of the 'issue-area'.[159]

The European legal framework is an example of regionalism and is illustrative of how regional legal orders have a transformational effect on the analysis of the concept of

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[158] On Constitutionalization, Deborah Cass, *Constitutionalization of the World Trade Organization*, Oxford: Oxford University Press, 2005.

[159] A term from International Relations used to designate certain areas or domains with a distinct legal and political framework as a result of the process of institutionalisation. This point will be further developed in Chapter 2 regarding institutions.

sovereignty.[160] The global trade rules defined by GATT Agreements and related Treaties of the WTO are also elucidative of how specialised legal orders are claiming a constitutional character.

6.4. Manifestations of Sovereignty[161]

The concept of sovereignty has multiple manifestations in legal and political theory:

Legal/Political

Sovereignty has been understood in different forms. Some, such as Austin,[162] see sovereignty as an exclusive legal concept because the sovereign is s/he who has the authority to command. This is a purely positivist understanding. Others, such as Schmitt,[163] see sovereignty in the context of political facts, stating that the sovereign is s/he who decides on the rule of exception.

Absolute/Relative

The division of absolute and relative sovereignty varies according to whether the concept is viewed as absolute, indivisible and unitary.

Internal/External

This binary division is not arbitrary, because it is part of the concept. International sovereignty means supremacy of the state in internal affairs and external sovereignty means independence in international affairs.

Positive/Negative

Here, the classification depends on how one sees the ability of states to pursue a sphere of freedom in international politics, it presupposes capabilities (positive

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[160] This will be the subject of analysis in Chapter 4 on the European Union.

[161] Here, we follow Georg Schwarzenberger, *International Law and Order*, London: Stevens & Sons, 1971, pp. 57–83.

[162] John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (first published 1832), New York: Prometheus Books, 2000, pp. 215, 277–282.

[163] Carl Schmitt, *Political Theology*, Chicago: Chicago University Press, 2005, p. 5.

sovereignty) or to enjoy the rights of sovereignty from non-interference from other authorities (negative).[164]

The classification presented here may help in understanding the philosophical problem in the concept of sovereignty in its multiple dimensions. Here the dichotomy between Bodinian sovereignty and Althusian sovereignty is presented, because both represent traditions in the history of political thought, and view sovereignty in different terms. The Bodinian tradition sees sovereignty as an absolute concept that is unitary, indivisible and supreme, which belongs only to the modern territorial state, and excludes other polities. The Althusian tradition sees the concept of sovereignty as a relative concept, divisible and potentially applicable to polities and political communities other than the territorial state that emerges slowly after the settlement of Westphalia.

6.5. Deterritorialization[165] and Territoriality

It is also necessary to explore issues of deterritorialization of authority in the context of changes seen in the constitutive or constitutional rules of the international system and the emergence of regional and functional legal orders in order to analyse the context in which sovereignty – defined as authority or ultimate authority within the state territorial jurisdiction – is challenged by the disaggregation as a result of their specific claims to authority. As Sassen argues:

> State sovereignty is usually conceived of as monopoly of authority
> within a particular territory. Today, it is becoming evident that state

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[164] Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World*, Cambridge: Cambridge University Press, 1990, pp. 26–31.

[165] By Deterritorialization of authority, the detachment of authority from the state and its territory is meant. The term is borrowed from Gilles Deleuze and Félix Guattari, *Anti-Oedipus*, London: Continuuum, 2004. Deterritorialization also means Reterritorialization, see Gearoid Tuathail and Timothy Luke, 'Present at (Dis)Integration: Deterritorialization and Reterritorialization in the New Wor(l)d Order,' *Annals of the Association of American Geographers*, vol. 84, No. 3, 1994, pp. 381–398.

sovereignty articulates both its own external conditions and norms. Sovereignty remains a systemic property but its institutional insertion and its capacity to legitimate and absorb all legitimating power, to be the source of law, have become unstable. The politics of contemporary sovereignties are far more complex than notions of mutually exclusive territorialities can capture.[166]

Sovereignty, then, shifts, from a state-bound concept subject to territoriality, to a concept that is not exclusively tied to a territory:

a) Sovereignty–Supreme authority–Territory–Jurisdiction;
b) Sovereignty–shared authority–deterritorialized–functional jurisdiction or regional jurisdiction.

This is why it is necessary to explore issues relating to conflicts, overlaps of different normative orders, and the challenges the new world poses to the territoriality of authority – all of which slowly emerged after Westphalia –following the narrative of the Bodinian Tradition and the counter-narrative of the Althusian tradition.

6.6. Conclusion

This chapter has examined the origins of the concept of sovereignty and its evolution, according to different international systems since the Peace of Westphalia, and has considered sovereignty as an attribute of statehood that derives from the structure of the international system.

In the discussion on the historical origins of the concept of sovereignty, the chapter analysed two philosophical traditions that offered two distinct frameworks for the concept of sovereignty; one that derived from Bodin and Hobbes – which is dominant in the literature –and the other, based on the work of pluralist authors writing within the federalist tradition, such as Althusius.

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[166] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton: Princeton University Press, 2008, p. 415.

This chapter has also explored the different 'constitutional rules' in international systems that define rules of membership, rules of behaviour and meta-rules, and which are different for each international system. The most important international systems were identified, specifically the Peace of Westphalia, The Congress of Vienna, The Treaty of Versailles and the United Nations System.

Finally, the chapter concluded that the multiplicity of regional and functional arrangements in the current international system would necessarily transform the current concept of sovereignty. Furthermore, it pointed to the processes of 'deterritorialization' of authority, and briefly considered the challenges posed to the international system.

Chapter 2

Institutions and the Concept of Sovereignty

'Human societies are structured; they resemble buildings rather than piles of rock. Institutions, in the strict sense of the word, determine the architecture of these buildings'.[1]

1. Introduction

This chapter examines the ways in which institutions and institutional theory have contributed to an understanding of the concept of sovereignty in the current international system. In addition, the chapter explores legal theory and looks at the limited explanation it offers to explain the mechanisms of cooperation between states. Thus, the chapter proceeds by analysing some of the various approaches to the study of institutions in the social sciences.

The chapter emphasises the need for an interdisciplinary approach in order to understand the role of states in the international system, especially the relevance of International Relations to the study of International Law, and argues that institutions at the international level need to be understood against the background of the different approaches in the social sciences, particularly in the context of neo-institutionalism, as it is presented in International Relations.

In order to understand international institutions the reasoning behind their design, and the mechanisms that have driven their evolution, needs to be understood. This in turn implies that an analysis of some of the factors that affect international institutions as presented in the literature is necessary.

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[1] Maurice Duverger, *The Study of Politics*, London: Nelson and Sons, 1971, pp. 67–68.

The chapter also examines the dichotomy between agency and structure in the social sciences, particularly when analysing the international system. It attempts to explain the concept of sovereignty in the context of the multiplicity of actors in the international system, looking at how the structure of the international system has shaped the behaviour of states. In addition, this section explores the trend towards regionalisation and the rise of functional legal arrangements, which restrict the freedom of states' actions and thus their legal sovereignty. It also highlights the increasing complexity woven into the constitutional rules of the international system seen clearly in the processes of 'judicialisation'. The chapter concludes with an analysis of the mechanisms of Global Governance in the context of international institutions.

1.1. Institutions and the Contribution of Institutional Theory

In legal theory, it is common to equate international institutions with international organisations. This is because legal theory does not usually focus on the essential question of why states decide to cooperate in an anarchical world,[2] as Klabbers emphasises:

> Legal theorists ordinarily have little business in trying to explain
> why states co-operate: such belongs to the social sciences properly.
> Moreover, the legal theorist is generally ill equipped to perform
> such a task: whenever lawyers engage in political analysis, more
> often than not the results fail to persuade professional political
> scientists.[3]

The limitations of legal theory to explain the mechanisms of cooperation between states is an important factor leading to an exploration of the institutional approach, considering that the legal theory focuses on the rules and judicial cases only, without

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[2] Here the term, anarchy, refers to its use in International Relations, as the absence of superior polities in the modern territorial state, and not to an absence of order.

[3] Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002, p. 34.

consideration of the facts behind the mechanisms of international cooperation. This, in turn, relates to the question of why states decide to cooperate in the first place, and calls for a closer look at the contours of that cooperation: an institutional approach as March and Olsen argue is 'one that emphasises the role of institutions and institutionalisation in the understanding of human actions within an organization, social order, or society'.[4]

The institutional approach helps to explain the mechanisms of cooperation between states, and illuminates the reconceptualisation of the concept of sovereignty. This is because of the role that international institutions play in regulating state behaviour and to determine states' preferences (their regulative and constitutive role), particularly in regional arrangements with the creation of international organisations, such as the European Union.

It is for these reasons that it is important to understand international institutions, the purposes behind their creation, and how they constrain state behaviour and reallocate authority to the global level in order to constrain states' sovereignty.

Institutions are not synonymous with organisations, it is argued.[5] A distinction that it is important to stress because in some cases – and this is the case in international affairs – there is a tendency to equate the two terms, as Hodgson points out:

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[4] James G. March and Johan P. Olsen, 'The Institutional Dynamics of International Political Orders,' *International Organization*, vol. 42, No. 4, 1998, p. 948. On the focus of the institutional approach in social science, see Vivien Lowndes, 'The Institutional Approach,' in David Marsh and Gerry Stoker, (eds) *Theory and Methods in Political Science*, Basingstoke: Palgrave Macmillan, 2010, p. 66.

[5] Geoffrey Hodgson, 'What are Institutions?' *Journal of Economic Issues*, vol. XL (1), 2006, p. 18. In International Law, it is common to refer to international organisations as international institutions and reduce institutional theory to the study of international organisations, e. g. 'It seems useful, therefore to make a systematic study of the institutional problems which arise in all or most international organisations. The branch of law concentrating on such problems may be called 'international institutional law,' see Henry G. Schermers, *International Institutional Law*, Leiden: A. W. Sijthoff, 1972, p. 2. Similarly, 'Our purpose is to provide an introductory overview of the law of international organisations,

Organisations are special institutions that involve a) criteria to establish their boundaries and to distinguish member from non-members, b) principles of sovereignty concerning who is charge, c) chains of command delineating responsibilities within the organisation.[6]

Organisations constitute special types of institutions and should also be seen as actors,[7] which means that in analysing the role of organisations in social life, they should be seen as purposive agents.

Institutions 'are systems of established and embedded social rules that structure social interactions,'[8] which suggests that a proper understanding of the term 'agency'[9] must be understood in order to consider the role of institutions in constraining, shaping and constituting the behaviour of agents. A theory of institutions, in addition, should provide an understanding of the design and the mechanisms of change[10] within

including international courts and tribunals as a whole'. Phillipe Sands and Pierre Klein, *Bowett's Law of International Institutions*, London: Sweet & Maxwell, 2009, p. 14. See also Jose E. Alvarez, *International Organizations as Law-makers*, Oxford: Oxford University Press, 2005. All these approaches are properly 'the Law of International Organisations,' but the approach taken in this chapter will be different and follow the various institutional approaches in the social sciences, which define institutions broadly as, for example, in Krasner (Chapter 2 about Institutions), Stephen Krasner, *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press, 1999, pp. 43–72.

[6] Idem., p. 18.

[7] Douglass North, *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990, pp. 4–5.

[8] Geoffrey Hodgson, 'What are Institutions?' op. cit., p. 18. For further definitions see Douglass North, op. cit., 1990, p. 4; W. Richard Scott, *Institutions and Organizations*, London: Sage Publications, 1995, p. 33; the latter emphasises that there are three 'Pillars' of institutions: regulative, normative and cognitive.

[9] Agency refers to how an individual actor acts in a social structure. This is related to the relationship between agency and structure, see Geoffrey Hodgson, 'Institutions and Individuals: Interaction and Evolution,' *Organization Studies*, vol. 28, 2007.

[10] On the mechanisms of change, see John L. Campbell, *Institutional Change and Globalization*, Princeton: Princeton University Press, pp. 63–89.

institutions, in order to provide an accurate description of their role in the social process under scrutiny. The level of analysis[11] is also important, relating as it does to the dimension of the social process one intends to study, whether local, national, regional or global.

Institutionalisation 'implies that institutional rules govern more of the behaviour of important actors'.[12] It is a process in which institutions are created for certain purposes and shape and determine actors' preferences.

It is also important to distinguish between individual institutions within the 'matrix of institutions'.[13] This observation is relevant because, in understanding the role of institutions in the social structure, it is important to observe the overall framework ('matrix') structure and shape of individual institutions and individual agencies, and also, to look at how individual institutions interact with each other.

The contribution of economics to the study of institutions is particularly relevant to the current argument in that it relates both to 'Old Institutional Economics' (OIE)[14]

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[11] On the level of analysis into the study of institutions, see Campbell, op. cit., p. 38.

[12] Judith Goldstein et. al., 'Introduction: Legalization and World Politics,' *International Organization*, vol. 54, No. 3, p. 387. For another definition and a more detailed analysis, see Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, Walter W. Powell and Paul J. DiMaggio (eds), Chicago: Chicago University Press, 1991, p. 149.

[13] Proposed by Robert Ackrill and Adrian Kay in 'Historical-Institutionalist Perspectives on the Development of the EU Budget System,' *Journal of European Public Policy*, vol. 13, No. 1, p. 114, 2006.

[14] On the history of the OIE, see Geoffrey Hodgson, *How Economics Forgot History: The Problem of Historical Specificity in Social Science*, London: Routledge, 2001; Malcolm Rutherford, *Institutions in Economics: The Old and the New Institutionalism*, Cambridge: Cambridge University Press, 1994; Geoffrey Hodgson, *Economics and Institutions*, Cambridge: Polity Press, 1988; Geoffrey Hodgson, 'Institutional Economics into the Twenty-First Century,' *Studi e Note di Economia*, Anno XIV, No. 1, 2009, Geoffrey Hodgson, 'What is the Essence of Institutional Economics?' *Journal of Economic Issues*, vol. XXXIV, No. 2, 2000.

and 'New Institutional Economics (NIE).[15] OIE is characterised by its emphasis on the roles of habit and routine in determining individual agency, as Geoffrey Hodgson an exponent of the synthesis between OIE and NIE points out, the concept of 'Reconstitutive downward causation' is defined as a process in which 'institutions as a special type of social structure with the potential to change agents, including changes to their purposes and preferences'[16] operate. This suggests that institutions have the potential to 'mould the dispositions and behaviours of agents in fundamental ways: that they have the capacity to change aspirations, instead of merely enabling or constraining them'.[17] Hodgson then points to the role of institutions in shaping the preferences of agents (constitutive role), viewing agents not simply as those that design and shape institutions.

Conversely in the NIE literature, individual preferences are considered as a given, and institutions are explained by way of the rational choice of agents with reference to transaction costs and cost-benefit analysis carried out through Pareto efficiency criteria.[18] The role of habit is explicitly rejected by NIE with the focus on rationality

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[15] With the emphasis on transaction costs, particularly contributions by Oliver E. Williamson, *The Economic Institutions of Capitalism*, New York: The Free Press, 1985; North, op. cit.; Anil Hira and Ron Hira, 'The New Institutionalism, Contradictory Notions of Change,' *American Journal of Economics and Sociology*, vol. 59, No. 2, 2000.

[16] Geoffrey Hodgson, *The Evolution of Institutional Economics: Agency, Structure and Darwinism in American Institutionalism*, London: Routledge, 2004, p. 14; Milan Zafirovski, 'Orthodoxy and Heterodoxy in Analyzing Institutions: Original and New Institutional Economics,' *International Journal of Social Economics*, vol. 30, No. 7, 2003, p. 816. 'Individuals shape institutions and institutions shape individuals,' see A. Allan Schmid, *Conflict and Cooperation*, Oxford: Blackwell Publishing, 2004, p. 8.

[17] Geoffrey Hodgson, 'Institutions and Individuals: Interaction and Evolution,' *Organization Studies*, vol. 28, 2007, p. 107. On the same notion that institutions define preferences, see James G. March and Johan P. Olsen, 'The New Institutionalism: Organizational Factors in Political Life,' *The American Political Science Review*, vol. 78, No. 3, 1984, p. 739.

[18] Transaction costs include information costs and the costs associated with reaching an optimal solution and the criteria for efficiency. This is the Kaldor-Hicks criterion, a modification of the Pareto criterion, which states that a solution is efficient if there is net gain from the state of affairs 'A' to the state 'B', as long as there is compensation for the losers in

of choices that are motivated by a cost-benefit analysis made by agents. According to NIE, the rationality of agents is presumed, although in recent scholarship, the concept of rationality is modified by the idea of bounded rationality.[19]

The contributions made by the different approaches to institutional economics are particularly relevant towards understanding and explaining the establishment and evolution of international institutions, to which aim both OIE and NIE offer valuable insights. This chapter will focus on international institutions from among the many forms of institutions about which analysis is obtainable. Understanding the mechanisms that drive the change in institutions is also important to the study of how institutions evolve. Especially relevant to the current discussion is the concept of 'path-dependence';[20] the notion that the past determines the way institutions evolve in the future, which as North argues:

> Path dependence means that history matters. We cannot understand
> today's choices (and define them in the modelling of economic

the movement from state 'A' to 'B'. This logic could also be applicable to institutions, as Knight argues, 'Pareto-optimal institutions have the following feature: Any change in the allocations produced by the institution benefits one actor only, at the expense of another. Institutions that are socially efficient are Pareto optimal, but the reverse does not hold,' Jack Knight, *Institutions and Social Conflict*, Cambridge: Cambridge University Press, 1992, p. 34. For a critical analysis of cost-benefit analysis and the efficiency criteria, see Matthew D. Adler and Eric Posner, *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, Chicago: Chicago University Press, 2001. This approach is favoured by proponents of Economic Analysis of Law. For its application to International Law, see Joel P. Trachtman, *The Economic Structure of International Law*, Harvard: Harvard University Press, 2008.

[19] On Bounded rationality see Christine Jolls, Cass R Sunstein and Richard H. Thaler, 'A Behavioural Approach to Law and Economics' in Sunstein, Cass R. (ed.), *Behavioural Law and Economics*, Cambridge: Cambridge University Press, 2000, pp. 14–15.

[20] One of the best known examples is the QWERTY keyboard, which became the norm as soon it was introduced but which was not established on the basis that it was the most efficient. See Paul A. David, 'Clio and the Economics of QWERTY,' *American Economic Review*, vol. 75, No. 2, 1985.

performance) without tracing the incremental evolution of institutions.[21]

The mechanisms of change in institutions are incremental and based on the logic of increased returns; meaning that as institutions evolve, there are strong incentives for the evolutionary process to be based on the initial set of constraints.[22] Once institutions are set on an initial evolutionary path, therefore, the costs of reversal become high, thus creating incentives for the stability and durability of a given institution, which explains why increasing return-processes tend to be self-reinforcing.[23] Institutions do not always evolve by 'formal' procedures as set out in their constituent charters; often their evolution is 'informal'.[24] Thus, it is important to understand the mechanisms of their evolution and also the 'modes' of institutional change in order to grasp the complexities, particularly with regard to international institutions. Mahoney and Thelen identify four modes of institutional change:

1. Displacement: the removal of existing rules and the introduction of new ones.

2. Layering: The introduction of new rules on top of or alongside existing ones.

3. Drift: the changed impact of existing rules due to shifts in the environment.

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[21] Douglas North, 'Institutions,' op. cit., 1990, p. 100.

[22] For extended discussions on path dependence and/or increasing returns, see Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics,' *The American Political Science Review*, vol. 94, No. 2, 2000, pp. 251–267; Stan J. Liebowitz and Stephen E. Margolis, 'Path Dependence, Lock-in, and History,' *Journal of Law, Economics and Organization*, No. 1, 1995, pp. 205–226; B. Guy Peters et. al., 'The Politics of Path-Dependency: Political Conflict in Historical Institutionalism,' *The Journal of Politics*, vol. 67, No. 4, 2005, pp. 1287–88; Robert Ackrill and Adrian Kay, op. cit.

[23] Idem., p. 252.

[24] Informal changes are particularly relevant, for example, in the context of the EU see Jane Jenson and Frederic Merand, 'Sociology, Institutionalism and the European Union,' *Comparative European Politics*, vol. 8, No. 1, 2010.

4. Conversion: the changed enactment of existing rules due to strategic redeployment.[25]

These modes of change often take place in international institutions, in particular when certain patterns inside their internal framework tend towards being more or less permanent when set beside the intentions of individual states.[26]

Following Scott, it is possible to identify three main roles or dimensions in institutions:[27]

a) Regulative, the extent to which institutions constrain behaviour.

b) Normative, the prescriptive roles institutions have in establishing values and norms.[28]

c) Cognitive, institutions shaping actors and the way they perceive reality.[29]

Generally, there are four main approaches to the study of institutions in the Social Sciences:[30]

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[25] James Mahoney and Kathleen Thelen, 'A theory of Gradual Institutional Change,' in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change*, Cambridge: Cambridge University Press, 2010, pp. 15–16; Kathleen Thelen, 'How Institutions Evolve,' in James Mahoney, and Dietrich Rueschemeyer, *Comparative Historical Analysis in the Social Sciences*, Cambridge: Cambridge University Press, 2003.

[26] An example of institutional change presented by Mahoney and Thelen is the British House of Lords and its survivability beyond its feudal origins and functions in a democratic age, op. cit., pp. 1–2. NATO offers a good example of layering and conversion: an organisation created to face the Soviet Union in the European continent it was transformed into an organisation with a new strategic focus outside Europe. See John S. Duffield, 'International Security Institutions,' in R. A. W. Rhodes (ed.), with Sarah A. Binder and Bert A. Rockman, *The Oxford Handbook of Political Institutions*, Oxford: Oxford University Press, 2006, p. 642.

[27] W. Richard Scott, *Institutions and Organizations*, London: Sage Publications, 1995, p. 35.

[28] This dimension is emphasised by North, op. cit.

[29] Constructivism in IR emphasises the cognitive role of institutions by stating that institutions often shape the interests and preferences of states.

a) Organizational Institutionalism

b) Rational Choice Institutionalism

c) Historical Institutionalism[31]

d) Sociological Institutionalism[32]

2. **International Institutions: Relevance to International Relations and International Law**

International Relations (IR) or International Politics is a social science that studies the international arena from different perspectives. Many approaches in IR are relevant to International Law (IL), because IR complements the study of Law with the study of social facts in the international sphere, while also illuminating the legal dimension by analysing the factors that give rise to legal rules and changes to them. The interdisciplinary approach of linking International Law and International Relations is a framework commonly employed by those devoted to the study and analysis of international affairs, as Abbot argues:

> The appeal of the interdisciplinary approach for lawyers and legal scholars is clear. Although IR is not well suited to resolving doctrinal questions, it remains of value even for the international lawyer qua lawyer. As Anne Marie Slaughter argues, integrating IR and IL 'can make international lawyers better lawyers': the diverse theoretical perspectives of IR help them to recognize the (often unspoken) assumptions that underlie their own and others' legal arguments, readings of texts and doctrines, and prescriptions, and

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[30] Campbell, op. cit., p. 11; for different strains of institutional approaches, see Lowndes, op. cit., p. 6.

[31] On historical institutionalism see Sven Steinmo and Kathleen Thelen, 'Historical Institutionalism in Comparative Politics,' in Sven Steinmo, Kathleen Thelen and Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge: Cambridge University Press, 1992.

[32] Didem Buhari-Gulmez, 'Stanford School of Sociological Institutionalism: A Global Cultural Approach,' *International Political Sociology*, Vol. 4, 2010.

to use distinct theoretical visions to generate responses and alternatives.[33]

The institutional framework was applied to the study of IR[34] theory by Neo-institutionalism,[35] while the dominant school in IR is Neo-realism,[36] which claims that

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[33] Kenneth W. Abbott, 'Toward a Richer Institutionalism for International Law and Policy,' *Journal of International Law and International Relations*, vol. 1, No. 1, 2005, p. 10; on the interdisciplinary approach see Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance,' in Walter Carlnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations,* Thousand Oaks, CA–London: Sage Publications, Ltd., 2002.

[34] On the relationship between IR and IL, the former with its instrumentalist optic and the latter with its normative optic, see Robert Keohane, 'International Relations and International Law: Two Optics,' in Robert Keohane, *Power and Governance in a Partially Globalized World*, London: Routledge, 2002, pp. 117–129; Anne-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda,' *American Journal of International Law*, vol. 87, No. 2, 1993.

[35] Or Neo-liberalism, the terms are used interchangeably in International Relations theory, Chris Brown, *Understanding International Relations*, Hampshire: Palgrave Macmillan, 2004, pp. 45–48.

[36] This is the dominant school of International Relations based on the Realist approach, for a critical analysis of E. H. Carr's Realism, see John Mearsheimer, 'E. H. Carr vs. Idealism: The Battle Rages On,' *International Relations*, vol. 19, No. 2, 2005. On Neo-realism, Kenneth N. Waltz, Theory of International Politics (published in 1979), particularly his 'three image' approach, the man, the state and the structure of the international system: Kenneth N. Waltz, *Man, the State and the War*, New York: Columbia University Press, 1959. Neo-realists are sceptical of the role of international institutions, for the discussion see John J. Mearsheimer 'The False Promise of International Institutions,' *International Security*, vol. 19, No. 3, 1994. Moreover, the Neo-realists emphasise the notion that states are more interested in relative gains than in absolute gains, meaning that international institutions may provide incentives where all states stand to gain, but because states are interested primarily in maximising their own security, they will be focused on relative gains. See Michael Mastanduno, 'Do Relative Gains Matter? America's Response to Japanese Industrial Policy,' in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate*, New York: Columbia University

states are rational, unitary, and are basically concerned with their own survival.[37] According to this school of thought, states are the most important actors (units) in the international system, whose primary concern is to maximise their security and/or power. Both Neo-realism and Neo-institutionalism share the view that the international system is anarchic.[38] Other important theoretical approaches for IR are Liberal theory[39] and Constructivism.[40] The thesis will not focus in detail on Liberal Theory or Constructivism, however, because according to these two approaches, the primary focus is not on international institutions; the former deals with the role of domestic politics and the various interest groups that define and shape foreign policy and participation in different international arrangements, while the latter, as part of Critical Theory emphasises the extent to which the international system is socially constructed, including the modern territorial state, to which, Constructivism is particularly relevant because it points out the mutually constitutive role of the state as an agent and the international system as a structure.

It is important to distinguish between the different approaches, not only because they reveal a variance of assumptions about the inner functioning of the international system, but also because they provide alternative approaches to the relevance and operation of institutions in the international system.

Press, 1993. Against this view, see John Gerard Ruggie, 'The False Promise of Realism,' *International Security*, vol. 20, No.1, 1995.

[37] On the key assumptions of Neo-realism, anarchy, self-help and balance of power, see Kenneth N. Waltz, 'Structural Realism after the Cold War,' in Michael E. Brown, Owen R. Cote Jr., Sean M. Lynn-Jones and Steven E. Miller (eds), *Primacy and its Discontents: American Political Power and International Stability*, Cambridge, Ma: MIT Press, 2009, p. 137.

[38] On anarchy see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Hampshire: Palgrave Macmillan, 2002.

[39] On the Liberal theory for IR, see Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics,' *International Organisation*, vol. 51, No. 4, 1997.

[40] On Constructivism see Alexander Wendt, 'Constructing International Politics,' *International Security*, vol. 20, No. 1, 1995, p. 71.

The concern of this thesis is to explore the role of international institutions, not to offer a detailed analysis of competing theoretical standpoints and their underlying paradigms. For this reason, the chapter discusses neo-institutionalism in the context of IR theory, and discusses some of the underlying assumptions regarding the role of international institutions. When relevant, other approaches of IR will be discussed, although the main focus will remain on the contribution of neo-institutionalism.

To understand the concept of sovereignty in relation to the role of international institutions in constraining states and other actors in international politics, a concept of the conditions of cooperation should be forthcoming or implied, according to Keohane, who argues: 'Institutions that facilitate cooperation do not mandate what governments must do; rather, they help governments pursue their own interests through cooperation'.[41]

2.1. Neo-Institutionalism and other Institutional Approaches in International Affairs

The study of neo-institutionalism relates to the desire to understand the international system, particularly the growing interdependence[42] between states in the international system. The theory was born to explain the dynamics of cooperation between states, and in particular the pervasiveness of international institutions in an international anarchic system,[43] and thus it was influenced by a rational choice approach.[44] Writing

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[41] Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton: Princeton University Press, 1984, (Reprinted 2005), p. 246; Robert Keohane and Robert Axelrod, 'Achieving Cooperation under Anarchy: Strategies and Institutions,' *World Politics*, vol. 38, No.1, 1985, p. 234.

[42] On 'interdependence' and its relationship with international institutions in the international system see Robert Keohane, 'International Institutions: Can Interdependence Work?' in Robert Keohane (ed.), *Power and Governance*, op. cit., pp. 27–38.

[43] Hedley Bull, op. cit., n. 10.

[44] On the role of rational choice in neo-institutionalism, see Robert Keohane, *After Hegemony*, op. cit., pp. 65–84; see also Robert Keohane and Lisa Martin, 'The Promise of Institutionalist Theory,' *International Security*, vol. 20, No. 1, 1995. On the rational-choice approach in the

from that approach, Keohane defines institutions as a 'persistent and connected set of rules that prescribe behavioural roles, constrain activity, and shape expectations'.[45]

The emphasis on cooperation should be understood in terms of the potential for discord as well harmony.[46] For neo-institutionalism, cooperation between states reduces uncertainty and limits the problems derived from negative externalities[47]which can affect two or more countries.

This means that states decide to cooperate in order to deal with transnational problems that cannot be settled solely by one state. In these instances, cooperation between states will ensue, with the establishment of international institutions, particularly considering the inadequacies of the modern territorial state – their limited, small-scale capacity – when dealing with global issues, as Ohmae argues:

> There is a growing sentiment that the system itself – the much patched and mended apparatus of the modern nation state – is an inadequate mechanism for dealing with the threats and opportunities of a global economy.[48]

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social sciences in general, see Michael Root, *Philosophy of Social Science: The Methods, Ideals, and Politics of Social Inquiry*, Oxford: Blackwell, 1993, pp. 100–123.

[45] Robert Keohane, 'International Institutions: Two Approaches,' *International Studies Quarterly*, vol. 32, No. 4, 1988, p. 386.

[46] Robert Keohane, *After Hegemony*, op. cit.

[47] Externalities can be positive or negative and are 'benefits conferred or costs imposed on others without compensation,' Inge Kaul and Ronald U. Mendoza, 'Advancing the Concept of Public Goods,' in Inge Kaul, et. al, *Providing Global Public Goods: Managing Globalization*, Oxford: Oxford University Press, 2003, p. 107, Richard Cornes, and Todd Sandler, *The Theory of Externalities: Public Goods, and Club Goods*, Cambridge: Cambridge University Press, 1986.

[48] Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies*, London: Harper Collins, 1995, pp. 59–60. Ohmae offers the functionalist argument that states do not have adequate scale or the correct structures to deal with negative externalities, and in his view, this should be done at the level of the 'Region State' which would replace the national state, Ohmae, op. cit, p. 136.

International institutions serve the interest of states in order to prevent a particular result (common aversions such as the 'tragedy of the commons'[49]) or to achieve certain ends (common interests) by joint action. The former is a classic example of coordination, the latter being a type of collaboration.[50] It is through international institutions that states deal with international externalities, such as international pollution or transnational criminality, which cannot be managed appropriately within the context of the modern territorial state, considering its scale and territorial bias, as Held and Mcgrew argue:

> In this context, many of the traditional domains of state activity and responsibility (defence, economic management, health, and law and order) can no longer be served without institutionalizing multilateral forms of collaboration.[51]

What the modern territorial states stand to gain from cooperation in the creation of international institutions should be seen as a Pareto-improving outcome, because without some form of cooperation, states will necessarily be worse off, as Hooge and Marks state:

> The coordination dilemma confronting multi-level governance can be simply stated: To the extent that policies of one jurisdiction have spill-over (i.e. negative or positive externalities) for other jurisdictions, so coordination is necessary to avoid socially perverse outcomes.[52]

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[49] On the 'Tragedy of the Commons' see, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge: Cambridge University Press, 1990.

[50] On the dilemmas of common aversion and common interests see Arthur Stein, 'Coordination and Collaboration: Regimes in an Anarchic World,' in David Baldwin (ed.), *Neorealism and Neoliberalism*, New York: Columbia University Press, 1993, p. 41.

[51] David Held and Anthony McGrew, *Globalization and Anti-Globalization*, Cambridge: Polity Press, 2008, pp. 25–26.

[52] Liesbet Hooge, and Gary Marks, 'Unravelling the Central State, but How? Types of Multi-level Governance,' *The American Political Science Review*, vol. 97, No. 2, 2003, p. 239. This

However, considering the anarchic nature of the international system, cooperation is not easy to achieve, although international institutions can reduce uncertainty and the transaction costs of repeated interactions between states and allow states to take advantage of economies of scale to increase the returns of an additional issue,[53] which point underlies rational choice institutionalism, as Ikenberry states:

> Rationalist theory sees as agreements or contracts between actors that function to reduce uncertainty, lower transaction costs, and solve collective action problems. Institutions provide information, enforcement mechanisms, and other devices that allow states to realize joint gains. Institutions are explained in terms of the problems they solve – they are constructs that can be traced to the actions of self-interested individuals or groups.[54]

Although international institutions can significantly decrease transaction costs and facilitate exchange between states, the end result of an international institution will not always reflect the most efficient result desired by states, particularly because 'institutional development frequently depends on prior outcomes (path-dependence) and evolutionary forces'.[55]

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point is also expressed by Robert Keohane and the prisoners' dilemma analogy to international affairs, Keohane, *After Hegemony*, op. cit.

[53] The reason states decide to create international institutions relates to their need to decrease the transaction costs of future interactions, and also to ensure a stable framework in order to achieve the desired results by joint action, as Keohane states: 'International regimes reduce transaction costs of legitimate bargains and increase them for illegitimate ones', Keohane, *After Hegemony* op. cit., p. 90.

[54] G. John Ikenberry, 'Institutions, Strategic Restraint, and the Persistence of American Post-war Order,' in Michael E. Brown, Owen R. Cote Jr., Owen R, Sean M. Lynn-Jones and Steven E. Miller, *Primacy and its Discontents: American Political Power and International Stability*, Cambridge, Ma: MIT Press, 2009, pp. 182–83.

[55] Barbara Koremenos, Charles Lipson and Duncan Snidal, *The Rational Design of International Institutions*, Cambridge: Cambridge University Press, 2001, p. 7.

2.2. Logic of Appropriateness and Logic of Consequences

In order to understand the effect institutions have on agents in social life, the two 'logics for actions' should be considered: the logic of appropriateness and the logic of consequences.

The logic of appropriateness sees action determined by the rules of what is appropriate behaviour; where actors match their actions to their identities, and behaviour is conditioned by what actors believe is the correct course of action. This logic contains cognitive and normative elements[56] and represents the logic used in Constructivist arguments. The logic of consequences, on the other hand, sees action as determined by a rational assessment of the interests of social actors.[57]

The relevance of these two logics in relation to international institutions is that they also represent two different approaches to the study of international institutions, Constructivism *v.* Rational Choice; the former emphasising that international institutions are not just instrumental agents of states but that they can exercise a significant influence in constraining state behaviour and in determining states' preferences even when considering power asymmetries in international affairs; the latter, emphasising that international institutions are a mere by-product of states' designs and that, at most, they constrain and shape states' behaviour, but even so, states preferences are considered exogenous, as a given.[58] Rothstein expresses this problem when he argues that:

> The advantage with the economic approach is that it provides us
> with clearly defined and universal micro-foundations of how
> individuals will act in different institutional settings (viz., they will
> maximize their expected utility). The problem is that, because it has

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[56] James, G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics*, New York: The Free Press, 1989, pp. 160–62.

[57] Kjell Goldmann, 'Appropriateness and Consequences: The Logic of Neo-Institutionalism,' *Governance: An International Journal of Policy and Administration*, vol. 18, No. 1, 2005.

[58] A recent example of rational choice applied to International Law is seen in the Economic Analysis of Law by Joel P., Trachtman, *The Economic Structure of International Law*, Cambridge, Massachusetts: Harvard University Press, 2008.

no theory of where preferences come from (of what is "expected utility" for different actors), it must generally deduce preferences from behaviour: the dependent variable is thus used to explain the independent, which in turn is re-used to explain the same dependent variable.[59]

In any case, looking at the contribution of institutionalism, 'the best theory would tell us when institutions necessarily matter to states, and why',[60] although what is considered the 'best' theory can be elusive. This means that a 'good' theory about international institutions should explain the origins of international institutions and take into consideration that states design institutions for certain purposes, and thus, look at the reasons behind their creation. Hence, a 'good' theory will also address the mechanisms of the evolution of institutions.

2.3. The Problem of Choice

Cooperation is needed in a world where states expect to gain from a coordinated international institutional framework. However, this does not mean that states have an unlimited set of choices, particularly because states cannot choose the constitutional rules of the international system without incurring the huge transaction costs of renegotiating the three types of rules that are the foundations of an international system.[61] Moreover, states cannot overcome the limits of their geographical position in international affairs.

For instance, the institutional development of the EU and its evolution has seen states that are eligible to access the EU more likely to apply for membership because the

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[59] Bo Rothstein, 'Political Institutions: An Overview' in Robert E. Goodin and Hans-Dieter Kinglemann, *A New Handbook of Political Science*, Oxford: Oxford University Press, 1998, p. 148.

[60] Nicholas Onuf, 'Institutions, Intentions and International Relations,' *Review of International Studies*, vol. 28, 2002, p. 211.

[61] Rules of membership, rules of behaviour and secondary rules (meta-rules) as discussed in Chapter 1.

cost of accession is lower than the transaction costs of establishing a new, similar institutional arrangement.[62]

In regions where nothing similar exists (as the EU integration process), states are less likely to create and establish similar institutional arrangements. This is because of associated high transaction costs, considering the difficulties of establishing a new regional arrangement, which might require the identification of common problems to solve, whether it is, for example, to liberalise trade, provide for common security or to avoid environmental degradation.

The same logic applies to functional institutions such as the WTO, where the gains to be obtained from membership are immense, taking into account that it is one of the largest global organisations within which trade liberalisation takes place. That said accession rules are negotiated case by case[63] which maintains high entry costs and which, thus, constrains the choice of states. A theory of international institutions should address these limitations of states in the establishment or their entry into international arrangements, and not only consider the differences in material capabilities and legal status between states (asymmetries of power and legalised hegemony), but also the outcomes of institutional arrangements (intended and unintended consequences). This implies that a theory of international affairs should explain why states decide to cooperate in certain areas (per capita stakes and regime theory). As a consequence, it is important to discuss, briefly, some of the factors that might affect the design and evolution of institutions in international affairs, namely: Regime Theory, Asymmetries of Power, Per Capita Stakes, Unintended Consequences and Public Goods.

2.4. Regime Theory

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[62] The cost of establishing a new institutional arrangement should be compared with the cost of entry into an already established institutional arrangement.

[63] Peter John Williams, *A Handbook on Accession to the WTO*, Cambridge: Cambridge University Press, 2008, p. 2.

The study of regimes from a rational-choice perspective has been part of International Relations scholarship for a long time. Regimes 'can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'.[64] Regimes are also international institutions, the basic function of which is to govern a particular issue area of international politics in order to achieve better coordination between states in that issue-area, whether it is in relation to trade, the environment or otherwise.[65]

2.5. Asymmetries of Power

It is important to remember that the design of international institutions is affected by asymmetries of power between states (power structures) in which states, legally equal but materially more powerful, might enjoy a privileged position in designing international institutions because they have greater bargaining power. This was the case, in particular, of the Post-World War II international system where the concept of the Great Powers was legally introduced by the United Nations Charter with the creation of the Security Council.[66] Institutional theory recognises the role that asymmetries of power have, not only in terms of establishing international institutions, but also in their evolution, as Keohane argues: 'More generally, the rules of any institution will reflect the relative power positions of its actual and potential

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[64] Stephen Krasner, 'Overview' in Stephen Krasner (ed.), *International Regimes*, Ithaca: Cornell University Press, 1983, p. 2.

[65] Ibid., p. 7; Oram R. Young, 'Regime Dynamics: the Rise and Fall of International Regimes,' in Stephen Krasner, *International Regimes*, op. cit., p. 93; Friedrich Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art or an Art of the State?' *International Organization*, vol. 40, No. 4, 1986, p. 759; Oran R. Young, 'International Regimes: Towards a New Theory of Institutions,' *World Politics*, vol. 39, No. 1, 1986.

[66] Simpson calls it 'legalised hegemony,' see Gerry Simpson, *Great Powers and Outlaw States*, Cambridge: Cambridge University Press, 2004. This point was explored in Chapter 1.

members which constrain the feasible bargaining space and affect transaction costs'.[67] The influence of the Great Powers in the design and evolution of institutional arrangements often imposes costs on weaker states, forcing them to accept outcomes which they would not otherwise willingly accept, as seen in the *Wimbledon* case discussed in Chapter 1.

2.6. Per Capita Stakes

Furthermore, 'per capita stakes' of the various actors in the international system also have an effect on institutional establishment and evolution, depending on the stake of states in certain issues. This means that depending on the issue, different states and actors will be more heavily involved in certain areas or regions of international politics, which will, therefore, give these states a greater role in the design and evolution of these institutions.[68] For example, European states have a greater stake in the development of the EU because it directly affects them; similarly, maritime states have greater incentives to participate in the political or legal developments that impact on the regime of the seas because they have economic interests in their maritime zones and Economic Exclusive Zones (EEZ).[69] As Komesar indicates in explaining the role of per capita stakes in the political process, 'Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with larger numbers and smaller per capita stakes'.[70] This notion

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[67] Robert Keohane, 'International Institutions: Two Approaches,' op. cit., p. 387, similarly Jack Knight, op. cit., p. 127.

[68] On per capita stakes, see Neil Komesar, 'Imperfect Alternatives: Choosing Institutions,' in *Law, Economics and Public Policy*, Chicago: Chicago University Press, 1994, p. 68.

[69] A sea zone of 200 miles where states have special sovereign rights of exploration of natural and marine resources, Part V (Article 56, rights of states and Article 57, the 200-miles extension) of the United Nations Convention of the Law of the Sea, 1982, see Malcom D. Evans, 'The Law of the Sea,' in Malcom D. Evans, (ed.), *International Law Documents*, Oxford: Oxford University Press, eighth edition, 2007, pp. 644–45.

[70] Komesar applied his Interest Group Theory of politics (IGT) to the individual level, but it can also be applied at the international level if the state is considered as an individual actor, as IR theory posits, see Neil Komesar, op. cit., p. 68.

corresponds to that of 'Voice' and 'Exit' proposed by Hirschman,[71] the former relating to the political participation of an agent in an institutional framework and the latter to the possibility of exit from an institutional arrangement. 'Voice' relates to Per Capita Stakes because it defines the level and depth of participation of an agent within an institutional framework. However, 'Voice' cannot be seen as separate from 'Exit', because if an agent cannot participate fully in an institutional arrangement, the 'Exit' option may need to be exercised.[72] This is significant in international affairs because states have a variable degree of participation in institutional arrangements depending on their position of power and the initial set of constraints defined by the rules of the arrangement. This means that in many instances of state participation, 'Voice' might be affected, and for that reason, 'Exit' may function as a last-resort mechanism to protect state sovereignty, particularly if sovereignty is shared, as it is in the EU.[73]

2.7. Unintended Consequences

The study of international institutions should also address the problem of unintended consequences, in the sense that international institutions are designed for certain purposes, but that the outcomes of their actions often produce results very different from those envisioned by their designers at the outset.[74] This is especially relevant to the concept of sovereignty because, if in designing and establishing institutions states do not fully anticipate the outcomes of their actions, the result might be that the power of institutions is enhanced, thus restricting state sovereignty. This point is of particular

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[71] Albert O. Hirschman, *Exit, Voice, and Loyalty*, Cambridge, MA: Harvard University Press, 1970.

[72] Hirschman, op. cit., pp. 125–26.

[73] This is why the new Treaty of Lisbon explicitly asserts the right of withdrawal from the EU, ending years of doctrinal debate. See analysis in Chapter 4 on the EU.

[74] Pierson also links the unintended consequences with the limitations of rational choice in institutionalism, see Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis*, Princeton: Princeton University Press, 2004, p. 108. On a rational-choice perspective in relation to unintended consequences, see Russell Hardin, *Liberalism, Constitutionalism and Democracy*, Oxford: Oxford University Press, 1999, pp. 23–24.

poignancy when considering the different mechanisms of evolution of institutions, such as Pierson argues in relation to the EU:

> Specific Institutional Arrangements have multiple effects. Expanded judicial review in the European Union simultaneously empowered judges, shifted agenda-setting powers away from the member states towards the European Commission, altered the character of discourse over policy reform, transformed the kinds of policy instruments that decision makers prefer to use, and dramatically changed the value of political resources traditionally employed by interest groups, to name just a few of the most obvious consequences.[75]

Public Goods

Public goods 'are usually defined as goods with non-excludable benefits and non-rival consumption. Non-excludability means that it is technically, politically, or economically infeasible to exclude someone from consuming the public good. Non-rivalry means that one person's consumption of the good does not detract from the availability to others'.[76]

At the international level, public goods provide a useful analytical framework to understand the nature of international cooperation in relation to the insufficiencies of states, within their own territorial jurisdictions, in tackling transnational problems. There are different types of Global Public Goods, with Peace and Security, the

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[75] Paul Pierson, op. cit., p. 109. On the application of institutional theory to the EU, especially the role of informal institutional change, see Jeffrey Stacey and Berthold Rittberger, 'Dynamics of formal and informal institutional change in the EU,' *Journal of European Public Policy*, vol. 10, No. 6, 2003.

[76] Inge Kaul, et. al., *Providing Global Public Goods: Managing Globalization*, Oxford: Oxford University Press, 2003, pp. 21–22.

Environment and Global Financial Stability[77] constituting some of the most important.[78] At the international level, the definition of Public Goods requires some adjustment when it is considered that some Global Public Goods do not conform fully to the definition; when for example, many so-called 'Public Goods' are excludable and can be rivals as in, for instance, the trade regime at the WTO, which although large, excludes non-member states, and the rivalry that exists among regional trading systems such as NAFTA or MERCOSUR.[79]

The 'Area'[80] is another example of a Global Public Goods or a 'global commons' considered part of the 'common heritage of mankind' (Article 136 of the United Nations Convention of the Law of the Sea)[81] which is managed by the International Seabed Authority. In the legal regime of the global commons, no states' claims of sovereignty are recognised by International Law.[82] This is significant, because in the regime of the global commons, states' sovereignty – defined by ultimate exclusive territorial authority – is not present, although global commons are considered the property of mankind as a whole.[83]

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[77] Global financial stability is an example of a Global Public Good, as recognised by the IMF, see Fariborz Moshirian, 'Globalisation and the Role of International effective Institutions,' *Journal of Banking and Finance*, vol. 31, No. 6, 2007. p. 1584.

[78] Pedro Conceicao, 'Assessing the Provision Status of Global Public Goods,' in Inge Kaul, et. al., *Providing Global Public Goods,* op. cit., p. 156.

[79] On 'impure public goods' see Severine Deneulin and Nicholas Townsend, *Public Goods, global Public Goods and the Common Good*, WED Working Paper 18, 2006: http://www.welldev.org.uk/research/workingpaperpdf/wed18.pdf [Accessed 22.12.2010].

[80] The 'Area' is defined in the UN Convention of the Law of the Sea as the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Article 1 of UNCLOS).

[81] Hereinafter, UNCLOS.

[82] Similarly, the Outer Space, the Moon and the Celestial bodies cannot be appropriated by claims of sovereignty by states (Article 2 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967).

[83] Susan J. Buck, *The Global Commons: An Introduction*, London: Earthscan Publications, 1998, pp. 27–29.

The provision of Global Public Goods in international affairs requires the protection of a regime or an institutional framework, as Held and McGrew assert, 'Effective and accountable institutions of governance are central to the effective provision of global public goods'.[84] As a result, Global Public Goods require rules to regulate their protection and enforcement, particularly considering the need for states to enjoy their benefits, as Moshirian points out:

> It is clear that global public goods require global institutions to ensure that they are produced and at the same time, they require the support and coordination of regional and national institutions to ensure that they will reach all nations.[85]

3. Agency *v*. Structure in International Relations

The dichotomy between agency *and* structure is pervasive in the social sciences.[86] As such, it also is relevant to IR theory[87] especially when analysing the structure of the

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[84] David Held and Anthony McGrew, 'Political Globalization: Trends and Choices' in Inge Kaul, et. al., *Providing Global Public Goods: Managing Globalization*, Oxford: Oxford University Press, 2003, p. 196.

[85] Moshirian, op. cit., p. 1585.

[86] 'Action and structure normally appear in both sociological and philosophical literature as antinomies,' see Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis*, London: Macmillan press, 1979, p. 49; see also Derek Layder, *Understanding Social Theory*, London: Sage Publications, 2006, pp. 193–212. According to Hodgson, structure 'includes all sets of social relations, including the episodic, and those without rules, as well social institutions', see Geoffrey Hodgson, 'Institutions and Individuals: Interaction and Evolution,' *Organization Studies*, vol. 28, 2007, p. 96. On discussions about the impact of rational choice, particularly its emphasis on methodological individualism, see Geoffrey Hodgson, 'Meanings of Methodological Individualism,' *Journal of Economic Methodology*, vol. 14, No. 2, 2007.

[87] Andreas Bieller and Adam David Morton, 'The Gordian Knot of Agency-Structure in International Relations: A Neo-Gramscian Perspective,' *European Journal of International Relations*, vol. 7, No. 1, 2001, pp. 10–13; Alexander Wendt, 'The Agent-Structure Problem in international Relations,' *International Organization*, Vol. 41, No. 3, 1987.

international system,[88] and its interaction with state agency. The relationship between agency and structure should be seen as mutually constitutive, as Giddens argues:

> The constitution of agents and structures are not two independently given sets of phenomena, a dualism, but represent a duality. According to the notion of the duality of structure, the structural properties of social systems are both medium and outcome of the practices they recursively organize.[89]

Bearing in mind that this thesis is concerned with analysis of the international system, in looking at agency, therefore, our primary focus is the state, seen as the most important actor since Westphalia. This implies an analysis of the multiple dimensions of the state; its constituent components, [90] and the different interest groups with multifarious interests and preferences within the state trying to advance their

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[88] Structure in IR theory is determined in part by Kenneth Waltz's Neo-realism and his 'three images' understanding of International Politics: structure is differentiated from the unit-level analysis, which includes analysis of the state, however, Waltz's theory reduces Structure or System to the unit-level analysis (the state), following his rational-choice approach. For a critical view, see John Gerard Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis,' *World Politics*, Vol. 35, No. 2, 1983; Alexander Wendt, *Social Theory of International Politics*, Cambridge: Cambridge University Press, 1999, pp. 139–189.

[89] Anthony Giddens, *The Constitution of Society*, Cambridge: Polity Press, 1984, p. 25; Beth V. Yarbrough and Robert M. Yarbrough, International Institutions and the New Economics of Organization, *International Organization*, vol. 44, No. 2, 1990.

[90] This is particularly relevant for federal states or decentralised states where the state is not 'operationally' a unitary actor but constitutes the many, considering that those states are vertically and horizontally divided into many centres. They are vertically divided into many centres because federal and decentralised states are composed of different units (states, regions or provinces) which enjoy significant autonomy. They are horizontally divided because in those states, power is usually divided in the executive, legislative or judicial power, and this often has an effect on the 'unity' of states' action, Slaughter calls it the 'disaggregated state,' see Anne Marie Slaughter, *A New World Order*, Princeton: Princeton University Press, 2004, pp. 12–15.

positions.[91] Furthermore, seeing the state as a unitary actor without considering the role of domestic politics in shaping state preferences and interests, could lead often to incorrect conclusions. States represent a plethora of different interests, as Gruber argues:

> One source bias has been their predilection for seeing 'states' as the fundamental building blocks of international relations theory. A legacy of Waltzian Realism, the assumption that states are (in the jargon) 'unitary actors' greatly simplifies the explanatory task, allowing the analyst to trace changes in state behaviour to corresponding changes in the larger international environment. That said, if our goal is to understand why international cooperation takes the form it does, abandoning the notion of states as internally undifferentiated entities is an absolute necessity.[92]

Certain groups within the state might have different interests, as Liberal Theory emphasises.[93] This means that states' interests will reflect the outcomes of domestic politics, and that as a consequence, domestic politics will also be reflected in the design of international institutions.

The structure of the international system[94] is composed of the 'constitutional' rules of the international system including rules of membership, rules of behaviour and meta-

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[91] This point is particularly emphasised by the liberal theory in IR, see Andrew Moravcsik, 'Taking Preferences Seriously,' op. cit.

[92] Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions*, Princeton: Princeton University Press, 2000, p. 259.

[93] Andrew Moravcsik, 'Taking Preferences Seriously,' op. cit., and Anne-Marie Slaughter, 'International Law in a World of Liberal States,' *European Journal of International Law*, vol. 6, No. 4, 1995.

[94] For neo-realism, the structure of the International system includes anarchy (absence of authority in international politics), differentiation between units (states are the most important units in the international system) and the distribution of capabilities between units (asymmetry of power). According to this approach, the state is seen as a unitary actor – no role for domestic politics is considered – and the structure of international politics compels

rules. Constitutional rules mean the 'foundational' rules that allow for interaction between states. Constitutional does not refer to a 'Constitution' for the international system.[95]

The structure of the international system constrains and shapes the behaviour of the different actors in the international system. However, care must be taken not to reduce state's agency to the structure of the international system, in that although the sphere of action of individual states is constrained by constitutional rules of the international system, states still retain some choice in the conduct of their own affairs. The constitutional rules of the international system are composed, firstly by rules that determine what the legitimate acceptable polities (units) in the international system (rules of membership) are; secondly, by the rules which proscribe and prescribe how these actors should behave (rules of behaviour) and thirdly, by rules about the creation of other rules (meta-rules or secondary rules), as Smit points out:

> Constitutional structures are coherent ensembles of intersubjective beliefs, principles, and norms that perform two functions in ordering international societies: they define what constitutes a legitimate actor, entitled to all the rights and privileges of statehood; and they define the basic parameters of rightful state action.[96]

These rules are foundational and define the rules of the game of each international system, as Philpott recalls,

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states to maximise their power or security, with the potential for cooperation seen as minimal. See Brian C. Schmidt, 'Realist Conceptions of Power,' in Felix Berenskoetter and M. J. Williams, *Power in World Politics*, London: Routledge, 2007, p. 46.

[95] Although some authors such as Fassbender see the UN Charter as the Constitution for the International Community. See Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law,' in Neil Walker, *Sovereignty in Transition*, Oxford: Hart Publishing, 2003.

[96] Christian Reus Smit, 'The Constitutional Structure of the International Society,' *International Organization*, vol. 51, No. 4, 1997, p. 566.

These rules are not the laws or institutions of "international society" that provide order or peace or justice among states; rather more foundationally, they create the system in the first place. They define the holders of basic authority and their most essential prerogatives. In the modern international system constitutive rules define sovereign states, not baronies, or tribes or churches or empires, as the legitimate polities, and they set forth their essential prerogatives, as non-intervention, *pacta sunt servanda*, and the like.[97]

Hence, the discretionary sphere of action of individual states is largely explained by the extent to which these rules operate in international politics, which suggests that in order to understand the role of states in the international system, it is necessary to consider not only the role of structure in constraining state behaviour, but also in constituting state conduct in international affairs.[98]

Notwithstanding this, it is important to point out that states are created in the Westphalian international system, the basic rules of which have shaped and restricted the way states behave, but that these rules have also had a constitutive role in shaping states' identities and interests.[99] International institutions have the potential to

[97] Daniel Philpott, 'Usurping the Sovereignty of Sovereignty,' *World Politics*, vol. 53, 2001, p. 309.

[98] Alexander Wendt, *Social Theory of International Politics*, op. cit., p. 155.

[99] From a Constructivist perspective, Alexander Wendt, Idem, p. 382, also emphasises the need to study international institutions to reflect these two approaches: neo-institutionalism and its rational-choice approach and reflective theories. On these 'reflective' or constructivist approaches, on the core features of constructivism, see John Ruggie, *Constructing the World Polity: Essays in International Institutionalization*, London: Routledge, 2000, pp. 32–34; Alexander Wendt, 'Constructing International Politics,' op. cit. From the sociological institutional perspective, the modern territorial state is a world-wide construction by cultural and associational processes, this perspective emphasises the role of the international system in defining the essential characteristics of the state, see Meyer et. al., 'World Society and the Nation State,' *The American Journal of Sociology*, vol. 103, No. 1, 1997. This perspective is closer to Functionalism and the notion that the structure creates actors and determines their

determine states' preferences by influencing and shaping domestic policy, as was shown by the membership conditionality (linking admission to an institutional arrangement with behaviour) of the EU, whereby some candidate countries changed a number of internal policies, the incentive being accessing the EU.[100] The state, as Axford argues, should be embedded in the structure of the international system, 'The state in the modern global system is both actor and social institution'.[101] This includes all attributes and privileges of statehood also, particularly that of sovereignty.

4. The Concept of Sovereignty in the Context of International Institutions

International institutions thus reflect the power structure of the international system, and it is in this context, that the concept of sovereignty must be understood.

This means that the concept of sovereignty with all its corollaries, namely, non-intervention and jurisdictional exclusive authority of states, depends on the power structure of the international system. Thus powerful states, particularly the Great Powers, will have additional influence in the design and the evolution of international institutions, including international organisations, as the establishment of the UN, for example, demonstrates.[102] Sovereign equality lives sides by side with a form of hierarchy in the international system, which means that Great Powers have a legalised hegemony in the structure of the international system, as in the case of the UN system

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patterns of action. For more detail from this perspective, see Daniel Little, *Varieties of Social Explanation: An Introduction to the Philosophy of Social Science*, Boulder: Westview Press, 1991, pp. 102–112.

[100] Judith Kelley, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions,' *International Organization*, vol. 58, 2004; Oran R. Young, *Governance in World Affairs*, Ithaca: Cornell University Press, 1999, p. 4. On the impact of international rules on domestic policy choices, see Andrew P. Cortell and James W. Davis, 'How Do International institutions Matter? The Domestic Impact of International Rules and Norms,' *International Studies Quarterly*, vol. 40, 1996.

[101] Barrie Axford, *The Global System: Economics, Politics and Culture*, New York: St Martin's Press, 1995, p. 134.

[102] For the same line of reasoning see Gerry Simpson, *Great Power and Outlaw States*, op. cit.

where the Great Powers are represented in the Security Council, as Wendt and Friedheim argue:

> Despite the juridical sovereignty of virtually every modern state, hierarchical political authority is also a pervasive phenomenon in international politics. Great Powers are widely acknowledged to have special prerogatives in their 'spheres of influence' to help 'manage' the international system.[103]

Power asymmetries and issues of bargaining power in the establishment of international institutions are not irrelevant either, as Gruber explains:

> The fact that the United States emerged from the war as the world's dominant economic power afforded it tremendous leverage. As the world's largest consumer and producer of traded goods, the United States could threaten to close off its market to nations that did not share its commitment to multilateral norms and principles. U.S. officials had recourse to other forms of leverage, such as denying other countries vital military or economic assistance.[104]

Once international institutions are established, exiting them comes at a high cost to states, considering that the benefits of membership in institutional arrangements exceed the costs of opting out. The WTO is an example of this, where the potential benefits of membership (access to the Global Trade Regime) exceed the costs of staying out.

However, if these institutional arrangements start challenging state sovereignty – by claiming a sphere of authority that rivals that of the state – the options for states in countering those claims decreases, considering the high costs of exiting. As a

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[103] Alexander Wendt and Daniel Friedheim, 'Hierarchy under Anarchy: Informal Empire and East German State,' in Thomas J. Bierkesterand and Cythia Weber (eds.), *State Sovereignty as a Social Construct*, Cambridge: Cambridge University Press, 1996, pp. 240–41.

[104] Lloyd Gruber, op. cit., pp. 35–36.

consequence, although states might have the 'legal' option of withdrawal from an international institutional arrangement, the costs of exit would leave states worse off.[105] As a result, the only viable mechanism for states is to increase 'Voice', that is, their political participation in the institutional arrangement

Furthermore, the costs of re-coordination into different and alternative institutional arrangements make international institutions more likely to persist over time, as Hardin notes, 'A coordination regime is commonly strong just because it is extremely difficult to re-coordinate large numbers on doing things some other way',[106] which confirms that although international institutions are the voluntary creations of states, the mechanisms of change in international institutions tend to be path-dependent, as Krasner emphasises: 'an institutionalist perspective implies that something persists over time and that change is not instantaneous and costless'.[107] For instance, Post-World War II international institutions are explained by path-dependence and responsive to the logic of increasing returns.[108]

International institutions constrain states and challenge state authority by the process of 'legalisation' in which institutional practices became institutionalised in formal rules. This is significant, because it is necessary to explore the extent to which global authoritative structures, which challenge state sovereignty, emerge from international institutions. The legalisation of rules at the international level implies three processes:[109]

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[105] This is the case of the EU, where challenges to sovereignty are common, but the cost of the exit option is too high to be contemplated, in which case, the only viable mechanism would be that of 'Voice', whereby states often change the nature of their political participation in the EU as a way to assert their own preferences and sovereignty. See Albert Hirschman, *Exit, Voice*, op. cit.

[106] Russell Hardin, *Liberalism, Constitutionalism and Democracy*, op. cit., p. 15.

[107] Stephen Krasner, 'Sovereignty: An Institutional Perspective,' *Comparative Political Studies*, vol. 21, No. 1, 1988, p. 71.

[108] Ikenberry, op. cit., pp. 204–205.

[109] The terms, Obligation, Precision and Delegation are used, see Goldstein et. al., 'Introduction: Legalization and World Politics,' op. cit., pp. 385–399. See also Raustiala's framework that uses different terms to express the same reality: Legality, Substance and

d) The identification and binding of the rules (Obligation);

e) The extent to which international obligations are weak or strong (Precision);

f) The creation of third-party enforcement mechanisms (Delegation).

The institutionalisation of the rules of GATT with the creation of the WTO and the mandatory dispute settlement mechanism is an example of institutionalisation of rules or 'legalisation'.[110] The process of legalisation or 'legality' often serves three purposes: 'First, legality is important to state officials, as evidenced by the often considerable debate over whether a proposed pact will be a contract or a pledge. Second … an agreement's legality often has implications for domestic law, which in some cases may explain why states – and private actors – argue over legality. Third, the politics of legal agreement as opposed to political agreement are distinctive'.[111] The structure of international obligations, whether a mere 'pledge' or a 'contract'[112] is particularly relevant when analysing the impact of dispute resolution mechanisms upon sovereignty. Thus it is important in order to understand the role that dispute resolution processes have in the evolution of international institutional arrangements, as Ostrom observes:

> It is obvious to most institutional analysts that rules must be enforced in some manner to achieve robust governance; the question of how rules will actually be enforced is frequently

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Structure, Kal Raustiala, 'Form and Substance in International Agreements,' *The American Journal of International Law*, vol. 99, No. 1, 2005, pp. 581–614.

[110]Alec Stone Sweet, 'Judicialization and the Construction of Governance,' in Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization*, Oxford: Oxford University Press, 2002, pp.71–78. Contrary to this perspective, see Jeffrey Dunoff who is particularly sceptical of the process of 'constitutionalization' (an example of 'legalisation') of the WTO by emphasising the politics of the organisation, Jeffrey Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law,' *European Journal of International Law*, vol. 17, No. 3, 2006.

[111] Kal Raustiala, op. cit., p. 590.

[112] Idem, p. 584.

ignored when proposed institutional changes are analyzed and a reform is proposed.[113]

This issue relates to the process of judicialization of politics, 'the ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies'.[114] Judicialization is part of the process of legalisation of institutional arrangements, of which an example is the changes made to the WTO–GATT dispute settlement process following the Uruguay Round, which established compulsory jurisdiction in all disputes.[115] As Stostad stresses, 'the change from GATT to the WTO is often described as a shift from a largely diplomacy-based,

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[113] In the context of resource regimes see Elinor Ostrom, *Understanding Institutional Diversity*, Princeton: Princeton University Press, 2005, p. 265.

[114] Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide,' *Fordham Law Review*, vol. 75, No. 2, 2006, p. 721. According to Baudenbacher, [Judicialization] 'in the broadest sense of the term means replacing non-judicial proceedings of legislation, administration, or dispute settlement with judicial proceedings,' see Carl Baudenbacher, 'Judicialization: Can the European Model be Exported to Other Parts of the World?' *Texas International Law Journal*, vol. 93, 2004, p. 381. On the proliferation of judicial bodies in international affairs, see Romano Cesare, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,' *International Law and Politics*, vol. 31, 1999.

[115] Panels might not be established by the Dispute Settlement Body (DSB) if this is decided by consensus ('negative consensus', Article 6.1. Dispute Settlement Understanding or DSU), however, considering that an aggrieved party would have reasons to object, the negative consensus is seldom reached, which explains why the WTO dispute settlement is seen as compulsory. Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization*, Oxford: Oxford University Press, 2006, pp. 115–16. Similarly, Bernhard Zangl, 'Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO,' *International Studies Quarterly*, vol. 52, 2008. Arguing against the relevance of the WTO panels as a pure example of legalisation, particularly considering that the panels' decisions are just 'recommendations' to the DSB and only after they have been adopted do they become binding in relation to the parties' disputes, see Andreas F. Lowenfeld, *International Economic Law*, Oxford: Oxford University Press, 2003, pp.155–56.

or negotiated, apparatus for dispute resolution to a more rules-based, or adjudicatory, model'.[116]

Judicialization has a constitutive effect on international arrangements because it increases the levels of states' compliance, thus affecting their authority. This is why it is necessary to understand the phenomenon of judicialization as the creation of new spheres of authority that go beyond the state. Judicialization renders obsolete the notion that the state has the 'ultimate authority', because in many instances, the decisions of those judicial bodies at the international level claim a sphere of authority that often collides and supersedes the sovereign authority of the state. For these reasons, it is important to understand the potential implications of judicialization on the concept of sovereignty.

4.1. Global Governance

The rationale for international institutions in an anarchical international system needs to be complemented with a theory of international (global) governance. Governance 'relates to any form of creating or maintaining political order and providing common goods for a given political community on whatever level'.[117] At the international level, governance imposes constraints on states by the foundational rules of the international system even in a world without formal hierarchical authority over the states. This means that global governance per se is based on a 'non-hierarchical mode of steering'.[118]

A theory of international governance will explain the different types and mechanisms of authority and how it is exercised in international institutions in certain issue-areas

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[116] Timothy Stostad, 'Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and its Impact on Developing Countries,' *Cornell International Law Journal*, Vol. 39, 2006, p. 812.

[117] Thomas Risse, *Global Governance and Communicative Action:* Government and Opposition, vol. 39, Issue 2, 2004, p. 289.

[118] Thomas Risse, op. cit., p. 292.

of international affairs[119] because global governance 'invokes shifting the location of authority in the context of integration and fragmentation'.[120] Thus, global governance implies a significant reconfiguration of power away from the modern territorial state towards international institutions.[121]. Authority in an era of global governance should be seen as pluralistic, considering the different forms of governance that exist in global politics. One needs to detach the concept of authority from the modern territorial state; as a result, a theory of sovereignty needs to take into account the different modes of authority that go beyond the state, as Rosenau recalls:

> It follows that world affairs can be reconceptualised as governed
> through a bifurcated system – what can be called the two worlds of
> world politics – one an interstate system of states and their national
> governments that has long dominated the course of events, and the
> other a multi-centric system of diverse types of other collectivities
> that has lately emerged as a rival source of authority with actors

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[119] The mechanisms of international governance include different types, ranging from international regimes (institutional frameworks in certain issue-areas, an example is the governance regime of the sea under the UN Convention on the Law of the Sea, which regulates the Law of the Sea), to the creation of formal International Organisations (like the UN and the EU), informal institutions like G-20 (partially informal) or mechanisms of political partnership between polities like federalism (in the case of federal arrangements between sovereign states). The literature also includes regulatory regimes in the framework of Global Governance, where private actors are preeminent; examples include the private bond-rating agencies. See Craig N. Murphy, 'Global Governance: Poorly Done and Poorly Understood,' *International Affairs*, vol. 76, No. 4, 2000, p. 794.

[120] Thomas G. Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges,' *Third World Quarterly*, vol. 21, No. 5, 2000, p. 806.

[121] This reconfiguration of authority also implies a reconfiguration of spaces and the processes for severance of the link between authority and territory (deterritorialization of authority). It also opens up new opportunities for participation of groups, as Gaventa argues: 'Thus, just as globalisation contributes to a separation of power from territory, so does it open up broader possibilities for action by relatively powerless groups not only at the supranational level but also through the interaction of these various levels,' see John Gaventa, 'Levels, Spaces and Forms of Power,' in Felix Berenskoetter and M. J. Williams (eds), *Power in World Politics*, London: Routledge, 2007, p. 210.

that sometimes cooperate with, often compete with, and endlessly interact with the state-centric system.[122]

The problem of legitimacy[123] of international institutions becomes particularly poignant when the growing importance of international institutions, in exercising a sphere of authority that goes beyond the state, is considered. International institutions, particularly organisations, have powers delegated to them by states, thus challenging the exclusive authority of the state. The delegation of power[124] exists because 'optimal solutions to some international problems, however, require more than a simple exchange of promises. Rather, they require a delegation of authority to some entity that, ideally, can make decisions that maximize the total gains to the parties to the agreement and perhaps address distributional issues among states'.[125] As Hathaway argues, 'When a state grants authority to an international body to take action or make decisions, that consent rests on a certain expectation of what the international body will do with the authority granted to it. But once the authority has been given away, states inevitably lose control of the exercise of it'.[126]

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[122] James N. Rosenau, 'Governance in a New Global Order,' in David Held and Anthony McGrew, *Governing Globalization, Power, Authority and Global Governance*, Cambridge: Polity Press, 2002, pp. 72–73.

[123] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' *American Journal of International Law*, vol. 93, 1999, which discusses one of the most important themes relating to the EU.

[124] On the two usages of delegation, the first of which presupposes a principal-agent relationship of hierarchical nature whereby states delegate certain powers to international organisations, the other, whereby states delegate authority over policy domains to international organisations and institutions; the former is close to the classical delegations, and the latter, closer to sharing of sovereignty, David A. Lake, 'Delegating Divisible Sovereignty: Sweeping a Conceptual Minefield,' *International Organization*, vol. 2, 2007, pp. 231–232.

[125] Andrew T. Guzman and Jennifer Landsidle, 'The Myth of International Delegation,' *California Law Review*, vol. 96, 2008, p. 1693.

[126] Oona A. Hathaway, 'International Delegation and State Sovereignty,' *Law and Contemporary Problems*, vol. 71, 2007, p. 23.

And it is here that the crux of the problem of sovereignty lies; in an anarchic international system, international institutions and international organisations exercise authority as a part of global governance, which often collides with the authority of the modern territorial state. This is why a new theory of sovereignty is required; one that recognises the 'disaggreggation of authority'[127] at the international level, as Higgot argues:

> But for international organizations to deliver better global governance, it is necessary to escape from a bounded notion of sovereignty and narrow definitions of security and state interest in international relations. Central to overcoming these limitations, as normative scholarship suggests, must be the recognition that sovereignty can be disaggregated and redistributed across institutional levels from the local to the global.[128]

Keohane, writing from an institutional perspective, sees sovereign statehood as an institution 'whose rules significantly modify the Hobbesian notion of anarchy'.[129] Sovereignty must, therefore be understood according to which part of the world it applies, and depending on the context, and in the contexts of 'complex interdependence' (as in the EU). For those reasons, The traditional view of sovereignty 'is no longer applicable'.[130]

Keohane sees sovereignty as 'less a territorially defined barrier than a bargaining resource for a politics characterized by complex transnational networks'.[131] However, sovereignty is not a bargaining resource; one state cannot be more or less sovereign

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[127] James N. Rosenau, 'Governance in the Twenty-First Century,' in Rorden Wilkinson, *The Global Governance Reader*, London: Routledge, 2005, p. 48.

[128] Richard Higgot, 'International Political Institutions,' in R. A. W. Rhodes, Sarah A. Binder and Bert A. Rockman, *The Oxford Handbook*, op. cit., p. 623.

[129] Robert Keohane, 'Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society,' in Robert Keohane, *Power and Governance*, op. cit., p. 65.

[130] Idem., pp. 72–73.

[131] Idem., p. 74.

because the attribute of sovereignty – a legal category – derives from statehood. The misunderstanding may have its root in the fact that many authors use the term sovereignty to merely describe 'decision–making' at state level, as Jackson clarifies:

> Most (but not all) of the time that 'sovereignty' is used in current policy debates, it actually refers to questions about the allocation of power; normally 'government decision-making power'. That is, when someone argues that the United States should not accept a treaty because that treaty infringes upon U.S. sovereignty, what the person most often means is that he or she believes a certain set of decisions should be made, as a matter of good governmental policy, at the nation-state (U.S.) level, and not at the international level.[132]

This does not mean that states are forbidden to delegate sovereign powers.[133] In the case of European integration, as will be explored further in Chapter 4, sovereignty is not merely a matter of degree, but is seen to be at the core of statehood. Notwithstanding this, it is important to comprehend the concept of sovereignty in a world with multiple centres of authority other than the modern territorial state.

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[132] John Jackson, Sovereignty-Modern: 'A New Approach to an Outdated Concept,' *The American Journal of International Law*, vol. 97, No. 4, 2003, p. 790. Similarly, Eli Lauterpacht, 'But to invoke the concept of national sovereignty as in itself a decisional factor is to fall back on a word which has an emotive quality lacking meaningful specific content', see Eli Lauterpacht, 'Sovereignty-Myth or Reality?' *International Affairs*, vol. 73, No. 1, 1997, p. 141. On the many uses of sovereignty in International Economic Law and in the WTO context, see Kal Raustiala, 'Rethinking Sovereignty in International Economic Law,' *Journal of International Economic Law*, vol. 6, No. 4, 2003.

[133] This point is especially relevant for those that distinguish between transfers of sovereignty and transfers of competences, considering that sovereign powers cannot be transferred as they are the sole attributes of states. See Arnaud Haquet, *The Concept of Sovereignty in French Constitutional Law* (*Le concept de souveraineté en droit constitutionnel Français*), Paris: Presses Universitaires de France, 2004, p. 25. On the problem of conferral of sovereign powers to International Organisations, see Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005.

From the perspective of Constructivism, the concept of sovereignty derives from the structure of the international system, as Jinks and Goodman argue: 'According to the sociological model we advance, the constitutive features of states derive from world-level cultural models, and the nature of sovereignty itself is a global cultural product'.[134] In this approach, the structure of the international system requires exploration in order that state 'autonomy' and the legal concept of sovereignty are understood.

Moreover, in order to understand how international institutions have challenged Westphalian sovereignty, it is necessary to look into the enforcement mechanisms of these institutions, particularly the role of dispute resolution in regional and functional regimes, as Held asserts:

> Instead if sovereignty as a concept is to retain its analytical and normative force – as the rightful capacity to take final decisions and make and enact the law within a given community – it has to be conceived as divided among a number of agencies and limited by the very nature of this plurality and the rules and procedures which protect it.[135]

It is this Althusian understanding of sovereignty that pervades world politics, considering the diversity of modes of authority that overlap and conflict with the authority of the state.

5. Conclusion

This chapter has analysed the contribution of international institutions to International Law, offering analysis of the various institutional approaches to international institutions, particularly in the context of International Relations.

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[134] Ryan Goodman and Derek Jinks, 'Toward an Institutional Theory of Sovereignty,' *Stanford Law Review*, vol. 55, 2003, p. 136.

[135] David Held, *Political Theory and the Modern State*, Cambridge: Polity Press, 1989, p. 238.

It has explored the reasons behind the emergence and design of international institutions, particularly with reference to the need for states to address negative externalities, but also as durable mechanisms of international governance with a set of constitutional rules and enforcement mechanisms.

The chapter has offered an explanation for the durability of international institutions, considering the different mechanisms by which institutions have evolved, particularly with reference to the notion of path-dependence. The thesis pointed out that this is relevant, because states cannot easily change institutions without incurring high transaction costs, and considering the constitutive and regulative effect that international institutions have on the modern territorial state, this means that sovereignty can only be understood in the context of existing international institutions.

The chapter concluded with an analysis of power asymmetries in the design and evolution of international institutions, and looked at the processes of institutionalisation, particularly with 'judicialization', and how this is redefining the idea that states have the ultimate authority. Finally, the chapter has discussed the different mechanisms of global governance and how this affects states' 'ultimate authority' or sovereignty.

That international institutions comprise different mechanisms of multi-level governance – federalism being one type of a multi-level governance system[136] in which authority is shared between different polities – will be the focus of discussion in the following chapter.

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[136] Liesbet Hooghe and Gary Marks, 'Unraveling the Central State, but How? Types of Multi-level Governance,' *The American Political Science Review*, vol. 97, No. 2, 2003

Chapter 3

The Federalist Tradition and the Concept of Sovereignty

1. Introduction

This chapter examines the contribution made by federalism to legal and political theory in the context of an analysis of sovereignty as a concept.

In order to gain a better understanding of the theoretical basis behind the concept of sovereignty, an adequate understanding of federalist theory is invaluable. This is because the concept of sovereignty in the federalist tradition is different from that typically found in the legal and political literature, which, written in the Bodinian tradition is associated with the modern territorial state.[1] This chapter will also analyse the origins of federalism as political theory, used to express the principle of partnership that is based on a contract or covenant between different polities in order to maintain self-rule of the constituent polities (whether States, Cantons or Länder) and, at the same time, to maintain shared-rule in common institutions. The federalist principle, as will be discussed below, should be distinguished from the concept of decentralisation, which implies a hierarchical element.

In order to better understand the historical origins of federalism, it will be necessary to identify the different historical experiences of it, which are examined in this chapter with particular reference to the United States and the different federal arrangements there.

It should be pointed out that there is no single American federal 'experience' because the United States had at least three federal experiments that can all be included within the federalist tradition. It is in the United States that the distinction between federation and confederation was first made.

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[1] Suffice to say that in order to understand federalism it is necessary to look at some of the successes as well as the failures of the federal unions, see Ursula K. Hicks, *Federalism: Failure and Success, A Comparative Study*, Basingstoke: The Macmillan Press, 1978.

This chapter will also present a discussion of the European tradition of federalism, focusing in particular on Germany and Switzerland because of their historical experiences with it, but also because these countries offer a view in stark contrast to the American experience, being that they are closer to the type of federalism found in the European Union today. The chapter concludes with a discussion of the possibilities of federalism beyond the state.

6.1. Federalism as Political Theory Revisited

Federalism etymologically comes from the Latin word *foedus*, which means literally covenant[2]. This enquiry focuses on the uses of the political theory of federalism applied to describe a set of relationships, different political arrangements, following in the tradition of Johannes Althusius.[3] Federalism as a political theory is based on the partnership of different polities into a larger political arrangement where elements of self-rule and common rule are preserved. Developed as a pragmatic necessity, federalism as a concept, described the necessity of preserving autonomy and unity in a political system. The will to preserve this balance, is where the political theory of federalism lies, as Elazar puts it:

> Federal principles are concerned with the combination of self-rule
> and shared-rule. In the broadest sense, federalism involves linking
> of individuals, groups, and polities in lasting but limited union in
> such a way as to provide for the energetic pursuit of common ends
> while maintaining the respective integrities of all parties.[4]

Federalism is a pluralistic mechanism of governance that allows the creation of a common federal system between different polities, organised along territorial lines, while, at the same time, preserving each polities' autonomy.[5]

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[2] Daniel J. Elazar, *Exploring Federalism*, Alabama: Alabama University Press, 1987, p. 5.

[3] See Chapter 1 of this thesis for more discussion on the legacy of Johannes Althusius.

[4] Elazar, *Exploring Federalism*, 1987, op. cit., p. 5.

[5] In this regard, federal theory has striking similarities with the notion of consociational theory (dealing with the recognition and inclusion of different communities within a polity or a

As a political theory, federalism embraces a non-exclusivist understanding of sovereignty as opposed to that found in the modern *Leviathan*, the territorial state that slowly emerged after Westphalia. What is meant by this is that federalism is based on a voluntary partnership of different polities, which establish a federal political system by sharing sovereignty. Here lays the genius of federalism: a political theory that does not assume a single unitary centre of authority, but which assumes several, as Elazar argues:

> Federalism can be defined as the mode of political organization that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both.[6]

6.2. Federalism *v.* Decentralisation

To fully understand the concept of federalism and its function in a political system, it is important to differentiate it from the concept of decentralisation. Too often these two concepts are associated, mainly because they have some similarities, in the sense that they represent the notion that in a political system it is possible for different levels of power, in terms of territorial polities, to coexist at different levels.

In order to fully grasp this point, it is necessary to distinguish between unitary and federal states. In unitary states, ultimate authority rests centrally with the state, and although unitary states can be decentralised and do recognise the autonomy of different local authorities or regions, this authority is given or recognised by the central state because it is the central state that creates the local government. Unitary states presuppose a hierarchical relationship between the central state and lower

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state). Lijphart sees federalism as a special and limited type of consociational theory. See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven: Yale University Press, 1977, p. 42.

[6] Daniel J. Elazar, *American Federalism: A View from the States*, New York: Harper & Row, Publishers, 1972, p. 2.

levels. Furthermore, in unitary states, decentralisation[7] is seen as a mechanism for recognition of local loyalties and interests (self-government in municipalities) and also to promote better governance. As Jellinek puts it when contrasting unitary states with federal states:

> The federal state is not a corporation of the State, just like the unitary state cannot be conceived as an association formed by the union of the municipalities of the state. It can be compared, where it dominates in its sphere, with the unitary state. Just like it dominates also over its territory and people…[8]

In federal states, federalism is recognised as a principle of partnership between the different polities and the federal state, whereby, the constituent polities and the federal state share authority by a written constitution. Authority does not emanate primarily from the federal state that grants autonomy to constituent units or states, but authority is shared between the federal state and its constituent units and is foundational of the federal covenant. In unitary states, authority is primarily one that belongs to the

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[7] It is also important to distinguish between the concepts of 'Devolution' and 'Decentralisation' as they are not the same. Decentralisation 'refers to the delegation of central government powers without the relinquishment of supremacy by the central legislature. Devolution may be legislative or administrative or both, and its more advanced forms involves the exercise of powers by persons or bodies who, although acting on authority delegated by the Westminster Parliament, are not directly answerable to it or to the central government.' Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law*, London: Sweet & Maxwell, 2001, p. 83; as Jackson and Leopold put it, Devolution '… should be distinguished from "decentralisation", which is a method whereby some central government powers of decision-making are exercised by officials of the central government located in various regions and federalism'. Jackson and Leopold, op. cit., p. 83. With Devolution there is no constitutional division of powers between the central government and the devolved regions, and there is a clear supremacy (sovereignty) of the central government (the state) over the devolved regions which can always revoke the status of devolution, so that in this way, also, it is different to federalism and decentralisation.

[8] Georg Jellinek, *General Theory of the State* (*Teoria General del Estado*), Mexico: Fondo de Cultura Economica, 2000 (first published in 1900, Staatslehere), p. 666.

central state and the constituent polities (regions, provinces or states) may enjoy a degree of autonomy that is recognised and given by the central state and not negotiated as pact or covenant between different polities.

For Kelsen however decentralisation could also be applicable to federal states, because according to his understanding, the concept of decentralisation is a matter of degree.[9]

Considering all of this, the question of whether federalism is similar to decentralisation – although legitimate – assumes the perspective and the traditional bias inherited from political theory in the Bodinian tradition: wearing the lenses of the modern territorial State. First, this is because there is an assumption that states are and were always the basic units in the international system, and second, that the question itself makes federalism redundant because it equates it with decentralisation,[10] which is not correct. Third, the question in itself sees federalism as a phenomenon that only occurs within the boundaries of the modern territorial state, while wishing away the long tradition of federalism in legal and political literature, at least since Althusius.

Johannes Althusius, writing in the context of the Holy Roman Empire, proposed an understanding of federalism that described the relationship of the different polities with the Empire by proposing a pluralistic governance system based on consent, as

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[9] Perhaps stemming from his Pure Theory of Law, see Hans Kelsen*, General Theory of Law and State*, New Brunswick: Transaction Publishers, 2006 (first published in 1945), pp. 316–17.

[10] Decentralisation is a term applicable to the phenomenon of creating autonomous local communities within a unitary territorial state. It is closely associated with the term devolution, which is used in common law, legal and political literature. Decentralised political systems require a hierarchy, a single centre of authority, a strong central government which then decides to create and delegate powers to local authorities, see Daniel J. Elazar, 'Federalism vs. Decentralization: The Drift from Authenticity,' *Publius: The Journal of Federalism*, vol. 6, No. 4, 1976, pp. 9–19.

was explained previously.[11] Although Althusius did not use the concept of federalism in the modern sense – as a political arrangement based on multiple levels of authority – his ideas are nonetheless a part of the foundational moment of the modern federalist tradition, in the sense that he advocates and describes a political theory based on a decentralised system of governance, in which different political communities share power in a larger political arrangement by preserving their autonomy,[12] as Elazar puts it:

> Decentralization implies the existence of a central authority, a central government. The government that can decentralize can centralize if it so desires. Hence, in decentralized systems the diffusion of power is actually a matter of grace not right, and, as history reveals, in the long run it is usually treated as such.[13]

Federalism does not imply a relationship between the centre and periphery, as in the concept of decentralisation, but suggests a non-hierarchical understanding of a political partnership, between political communities, based on the idea of power built around a matrix model.[14],Federalism, therefore, is not only a descriptive term but it is also a normative one, because it 'refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule … and the essence of

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[11] On Hueglin's interpretation of federalism in the context of the Holy Roman Empire see Thomas Hueglin, 'Johannes Althusius: Medieval Constitutionalist or Modern Federalist?' *Publius: Federalism as a Grand Design*, vol. 9, No. 4, 1979.

[12] H. H. F. Eulau, 'Theories of Federalism under the Holy Roman Empire,' *The American Political Science Review*, vol. 35, No. 4, 1941, pp. 648–649.

[13] Elazar, *Federalism vs. Decentralization*, op. cit, pp. 13; similarly, Friedrich: 'But as the word decentralization clearly indicates, such an approach posits the center as a given and primary, and allows for subcenters as, in effect, governmental entities to which some power and authority have been delegated for purely pragmatic and heuristic reasons'. See Carl J. Friedrich, *Trends of Federalism in Theory and Practice*, New York: Frederick A. Praeger, 1968, p. 4.

[14] Federalism presupposes a 'constitutional diffusion of power'. See Daniel Elazar, *Exploring Federalism*, op. cit., pp. 5–6.

federalism, as a normative principle is the perpetuation of both union and non-centralization at the same time'.[15]

Nonetheless, federalism has the potential to generate different and contradictory meanings, which is why it is necessary to understand its evolution and its diversity by considering different federal experiences, as Black states:

> Attempts to differentiate the various ideas of federalism bring us to problems of definitions. Concepts of government like federalism achieve precise meaning only through being used in similar ways over time and by a variety of people. Precision of meaning is impaired, however, whenever somebody tries to use such concepts to promote a particular political view – whether for ideological or programmatic reasons.[16]

1. 3. Federalism and the Union of States

The Althusian tradition[17] posits federalism as a concept applicable to the union of states, and not only to the modern territorial state. A concept of federalism was traditionally used to analyse the internal arrangement within the Holy Roman Empire, but with the emergence of the modern territorial state, however, authors found it increasingly difficult to explain the nature of the relationship between the multiplicity of states within the jurisdictional sphere of the Empire, with the result that their

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[15] Ronald L. Watts, *Comparing Federal Systems*, Ontario: McGill-Queen University, 1999, p. 6. Similarly, Filippov et. al., *Designing Federalism: A Theory of Self-Sustainable Federal Institutions*, Cambridge: Cambridge University Press, 2004, p. 34. For Watts, federalism is a normative concept distinct from federal political systems, the descriptive term that includes federations, confederations, decentralised unions, leagues, condominiums, associated states and other types of federal systems. See also Ronald L. Watts, 'Federalism, Federal Political Systems and Federations,' *Annual Review of Political Science*, vol. 1, 1998, pp. 120.

[16] Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism*, Montreal: McGill-Queen University Press, 1975, p. 7.

[17] The contributions of Ludolph Hugo and Gottfried Leibniz were discussed in Chapter 1.

explanations appeared increasingly anachronistic in the post-Westphalian international system.[18]

The will to explain the relationships between the different states within the Holy Roman Empire led early authors, writing within the tradition of federalism, to introduce important arguments in favour of federalism. The abolition of the Holy Roman Empire[19] brought federalism, as a mechanism of multi-level governance to the fore, and its framework was applied to the newly formed German Confederation.[20]

The German Confederation was created after the Congress of Vienna to accommodate the states that had been part of the Holy Roman Empire and, according to Philimore[21] it was a union in which states created a 'federal union'[22] for the purposes of common defence.[23] It is clear that contemporary writers saw these types of union, not in the modern sense of either an international organisation or a territorial federal state, but as a union of states, and they used the word 'federal' to denote a union of sovereign states.

The German political literature, following in the Althusian tradition, also accepted the notion of a union of states, particularly that of the confederation, and clearly

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[18] See Chapter 1 about the nature of different polities before the rise of the modern territorial state.

[19] Forced on Francis I by Napoleon Bonaparte; see Blanning, op. cit., p. 285.

[20] *Deutscher Bund* in 1815 was preceded by the Confederation of the Rhine (*Rheinbund*) a Napoleonic creation. See Henry Wheaton (1785–1848), *Elements of International Law*, (first published in 1836 by Boston: Little Brown Company), fifth edition, London: Steven and Sons Limited, 1916, p. 59.

[21] Robert Philimore was a British lawyer (1810–1885), his work, relevant to this discussion is *Commentaries Upon International Law*, London: Butterworths, 1871.

[22] The term 'federal union' was also applicable to confederations. The distinction between federation and confederation was brought about by the establishment of the American Federal Union, and was only solidified after the American Civil War as will be discussed below.

[23] Philimore, op. cit., pp. 133–34.

distinguished the concept of *Bundesstaat* from that of *Staatenbund*.[24] The former referred to federations as sovereign states, while the latter was used in the sense of confederations or the union of states. Confederations, as a type in the *genus* federalism, were considered a union between states; something in between a mere alliance and federal state, as Forsyth argues:

> Insofar as they represent the intermediary stage between the interstate and the intrastate worlds, *federal unions* or *confederations* have a particular fascination. They open a new perspective on these two worlds. In making such a union, individual states place themselves within a totality which has its own distinct representation, its own external policy and its own internal policy.[25]

However, the terms 'federal' and 'confederal' have been used interchangeably throughout most of the history of federalism to denote federations and confederations, but it was not until the advent of American constitutional experiences that the terms federation and confederation were used to describe different federal political arrangements and that a clear distinction was then made. Nonetheless in International Law the difference is clear: in a confederation, states remain fully independent[26] and, in general, free to withdraw from the confederation; sovereignty is transferred to the confederation, which is limited in its purposes, and usually created for common defence or foreign affairs. In a Federation, on the other hand, there is a single

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[24] *Bundesstaat* refers to federations while *Staatenbund* refers to confederations; see Sobei Mogi, *The Problem of Federalism: A Study in the History of Political Theory*, London: George Allen & Unwin, vol. 1, 1931, p. 349. This was also found in earlier writers of International Law: see Murray Forsyth, *Union of States*, Leicester: Leicester University Press, 1981, pp. 133–46.

[25] Murray Forsyth, Ibid., p. 7.

[26] This included the capacity to enter into international agreements (*jus tractatum*), capacity to have diplomatic representation (*jus legationis*), which was particularly relevant in the debates about the legal nature of the Union between Norway and Sweden in 1814. See Eirik Holmoyvik, 'The Theory of Sovereignty and the Swedish-Norwegian Union of 1814,' *Journal of the History of International Law*, vol. 7, 2005.

sovereign state, although in a federal form, with a single unitary will and capacity to enter into international relations. As the Montevideo Convention on the Rights and Duties of States declared in Article 2 'The federal State shall constitute a sole person in the eyes of international law'.[27] This means that in confederations, the states and the union have effectively a shared sovereignty[28] although each state retains a separate legal personality. In federations defined in the modern sense, only the federation is sovereign (externally) and not the sub-units or constituent parts, whether they are called States, Länder or Provinces.[29] Similarly, for the Swiss legal scholar Bluntschli[30] the difference between a confederation and a federation was that in the former, states retain their external sovereignty, while in the latter, the central power exercises sovereignty exclusively. But as discussed below, in the debates in the American legal and political literature, this was not consensual.

2. The Federal 'Experiences' of the United States of America

The federal experiences of the United States are fundamental to understanding the contribution federalism, as a political theory, made to the study of sovereignty.

The American Founding Fathers,[31] in order to maintain the unity of the new country while at the same time retain the autonomy of the original colonies, devised a political

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[27] Montevideo Convention on the Rights and Duties of States of 1933.

[28] Note that in the Union between Sweden and Norway of 1814 two conceptions of sovereignty were discussed; one which considered that sovereignty was absolute and indivisible, and the other that considered that sovereignty could be shared, Holmoyvik, op. cit., pp. 141–46.

[29] This distinction will be further explored in subsequent sections.

[30] Johann Caspar Blunstschli (1808–1881), was one of the most preeminent legal scholars of the nineteenth century, International Law Codified (*El Derecho Internacional Codificado*), Mexico, 1871, code 72, p. 91.

[31] The term is used for the leaders of the United States from American Independence to the adoption of the Federal Constitution in 1787.

system that was inspired by the Enlightenment, particularly authors from the period such as Montesquieu,[32] John Locke and David Hume, among others.[33]

The new American Republic in its historical experiences with federalism was influenced by its own colonial experience in self-government within the British Empire,[34] particularly relevant to which was the 'Covenant Tradition'[35] and the emphasis of constitutions as covenants between communities. The US was also influenced by European historical experiences in federalism; especially the contribution of the Swiss Confederation,[36] the United Provinces of the Netherlands[37] and other experiences of pluralistic governance systems.

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[32] Charles de Secondat, Baron de Montesquieu (1689–1755), was deeply influential in the *Federalist Papers* with his work, *The Spirit of Laws* (*Le Spirit de Lois*), first published in 1748, New York: Prometheus Books, 2002. Of particular importance was the discussion that ensued in the Second Period of American federalism about the possibilities of republican governments in a large territory, where Montesquieu, discussing the concept of confederacies, believed that it was not possible. See Montesquieu, Book VIII, op. cit., p. 120; Book IX, op. cit., pp. 126–128. The authors of the *Federalist Papers*, considering the novelty of the new American Republic, believed it was possible to forge an 'extended republic' in a federal form in North America.

[33] On the influences of the European Enlightenment, particularly the Scottish Enlightenment in early American political thought, see Douglas Adair, '"That Politics May be Reduced to Science:" David Hume, James Madison, and the Tenth Federalist,' *Huntington Library Quarterly*, vol. 20, No. 4, 1957.

[34] Which, until its independence was more than one century old, A. E. Dick Howard, 'The Uses of Federalism: The American Experience,' *American University Journal of International Law and Policy*, vol. 8, 1992, pp. 392–94.

[35] On the Covenant tradition, Daniel J. Elazar, 'What Happened to Covenant in the Nineteenth Century?' in Daniel J. Elazar (ed.), *Covenant in the Nineteenth Century: The Decline of an American Political Tradition*, London: Rowman & LittleField, 1994.

[36] Particularly, the Old Swiss Confederation from 1291 to 1798, which was discussed in the *Federalist Papers*.

[37] The *Federalist Papers* give the example of the United Provinces of the Netherlands (before the centralisation imposed by France after its conquest) as an example of a confederation ('confederacy') and argues: 'I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its

The United States had during its short but turbulent history several 'experiences' –[38] which are elucidative of the misunderstanding into which part of the literature has fallen – and account for some of the problems of the conceptualisation of federalism, considering the issues of historical specificity.[39] First of all, a federation is not federalism; second, the larger phenomenon of federalism encompasses several realities that go far beyond the reality of a federation, as a brief survey of the relevant history will confirm; third, in the American federal experiences, the concept of a federation had at least two different meanings historically. Thus, in order to avoid the reductionist fallacy[40] of reducing federalism to the federation type, the significance and relevance of the contribution made to federalist thought by American political and legal literature should be considered.[41] This contribution was expressed in the

responses are unequivocal, they ought to be conclusive and sacred', Federalist No. 20, *The Federalist Papers*, op. cit.

[38] The term is 'experiences' in the plural and not experience in the singular because the United States had at least three types of federal arrangements. The 'proto-confederal' experience of the *Articles of the Confederation* from 1781 to 1789; the federal experience which began with the approval of the second American Constitution of 1789 and lasted until the end of the Civil War in 1865, and the national federal experience since 1865. On the three faces of American Federalism see Randy E. Barnett, 'Three Federalisms,' *Loyola University Chicago Law Journal*, vol. 39, 2008. On the different periods of American federalism see Ellis Katz, 'The Development of American Federalism,' in *The Federal Idea, The History of Federalism from the Enlightenment to 1945*, edited by Andrea Bosco, London: Lothian Foundation Press, 1991, pp. 39–50; Daniel H. Deudney, 'The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union,' *International Organization*, vol. 49, No. 2, 1995, pp. 191–228. In addition, Ackerman identifies three historical periods in American Constitutionalism, each of which, according to him, was as original and deep, and which he calls a 'constitutional regime': the Founding, the Reconstruction and the New Deal, see Bruce Ackerman, *We The People: Foundations*, vol. 1, Cambridge, MA: Harvard University Press, 1991, pp. 40–44.

[39] The problems related to historical specificity were noted in Chapter 1.

[40] A Reductionist fallacy in which one takes the part for the whole.

[41] On the conceptual distinction between federalism and federation, see also Michael Burgess and Alain G. Gagnon (eds), *Comparative Federalism and Federation*, Hemel Hempstead: Harvester Wheatsheaf, 1993.

'Philadelphia Convention,'[42] the final document that approved the project of the new Constitution, which represented a significant and original contribution to federal theory, and which invented the modern notion of federation, creating a new vocabulary for legal and political theory that was different to the earlier writings of authors working in the context of the Althusian tradition. This new vocabulary was novel in the history of political theory, because it separated the federation, as a species of the larger *genus* which is federalism, as King states: 'We shall take it that federalism is some one or several varieties of political philosophy or ideology, and that federation is some type of political institution. The intention is not that such a distinction is widely observed, but only that it is useful'.[43] Moreover, the Convention inaugurated the distinction between federation and confederation. For all these reasons the American contribution to federal theory is important, but the developments and innovations of the federal experiences in America, which culminated in a national federalism, are also significant.[44] It is in the *Federalist Papers*[45] that a conceptual distinction between a federation and a confederation emerges for the first time, as *Federalist Paper* Number IX states:

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[42] The Philadelphia Convention was called to 'revise' the Articles of the Confederation and was responsible for the draft of the American Constitution of 1787; the 'revision' was in fact a new constitutional moment. See Walter E. Derlinger, 'The Recurring Question of the "Limited" Constitutional Convention,' *The Yale Law Journal*, vol. 88, No. 8, 1979, p. 1625.

[43] Preston King, *Federalism and Federation*, London: Croom Helm, 1982, p. 75. Similarly, 'Without a doubt the Philadelphia Convention marks the starting point for an understanding of the origins of federalism and the meaning of the term today'. Deil S. Wright, and Carl W. Stenberg, 'Federalism, Intergovernmental Relations, and Intergovernmental Management: The Origins, Emergence, and Maturity of Three Concepts across Centuries of Organizing Power by Area and by Function,' Chapter 11, *Handbook of Public Administration*, London: Taylor & Francis Group, 2006.

[44] Here, one is not debating the issue of whether the *Federalist Papers* have a nationalist tendency as opposed to states' autonomy. For more on this controversy see, Jean Yarbrough, 'Rethinking "The Federalist's View of Federalism,"' *Publius: The Journal of Federalism*, vol. 15, 1985, pp. 31–53. See also the following note on the *Federalist Papers*.

[45] The *Federalist Papers* were of particular importance: a collection of 85 articles published between 1787 and 1788 by James Madison, Alexander Hamilton and John Jay under the collective pseudonym 'Publius'. The *Papers* explored the contours of the new American

The definition of a confederate republic seems simply to be an assemblage of societies or an association of two or more States into one State… The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of federal government.[46]

2.1. Confederation *v.* Federation in American Federalism

In their enterprise, the American Founders devised and created a new *genus* of political organisation: the federation.[47] The term federal was used in the eighteenth

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Constitution, in order to convince New Yorkers to ratify the federal constitution. As Thomas Jefferson wrote, 'With respect to the *Federalist*, the three authors had been named to me. … It does the highest honour to the third as being, in my opinion, the best commentary on the principles of government ever written'. 'Letter from Thomas Jefferson to James Madison, 18 November 1788,' in *The Life and Selected Writings of Thomas Jefferson*, New York: The Modern Library, 2004, p. 418. The influence of the New American Constitution on political and legal theory should be acknowledged because of the innovations present in it, such as judicial review, federation, the creation of the office of the presidency, separation of powers along republican lines, and many other constitutional principles that have influenced several other constitutions worldwide. However, that having been acknowledged, the legacy of the Constitution towards an understanding of federalism can also be a hindrance because of the reductionist perspective in which federation becomes embroiled in all that is of the federal experience. For a more critical viewpoint, see Jean Yarbrough, 'Rethinking "The Federalist's View of Federalism,"' op. cit. To overcome the legacy, a recovery of federalism in the Althusian tradition is required.

[46] *Federal Paper* Number IX, (written by Alexander Hamilton) in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, London: Penguin Books, 1987, p. 122. Unless noted otherwise, this will be the edition used throughout this chapter.

[47] K. C. Wheare, *Federal Government*, Oxford: Oxford University Press, 1963, pp. 10–11.

century to represent unions of states, and was a synonym of what was known as a confederation. It was neither a unitary state[48] nor a union of sovereign states, but independent under International Law.

The American Founders created a political system to replace the *Articles of the Confederation,* which regulated relations between the original thirteen colonies. This new *genus* was a federation that constituted a single sovereign state under International Law; a single polity that was different from a confederation – a union of several sovereign states, all of which retain their individual legal personality and statehood under International Law, but which, however, delegate limited powers to a new legal entity by effectively sharing sovereignty. This distinction only became clear in the new American federal commonwealth because federalism was used to describe different types of federal political systems, including confederations. Moreover, the previous institutional arrangement seen in the *Articles of the Confederation* did not follow the model of a federation, but that of a confederation; akin to a union of states, in which individual states retain their individual sovereignty and remain unitary actors under International Law, whilst sharing sovereign powers in a limited political arrangement usually for the purposes of common defence and foreign affairs.[49] It is important to bear in mind this distinction because these two political forms are manifestations of federalism as political theory. Furthermore, in both forms, sovereignty is divided and effectively shared by the union that is formed; hence both these federal arrangements were somehow anti-Bodinian, in the sense that they did not describe sovereignty as indivisible or absolute, but saw sovereignty as a shared attribute of the constituent units of the federal arrangement.

The creation of the federal union in the Second Period of the American Republic created a single sovereign territorial state – although with limited powers attributed to the central government – because sovereignty was shared between states and the

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[48] A unitary state is characterised by a high degree of centralisation in the hands of the central state, which determines the pattern of decentralisation of local governments, and which is based on a centre-periphery model as discussed previously.

[49] This was the case of the early Swiss confederation.

federal union in the Althusian tradition, with the understanding that sovereignty ultimately belonged to the people,[50] as Ackerman acknowledges:

> It was an elementary principle of eighteenth-century political science that every nation had to have one – and only one – sovereign. Who was ours? A flat-footed answer would endanger the entire enterprise. On the one hand, to proclaim the national government as the sovereign would alienate large portions of the public committed to their state's political identity and fearful of the prospect of centralizing tyranny. On the other hand, to identify the state governments as unequivocal "sovereigns" undermined the point of the Federalist initiative – which was to construct a new central government that could wield limited, but substantial power. The Federalists brilliantly saw that the Radical Whig ideology permitted a third answer: deny that any government should be viewed as "sovereign"; insist that, in America, the only legitimate sovereign was The People, who could delegate different powers to different governments in any way that would serve the common good.[51]

In all periods of the American federal experiences, the process of institutional change was made through different institutional processes; judicial[52] and political. It is not the purpose of this thesis to offer a detailed description of the processes of evolution of American federal experiences, but to shed light on the debate about the nature of sovereignty by considering the different American federal experiences.

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[50] On this point see Jean Yarbrough, 'Rethinking "The Federalist's View of Federalism,"' op. cit., p. 42.

[51] Bruce Ackerman, *We The People: Foundations*, vol. 1, op. cit., pp. 216–217.

[52] The judicial process has been very influential in the history of the evolution of American federalism, since the decision *Marbury vs. Madison 5 U.S. 137 (1803)*, which established the doctrine of judicial review, an innovation which is now part of the majority of Constitutions worldwide.

The study of American federalism is invaluable towards an understanding of the different dimensions of federalism, particularly concerning its practical manifestations in the forms of federation and confederation. The American political experiment of Federalism started with the *Articles of the Confederation*, and by following through the literature, three main periods of the manifestation of federalism in the United States can be identified.[53]

2.2. First Period of American Federalism

The rationale used in the exposition of the *Federalist Papers* was to overcome the limitations found in the first American Constitution, *The Articles of the Confederation.*[54] The limitation of the institutional arrangement was the argument used by the Federalists, which was based on the apparent weakness of the central union and its dependence on the will of the states in order to operate autonomously, particularly on issues related to common defence and foreign affairs; this is expressed by Hamilton in *Federalist Paper* XV: 'In our case the concurrence of thirteen distinct sovereign wills is requisite under the

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[53] Following Bruce Ackerman, who acknowledges three periods: The Founding Period, The Reconstruction (Post-Civil War) Period and the New Deal Period, see *We The People: Foundations*, vol. 1, op. cit., p. 40. For the purposes of this research, the *Articles of the Confederation* mark the beginning because it is a forgotten manifestation of the federal phenomenon. In addition, the constitutional changes and innovations of the Reconstruction period are identified but that is the limit of the research here because, largely, since the end of the Civil War, American federalism can be seen in light of the phenomenon of decentralisation. This is because after the Civil War, the US became a national state closer to unitary states in many respects, and federalism, became basically a policy tool for devolution. On the historical origins of American federalism and its relationship with earlier federal political theory see Charles S. McCoy, 'Federalism: The Lost Tradition?' *Publius: The Journal of Federalism*, vol. 31, No. 2, 2001, pp. 1–14.

[54] 'The Articles of Confederation and Perpetual Union' (its official name) was approved by the original thirteen colonies in 1777, and ratified by the original colonies in 1 March 1781. It lasted until it was replaced by the US Constitution on 4 March 1789 after its ratification. Available at: http://www.loc.gov/rr/program/bib/ourdocs/articles.html [Accessed 18.12.2010].

Confederation to the complete execution of every important measure that proceeds from the Union'.[55]

The weakness of the central government[56] in *The Articles of the Confederation* was one of the reasons that justified the call for a Constitutional Convention, which culminated in the final document that approved the Constitution of 1787. The framers of the American Constitution emphasised the limitations of their previous constitutional order, especially the practical limitations of a political arrangement based only on states' agency, which excluded private individuals. This is why Hamilton makes clear that the new Constitution should not be merely a compact between states, but a compact between the people as well:

> The great and radical vice in the construction of the existing Confederation is in the principle of Legislation for States and Governments, in their Corporate Collective Capacities, and as contradistinguished from the Individuals of whom they consist.[57]

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[55] *The Federalist Papers* No. XV, op. cit., pp. 145–149. On the deficiencies of the American Confederation. On the debates about the weakness of the *Articles of the Confederation* and the different historical approaches see Richard B. Morris, 'The Confederation Period and the American Historian,' *The William and Mary Quarterly*, Third Series, vol. 13, No. 2, 1956.

[56] The federal government lacked taxation powers and generally coercive power, thus it needed to be changed into a stronger centralised political federal union, this was the argument presented by the *Federalist Papers* in supporting a revision of the *Articles of the Confederation*. However, one could argue that the framework of the *Federalist Papers* is somehow biased and incomplete and that a new paradigm is needed; one that acknowledges that the federal government was not much weaker than in the Constitution approved in Philadelphia, and which recognises the continuities between the *Articles of the Confederation* and the Constitution of 1787. See, Eric M., Freedman, 'Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of the Confederation,' *Tennessee Law Review*, vol. 60, 1993, pp. 787–91.

[57] *Federalist Paper* XV.

The *Articles of the Confederation* stated in Article II that 'Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled'.[58] The confederation was based on an interstate basis; a compact between the thirteen original colonies, now states, and not a compact established by the 'American people'. The provisions also stipulated that the confederation was to be perpetual and that alterations to its character should be approved by the legislatures of all states, as Article XII stipulates:

> Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, *and the Union shall be perpetual;* nor shall any alteration at any time hereafter be made in any of them; *unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State*.

This provision was not respected by the Constitutional Convention in Philadelphia, however, which in a Constituent Act, approved a new Constitution with different provisions that required approval of only nine states, instead of the original thirteen.[59] This action was not, however, free from controversy: the Anti-

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[58] This Article merely represents the notion of the United States as a 'compound republic' and, as Smith argues, 'Thus, the key to maintaining the federal structure in a confederate republic was a constitutional protection for the continued existence of states as entities', see Douglas G. Smith, 'An Analysis of Two Federal Structures: the Articles of Confederation and the Constitution,' *San Diego Law Review*, vol. 34., No. 1, 1997, p. 312. This argument also applies to the Constitution of 1787, approved in Philadelphia, because, although it created a new *genus* – the federation – one key element of a federal political system is the autonomy of the constituent units.

[59] Article VII of the Constitution of the United States. On the controversy of the 'illegality' of the constitutional norm of the Federal Constitution, see Ackerman, *We The People: Foundations*, vol. 1, op. cit. pp. 41–42. On the interpretation of the transition from the Articles to the New Constitution, and the claims that Constitutions are coordination

federalist[60] movement demonstrated by opposing the adoption of the federal Constitution of 1787 while holding a 'proto-federalist' position, in the sense that they considered a confederation – as a union of states – as the supreme embodiment of the federal principle, and criticising the new Constitution, 'The Pennsylvania Minority' as they were known, declared:

> In short consolidation pervades the whole constitution. It begins with an annunciation that such was the intention. The main pillars of the fabric correspond with it, and the concluding paragraph is a confirmation of it. The Preamble begins with the words: "We The People of the United States" which is the style of a compact between individuals entering into a state of society and not a confederation of states.[61]

2.3. Second Period of the American Federalism

The new Constitution was created as covenant among the 'People' of the United States of America as a whole, and not just as a covenant between the separate states. In the preamble to the Constitution, there appears the symbolic rationale of a building up a national political system with the words: 'We the People', instead of 'we the States', as would be expected in a confederal political system. As a consequence, 'the national government was conceived as one of limited and

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mechanisms and not contracts, see Russell Hardin, *Liberalism, Constitutionalism and Democracy*, Oxford: Oxford University Press, 1999, pp. 82–141.

[60] Name attributed to the opponents of the Federal Constitution of 1787; see Herbert J. Storing, *What The Anti-Federalists Were For*, Chicago: Chicago University Press, 1981.

[61] The Pennsylvania Minority or 'The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents,' was an address signed by the minority of voters on the Pennsylvania Convention ratifying the new Constitution. It appeared in two Pennsylvania newspapers in 1787 and in other publications, criticising the new American Constitution. See Ralph Ketcham (ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates*, New York: Signet Classics, 2003, p. 246.

enumerated powers. The powers of states were simply everything left over from that enumeration'[62].

Once the new federation was established,[63] conflicts appeared in the interpretation of the powers between the federation and states,[64] which were not easily resolved in the judicial or in the political process. Notwithstanding this, the prevailing understanding was that the new American polity was based on the principle of 'dual sovereignty'; those of states and the union. And herein lies the relevance of the study of federalism – in particular of the American federal experiences – towards the understanding of sovereignty, because the American federation offered a non-Bodinian understanding of the concept of sovereignty, as Alexis de Tocqueville[65] commenting on the second period of American federalism stresses:

> Two sovereignties are necessarily in presence of each other. The
> legislator may simplify and equalise the action of these two
> sovereignties, by limiting each of them to a sphere of authority

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[62] Barnett, op. cit., p. 286. That is why the Tenth Amendment was of such importance as a limit to federal power. The first Ten Amendments were adopted on 15 December 1791. For an overview of the American Constitution of 1787 see http://www.loc.gov/rr/program/bib/ourdocs/Constitution.html [Accessed 18.12.2010].

[63] On the Philadelphia Convention and the foundational moment of the new Constitution see Bruce Ackerman, *We the People: Transformations*, vol. 2, Cambridge, MA: Harvard University Press, 1998. On Federalism as the core hallmark of the new Constitution see Michael Burgess, *Comparative Federalism: Theory and Practice*, London: Routledge, 2006, p. 56.

[64] The nullification crisis of 1833, in which South Carolina defended the principle that states could 'nullify' federal Laws, see Keith E. Whittington, 'The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change,' *Publius: The Journal of Federalism*, vol. 26, No. 2, 1996, pp. 1–24.

[65] Alexis de Tocqueville (1805–1859), French author whose seminal work on America and its legal and institutional framework is entitled *Democracy in America* (*De la Democratie en La Amerique*), first published in 1835. (Henry Reeve translation), *Democracy in America*, New York: Bantam Classic, 2000.

accurately confined; but he cannot combine them into one, or prevent them from coming into collision at certain points.[66]

The concept of sovereignty in the American federation, in both the internal and legal narrative,[67] was that of 'concurrence of sovereignties', although for International Law it constituted a single state. Nevertheless, this was not the position of those who, like John Calhoun,[68] held the view that the American Constitution was still a compact or covenant among sovereign states instead of the constitutional charter of a single state in a federal form. Calhoun's views are particularly relevant to the current discussion, because he represents a prevalent view held in the literature of the period that saw federalism in a very different light to that of scholars before him after the Reconstruction, commenting on the Constitution of the United States, he stated that:

> It is federal (the polity) because it is the government States united
> in a political union, in contradistinction to a government of

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[66] Tocqueville, op. cit., p. 189. Similarly, Kelly et. al., *The American Constitution, Its Origins and Development*, New York: W. W. Norton & Company, 1983, pp. 105–106.

[67] The reference is to sovereignty in its internal dimension, because in federal states sovereignty is shared internally between different levels of government, here sovereignty refers to domestic sovereignty, Krasner, *Sovereignty: Organized Hypocrisy*, op. cit. p. 9. However, sovereignty can also be shared in its external dimension, and confederations are a prime example of that.

[68] John Calhoun (1782–1850), Vice-President of the United States and Senator from South Carolina, developed the theory of 'nullification' as an expedient of solving political impasses in which states could consider inapplicable federal ordinances and laws by 'nullifying' them, thus he saw nullification as improvement to federal government, and many concurred in that understanding, as his views were considered at the time an improvement on the *Federalist Papers*. As a corollary of his theory, he developed the doctrine of concurrent majorities and the right of secession for states. See John Calhoun, 'A Disquisition on Government: A Discourse on the Constitution of the United States,' *The Works of John Calhoun*, vol. 41, New York: D. Appleton and Company, 1853; John Turnbull (Brutus), *The Crisis, or Essays on the Usurpations of the Federal Government*, Charleston: S. E. Miller, 1827 and Edoardo Tortarolo in Sergio Fabrini (ed.), *Democracy and Federalism in the European Union and the United States*, Abingdon: Routledge, 2005, p. 88.

individuals socially united: that is by a social compact. To express it more concisely, it is federal and not national, because it is the government of a community of States, and not the government of a single State or Nation.[69]

But this interpretation did not hold, mainly because of the pervasiveness of the federal understanding inherited from the Madisonian paradigm[70] in which a federal government, and not a mere Confederation, was established. These two rival paradigms would eventually be tested in the American Civil War.

2.4. Third Period of American Federalism

The Third Period of American federalism was sealed by the end of the American Civil War[71] and also by those who, like Calhoun, saw federalism in the light of the states' rights theory, as Wheare puts it:

A long controversy, which was not finally closed until after the Civil War of 1861–5, continued between those who regarded the general government as the agent of the states and those who maintained that it was or ought to be an independent government. Indeed it took 'the terrible exercise of prolonged war' in Woodrow

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[69] Calhoun, 'A Discourse on the Constitution of the United States,' op. cit. p. 113.

[70] By reference to James Madison, considered the most important author of the American Constitution of 1787; see also *Federalist Papers*, No. XXXIV.

[71] This was known as the "Reconstruction" period, during which time the American federal process was increasingly centralised. On the constitutional changes that superseded the constitutional paradigm of the original text of the Constitution of 1787, as Ackerman puts it: 'The Republican Reconstruction of the Union was an act of constitutional creation no less profound than the Founding itself: not only did the Republicans introduce new substantive principles into our higher law, but they reworked the very process of higher lawmaking itself'. Bruce Ackerman, 1990, *We the People: Transformations*, vol. 2, op. cit., p. 46. See also Daniel J. Elazar, 'Civil War and the Preservation of American Federalism,' *Publius: The Journal of Federalism*, vol. 1, No. 1, 1971, pp. 39–58.

Wilson's phrase, to resolve the conflict between the two principles.[72]

In the Reconstruction Period, in the internal debates about the constitutional position of states in the American Constitution, the Supreme Court in *Texas v. White* declared that the union was indissoluble and perpetual and forbade the secession of states.[73]

After the end of the Civil War, three important Amendments were approved in the Constitution, which in effect nationalised the protection of constitutional rights by the Federal Government, as Walker argues: 'The Civil War and its aftermath also produced three constitutional amendments (The Thirteenth, Fourteenth, and Fifteenth), a cluster of civil rights acts, and a highly intrusive, congressionally dictated approach to reconstruction in the southern states – all signs of an extraordinary

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[72] K. C. Wheare, *Federal Government*, 1963, op. cit., p. 8. Nonetheless, as Laski observes: 'If we can say today that the interests of the American nation are supreme, and that the old States' rights theory of sovereignty is largely obsolete, we have to remember that a Civil War was needed to give it a death-blow', Harold Laski, *Studies in the Problem of Sovereignty*, New Haven: Yale University Press, 1917, p. 277.

[73] *Texas v. White, 74 U.S. 700 (1869),* this decision rejected John Calhoun's compact theory of federalism. Although secession is forbidden under the US Constitution, it does not rule out the right of self-determination under International Law. In the Canadian federation, because of the Quebec situation, 'secession' was considered legal, albeit only if negotiated with the rest of the Federation, *Reference re Secession of Quebec, [1998] 2 S.C.R. 217* **(**Canadian Supreme Court), at: http://scc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.pdf [Accessed 09.09.10]. The prohibition of secession decreased the 'Exit' mechanism of states in the federal system, thus increasing the centralisation of authority of the federal state, James Buchanan, *The Cato Journal*, vol. 15, Nos 2–3, 1995–6 at: http://www.cato.org/pubs/journal/cj15n2-3-8.html [Accessed, 11-09-10]. On 'Voice' *vs.* 'Exit', see Albert O. Hirschman, *Exit, Voice, and Loyalty*, Cambridge, MA: Harvard University Press, 1970. On the importance of 'Exit' in Fiscal Federalism see Charles Tiebout, 'A Pure Theory of Local Expenditures,' *Journal of Political Economy*, vol. 64, No. 5, 1956, pp. 416–24.

assertion of national legal authority.'[74] The end result of these constitutional changes shifted the increasing national power in favour of the federal polity.

American Federalism was also, in part, conditioned by the transformations caused by The New Deal;[75] an ideological programme that asserted federal intervention in the economy, and significantly altered the power relations between states and the federal polity, it was the birth of the concept of 'cooperative federalism'.[76]

Federalism emerges, understood increasingly as a mechanism of local governance, an issue of decentralisation or devolution.[77] This is the understanding prevalent

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[74] David B. Walker, *The Birth of Federalism, Slouching Toward Washington*, Chatham, New Jersey: Chatham House Publishers, 1995, p. 77; similarly Barnett, op. cit., p. 289. The passage of Amendments generated legal controversy because Article V of the Constitution was not thoroughly followed see Bruce Ackerman, *We the People: Transformations*, vol. 2, op. cit., 1998, pp. 99–159.

[75] The New Deal was a period of centripetal federalism, with the Supreme Court that had acted as a restraint against federal expansion in the previous decades in retreat because of an activist government led by the American President Franklin D. Roosevelt, which decided to tackle the Great Depression and 'after this peaceful revolution the Tenth Amendment was but a truism that no longer operated as a direct restriction on national actions'. See Deil S. Wright and Carl W. Stenberg, op. cit., p. 420; 'The economy acted as 'centralising force,' see Howard, A. E. Dick, op. cit., p. 399.

[76] The old notion of 'dual federalism' was rejected by the USSC, and the Court expanded the scope of the commerce clause to reach into areas which were closed to the federal polity, David S. Walker, op. cit., p. 94. The Civil Rights Era was also a decisive factor in nationalising certain areas that were considered the reserved domain of states, considering the need to protect constitutional rights, such as equal access to voting and enforcement of racial equality; as a consequence, the American understanding of federalism was affected, as Howard clarifies: 'Alongside the centripetal effects of economic factors, another force tending toward the concentration of government power has been the notion of justice or equality', Howard, A. E. Dick, op. cit., p. 405.

[77] For a critique of American federalism and the different purposes of federalism historically in America, see Edward L. Rubin, 'Puppy Federalism and the Blessings of America,' *Annals of American Society for Political Science*, vol. 57, 2001, pp. 37–51. The old issues of

nowadays, federalism, not in the Althusian tradition of seeing different political communities sharing sovereignty and effectively dividing power, but federalism as a mechanism and a tool of local governance, as Elazar states: 'The relatively few men who look at American politics with greater breadth of understanding recognize federalism as a political principle – something more than simply an administrative device or even a legal-constitutional one'.[78]

The American Constitution evolved, and now accommodates principles different to those proposed at the Founding Period, which is relevant, because these principles although not explicit in the text of the Constitution, are now considered a part of the 'invisible' Constitutional framework.[79]

American federalism developed safeguards for the protection of states' autonomy, which included the principle of 'Anti-Commandeering',[80] developed by the Supreme Court, which forbids the federal state of mandating or compelling states to enact a

nullification and controversies on states' rights were gone. Some authors emphasise that federalism is now based on the notion of cooperative federalism.

[78] Daniel J. Elazar, 'First Principles,' *Publius: The Journal of Federalism*, Vol. 3, No. 2, 1973, p. 2. Similarly, see David Walker, op. cit. 'In terms of power relationships, our system remains basically a nation-centered one', David B. Walker, op. cit., p. 302.

[79] Lawrence H. Tribe, *The Invisible Constitution*, Oxford: Oxford University Press, 2008, pp. 28–36. Purcell argues that American federalism since the Founding Period was 'marked by imprecise and uncertain lines of authority', Edward A. Purcell, *Originalism, Federalism and the American Constitutional Enterprise*, New Haven: Yale University Press, 2007, p. 17.

[80] The Anti-Commandeering principle does not allow for the federal government to 'commandeer' states to pursue federal policies, contrary to what happens in the EU where Directives are possible, or in German federalism with the Framework Laws, see Daniel Halberstam, 'Comparative Federalism and the Issue of Commandeering,' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, 2001. Although in practice the federal state through monetary funds can create 'incentives' for states to pursue federal policies; a good example was the minimum drinking age, which was set nationally by the states at twenty-one years because of monetary incentives, see Sarah F. Liebschutz, 'The National Minimum Drinking-Age Law,' *Publius: The Journal of Federalism*, vol. 15, No. 3, 1985.

federal program.[81] The Limits to federal authority also include the principle of sovereign Immunity'.[82]

In the case *United States vs. Lopez*,[83] the USSC invalidated the Gun-Free School Zone act because Congress did not legislate within the scope of the Commerce Clause, and the banning of guns near schools did not affect intrastate commerce.[84] This case provides an example of the recent jurisprudence of the USSC in trying to revert to some of the excessive centralisation at the hands of the federal Government.

However, these limitations of the federal state are less important than they might seem at first. As Justice Kennedy, a supporter of the decisions, put it, 'they involve the etiquette of federalism'.[85]

The Enumerated Powers granted to Congress by Article 1 of the USC in the First Period of American Federalism, which operated as a limit to federal power,[86] is no

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[81] The cases *New York v. United States 505 US 144*. 1992 and *Printz v. United States (521 US 98, 1997)* are representative cases of the Anti-Commandeering Principle.

[82] For a critical analysis of Sovereign Immunity in American federalism, see John F. Manning, 'The Eleventh Amendment and the Reading of Precise Constitutional Text,' *Yale Law Journal*, vol. 113, 2004. See also *Seminole Tribe of Florida v. Florida, 517 U.S. 44, 1996*.

[83] *United States v. Alfonso Lopez, Jr., 514 U.S. 549 (1995).*Similarly**,** *Garcia vs. San Antonio Metropolitan Authority, 469 U.S. 528, 1985***,** whereby the USSC ruled that states protect their interests through their action in the federal institutions, see George A. Bermann, 'The Role of Law in the Functioning of Federal Systems,' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, 2001, pp. 201–203.

[84] *United States v. Alfonso Lopez, Jr., 514 U.S. 549 (1995).*The Commerce Clause is a restriction on federal power by enumerating the powers of Congress in regulating intrastate commerce, Article 1, Section 8, Clause 3 of the United States Constitution (USC). The Proper and Necessary Clause, Article 1, Section 8, Clause 18, USC, gives the US Congress a power that often collides with the notion of enumerated powers.

[85] Mark Tushnet, *The New Constitutional Order*, Princeton: Princeton University Press, 2003, p. 44. See also Daniel Halberstam, 'Comparative Federalism,' op. cit.

[86] As the USSC defined in *McCulloch vs. Maryland, 17 U.S. 316 (1819).*

longer considered a limitation, neither are the limits imposed by the Tenth Amendment ('The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people'), as Greve states: 'The evisceration of enumerated powers and that of concurrent expansion of constitutional rights spelled the death of federalism as a principal constitutional concern and as a serious constraint on government'.[87]

For all of the above, the legacy of the American contribution to federalism is double-edged, in the sense that although the American constitutional project created the concept of a modern federation it also created a political tradition that equated federalism with a federation, particularly in respect of understanding the American experiences. This is incorrect, however, because as noted previously, federations are only one manifestation of many federal arrangements[88]and, besides, American federalism contains a history of competing understandings of what federalism is[89] at different historical moments. Reducing federalism to a modern understanding of a federation is to fall into the reductionist fallacy; as Davis emphasises, 'Thus, while there was a time when one could speak of federalism and America in the one voice, this easy equation is no longer possible'.[90]

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[87] Michael S. Greve, *Real Federalism, Why it Matters, How it Could Happen*, Washington: The AEI Press, 1999, pp. 18–19. This is not the view of those that see the increasing centralisation at the hands of the federal government as a positive development for improving standards, and protecting constitutional rights, as happened in the expansion of civil rights in the 1960s; they would have a different conception of federalism.

[88] For an exemplificative and non-typological list of federal arrangements, see Elazar, *Exploring Federalism*, op. cit., pp. 39–64; Watts, *Comparing Federal Systems,* op. cit. pp. 8–20; Daniel J. Elazar, 'International and Comparative Federalism,' *Political Science and Politics*, vol. 26, No. 2, 1993, pp. 190–195.

[89] On the competing approaches to modern American federalism, see Donald B. Rosenthal and James M. Hoefler, *Competing Approaches to the Study of Federalism and Intergovernmental Relations*, vol. 19, No. 1, 1989, pp. 1–23.

[90] S. Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning*, Berkeley: University of California Press, 1978, p. 182.

3. The European Tradition of Federalism

The European tradition of federalism offers a rich overview of the issues associated with federalism, especially the tension between the need for autonomy and the desire for shared rule. Manifestations of the federal experience are found in the union of sovereign states, but also within a sovereign state. Nonetheless, some authors persist in seeing federalism through the lenses of the American experiences, without considering the different historical experiences in the US, and at the same time, disregarding the European tradition of federalism. This is the case with many authors when applying the federal framework to the EU, as Scharpf argues:

> When 'Europeanist' politicians and social scientists were considering processes of integration that might lead to a 'United Europe', what they had in mind was a federal system fashioned after the American model. What was created, however, were institutional arrangements corresponding more closely to the tradition of German federalism.[91]

Germany and Switzerland offer good examples of federal politics considering the present idiosyncrasies of their federal political systems, and attending to the evolution of federalism in their own historical experiences:

> Naturally all those interested in the federal idea and how it can be out to practice look to Switzerland as an example of a successful federal state rooted in a pluri-cultural, if not pluri-national society. Students and observers of the process of European integration and especially of its 'end-state' often debated in relation to the federal model-figure prominently among the latter.[92]

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[91] Fritz W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration,' *Public Administration*, vol. 66, 1988, p. 242.

[92] Clive Church, and Paolo Dardanelli, 'The Dynamics of Confederalism and Federalism: Comparing Switzerland and the EU,' *Regional and Federal Studies*, vol. 15, No. 2, 2005, p. 163.

3.1. Germany

The federal tradition in Germany offers an indication of the evolution of federal arrangements following the abolition of the Holy Roman Empire. The German political and legal tradition provides a significant contribution to federal political theory, although federalism in Germany followed a different trajectory to that in the US, where the impetus of centripetal forces was stronger. In Germany, federalism remains a stronger constitutional principle although it is organised in a matrix, where the dispersion of power remains the norm, particularly considering the centralisation of the previous regime; first in the Weimar Republic and afterwards in the Third Reich, as Johnson argues:

> The constitutional settlement of 1949 was intended to promote this kind of dispersion of political power and to avoid what was seen as a disastrous experience of centralization and the abuse of power after 1933. The controlling parameters within which the Federal Republic evolved after 1949 and consolidated its constitutional provisions turned out to be exceptionally favourable to the realization.[93]

In Germany, for reasons of history; the presence of the Holy Roman Empire[94] and late unification,[95] a strong federalist spirit in the Althusian tradition has been maintained. The German Confederation, as discussed above, was a creation of the Congress of

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[93] Nevil Johnson, 'Territory and Power: Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany,' in Charlie Jeffery (ed.), *Recasting German Federalism: The Legacies of Unification*, London: Pinter, 1999, p.37; David P. Conradt, *The German Polity*, New York: Longman, seventh edition, 2001, p. 244.

[94] The Holy Roman Empire was established in Germany and Austria as its core areas, and to paraphrase Voltaire, it was not Holy, Roman or Empire. See. Peter H. Wilson, *The Holy Roman Empire 1495–1806*, London: Macmillan Press, 1999, p. 1.

[95] Led by the Kingdom of Prussia in 1871 after the defeat of France and Napoleon III, it replaced the North-German Confederation by establishing a national German Federal State.

Vienna[96]uniting most of the German states into one single confederal polity, as Wheaton argues:

> Germany, as it has been constituted under the name of the Germanic Confederation, presents the example of a system of sovereign States united by an equal and permanent Confederation.[97]

The German experience is interesting, because the design of German federalism took into account the different historical experiences of Germany and, particularly, the German Confederation, as Johnson recalls: 'The Basic Law was thus a thoroughly German constitutional document in which can immediately be discerned remarkably clear continuities with past experience of constitution-making over the previous century and longer'.[98]

Federalism in the German polity is protected by the 'Eternity Clause' in the Basic Law (Article 79 3), which forbids changes in the federal principle of the German State. The 'Principle of Federal Loyalty' mandates the Federation and the Länder to respect the idea of the federation.[99] These two legal protections of federalism are effectively guaranteed by the Federal Constitutional Court, which is keen to protect the essence of German federalism, particularly the participation of the Länder in the federal structures through the *Bundesrat*, and also to avoid encroachments of their competences by expansion of the federal state.[100]

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[96] Wolfgang Renzsch, 'German Federalism in Historical Perspective: Federalism as a Substitute for a National State,' *Publius: The Journal of Federalism*, vol. 19, No. 4, pp. 17–33.

[97] Wheaton, op.cit. p. 59.

[98] Nevil Johnson, 'German Federalism Today,' in Charlie Jeffery and Peter Savigear (eds), *Recasting German Federalism: The Legacies of Unification,* London: Pinter, 1999, p.33.

[99] On the principle of Federal loyalty or Comity (*Bundestreue*), see Uwe Leonardy, 'The Institutional Structures of German Federalism,' in Jeffery, Charlie (ed.), *Recasting German Federalism: The Legacies of Unification*, London: Pinter, 1999, pp. 19–20.

[100] Philip Blair and Peter Cullen, 'Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court,' in Jeffery, Charlie (ed.), *Recasting German Federalism: The Legacies of Unification*, London: Pinter, 1999, p. 123.

In the German federal state, in the *Bundesstaat*[101] there is a strong emphasis on the self-rule of the states (Länder). As an illustrative example of the degree of deep federalism in Germany as compared to American federalism, German second-chamber (*Bundesrat*) representatives are indicated by the Länder governments,[102] a practice that ended with the Seventeenth Amendment in the American Senate in 1913[103] which provided for the direct election of Senators.

At first glance, American federalism is more consistent with representative democracy, but that interpretation does not hold when it is considered that although direct election of senators provided independence from the states' legislatures, it weakened the federal element that had been inherited from the Madisonian Constitution, this is because states' representative bodies could not influence decision-making in the federal political process by appointing senators to Congress.

Hence the influence of the states – as unitary agents – decreased in the Senate, which was created as a body to represent states' legislatures. In federal political theory, every federal arrangement is idiosyncratic, and when designing the rules of a polity – whether a confederation or a federation – there is a choice between the careful balancing of elements of self-rule and shared-rule. The American institutional evolution favoured the national element to the detriment of the federal element,

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[101] Federation established by the German Basic Law (*Das Grundgesetz*) in 1949. On German Federalism see Arthur Gunlicks, *The Länder and German Federalism*, Manchester: Manchester University Press, 2003.

[102] Articles 50–54 of the German Basic Law.

[103] Replaced Article 1, Section 3. The Seventeenth Amendment reduced states' powers and interests by taking a voice in the common federal institutions and increasing the power of federal government, as Filippov and colleagues argue: 'The original intent of legislative apportionment, of course, was to peripheralize the American federation by giving state governments some direct control over the federal center. With direct election, or at least with ineffective state control of senators, however, the power of the center relative to that of state governments was increased.' Mikhail Filippov et. al., *Designing Federalism*, 2004, op. cit., p. 126.

which, as already noted, was inherited from the Madisonian Constitution.[104] But in Germany – in part because of its historical experiences with federalism – a strong version of federalism was adopted in which the constituent units had a larger participation in the federal political process, as Gunlicks observes:

> German federalists, after all believed that the Länder should participate in law-making and in the administration of federal laws, both which were very much in the German tradition. This favoured the representation of the Land governments in a second chamber of the Länder that would mediate between the federal and the Land governments. This is the solution that is most federal, in the sense that it provides for a federal division of powers in which both levels are represented by governments. A Senate solution would have duplicated in the *Bundesrat* the party representation in the *Bundestag*, whereas representation was to be based on the different principles of continuity, stability (i.e. long-standing interests of the Länder) and administrative expertise.[105]

The rationale was to *decrease* centralisation, precisely the opposite path to that chosen for American federalism.[106] The *Bundesrat* 'not only embodies the intergovernmentalism of the federal system, but to a large extent it is also responsible for the efficient management and coordination of many of the wide-ranging institutional interdependencies arising from the intergovernmental structure'.[107] The *Bundesrat* alongside the *Bundestag* (lower chamber directly elected to represent the whole country) has significant powers in the enactment of federal legislation – which is the case – because in the German federal system, the Länder are responsible for

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[104] By reference to James Madison considered as one of the most influential members in the draft of the American Constitution in the Philadelphia Convention.

[105] Arthur Gunlicks, op. cit., p, 343.

[106] William H. Riker, The Senate and American Federalism, *The American Political Science Review*, vol. 49, No. 2, 1955, pp. 452–469.

[107] Uwe Leonardy, op. cit., p. 5.

most of the administration, while the federal state is responsible for most of the legislative activity.[108]

German federalism is also characterised by the practice of 'joint-decisions', whereby the Länder and the federal state are engaged in a kind of cooperative federalism in that both are engaged in joint planning, implementation and financing of certain tasks under a joint decision-making procedure.[109] This practice significantly altered the nature of the political process in the federal political system. The 'dual government', whereby each government is responsible for its own sphere – a common feature in the United States – is not a feature of the German federal system.

The German federal system allows for the representation of the different polities' communities in the federal political system as a whole, and this is the essence of federalism, to allow not only persistence of autonomy (self-rule) of the polities, but also to allow them to participate as autonomous units in the political process of the federal union (shared rule).

3.2. Switzerland

Switzerland and federalism are almost synonymous.[110] The Swiss Federation (its official title is the 'Swiss Confederation') is a significant case for the study of

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[108]Uwe Leonardy, op. cit., p. 12. Article 83 of the Basic Law refers to the implementation of the federal legislation by the Länder in their own right; Article 84 of the Basic Law refers to implementation of federal legislation under supervision of the federal government and Article 85 of the Basic Law refers to the implementation of federal legislation for the federation. Note the similarities with EU Directives.

[109]Hartmut Klatt, 'Centralizing Trends in West German Federalism, 1949–89,' in Charlie Jeffery, *Recasting German Federalism: The Legacies of Unification*, London: Pinter, 1999, p. 42, The practice is in Articles 91a and 91b of the Basic Law (Constitution). This practice is also common in the EU institutional arrangement; for a criticism, see Fritz Scharpf, op. cit.

[110] Considering its historical federal experiences; for a critical analysis of Swiss federalism see J. Wayne Baker, 'The Covenantal Basis for the Development of Swiss Federalism,' *Publius: The Journal of Federalism,* vol. 23, No. 2, 1993; Daniel Thurer, 'Switzerland: The Model in Need of Adaptation?' in Joachim Jens Hesse and Vincent Wright, *Federalizing*

federalism as a political theory because of its long tradition of federalism, first as a confederation, and in its present form as a federation.[111]

Although Switzerland is now a federal national state, it is also one of the least centralised, where the constituent polities (the cantons) enjoy a significant degree of independence within the national federal state. In Switzerland, the logic of representation is based primarily around federalism, and cantons are represented at the federal common institutions as separate polities. This means that cantons are seen as the primary actors for political action in the Council of States, the second chamber (*Standerat*) or in the Federal Council (*Bundesrat*), which is the federal executive.

Another feature of Swiss federalism is the dual membership of deputies to the first chamber, the National Council (*Nationalrat*) and cantonal assemblies.[112] Cantons are also the expression of primary political action in terms of the participation of individual citizens via democratic referendums.[113]

The political process in Switzerland represents the country's most important institutions through the operation of federalism, in contrast to American federalism, where the judicial process has been seen as a stronger participant in the federal political system throughout history, and to this day. For instance, the Federal Tribunal

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Europe? The Costs, Benefits, and Preconditions of Federal Political Systems, Oxford: Oxford University Press, 1996.

[111] In its old form, the Swiss Confederation traces its origins back to 1291 and the Oath of Fellowship (*Eidgenossenschaft*) or to 1315 in the Pact of Brunnen (*Morgatenbrief*) that lasted up until 1798, when it was destroyed after the Napoleonic invasions, after which a centralised state was established until 1815. From 1815 to 1848 there was another constitutional arrangement that tried to revive the old confederation based on a union of states. Two other Constitutions followed, one in 1848, which followed the American federal arrangement by establishing for the first time a Confederation, and another in 1874, which followed the federal model. The present Constitution is from 2000. See Murray Forsyth, op. cit., pp. 18–30; Thomas Fleiner, 'The Current Situation of Federalism in Switzerland,' *REAF*, No. 9, 2009.

[112] Ronald L. Watts, *Comparing Federal Systems*, op. cit. p. 23.

[113] On the characteristics of Swiss federalism, see Michael Burgess, 2006, op. cit., p. 119.

cannot rule on the validity of federal laws in Switzerland, only on cantonal laws, thus, disputes on federal laws are ultimately determined by referendum.[114] This means that disputes on the acts of the federal legislature can be solved within the federal legislatures or by referendums, for which, there is a principle of double majority that demands a majority of both Swiss citizens and cantons. In Switzerland, as in Germany, the cantons and the communes perform most federal administration.[115]

The history of federalism in Switzerland offers invaluable insight into the nature of federal political systems and the concept of sovereignty, because it shows the diversity of federal experiences and how they allocate ultimate power. In the case of Switzerland, there is a need to preserve the autonomy of irreducible polities (the cantons) because of linguistic and religious reasons, which makes Switzerland an archetype of polity where non-centralisation – despite the small size of the country, and in terms of population and territory – is the rule. The Swiss federal state, organised as a modern territorial state, in its present form since 1848, demonstrates a balance between the need for shared-rule and the desire for self-rule.[116]

Sovereignty, in Switzerland, in its internal dimension – because the cantons do not have the attributes of statehood, as they are not independent states – is shared between the federation and the cantons. The Swiss Constitution recognises in Article 3 the sovereignty of the cantons by stating that: 'The Cantons are sovereign except to the

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[114] Watts, *Comparing Federal Systems*, op. cit., p. 100: in Switzerland all Courts are cantonal in organisation, which means that as the only type of court, cantonal courts in Switzerland, apply both cantonal and federal law; however there is no judicial review as there is in the US or Germany, Fleiner, op. cit., pp. 58, 61.

[115] Jurg Steiner, 'Continental Integration and Swiss Federalism: A New Openness to Europe?' in Harvey Lazar et. al. (ed.), *The Impact of Global and Regional Integration on Federal Systems*, Kingston, Canada: McGill-Queen's University Press, 2003, p. 177.

[116] Although some have argued that Swiss federalism is also in need of change, particularly before the approval of the present Constitution; Sonia Walti, 'Institutional Reform of Federalism: Changing the Players Rather than the Rules of the Game,' *Swiss Political Science Review*, vol. 2, No. 2, 1996.

extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation'.[117]

This is unusual for national constitutions – even federations – to seek recognition of sovereign powers to sub-units; nonetheless this sovereignty refers to internal sovereignty, which as noted above, for federations, constitutes a single sovereign state in International Law. Another interesting Article in the present Swiss Constitution is the principle of subsidiarity in Article 5a,[118] which stipulates, 'The principle of subsidiarity must be observed in the allocation and performance of state tasks'. This is interesting, because in the Swiss Constitutional system, the concept of sovereignty is seen as a core attribute in which cantonal autonomy and independence from the federation are enshrined, and at the same time, sees subsidiarity as an organising principle in addition to cantonal sovereignty, and not as a replacement.

However, sovereignty from a pure Schmitian-concept point of view[119] lies at the cantonal level: it could be argued that even cantons do not hold the exclusive authority, and this is because one the key factors in the Swiss federal partnership is the notion that authority is exercised in common; sovereignty is shared between the cantons and the federation. In this sense, therefore, ultimate authority is decoupled from a single holder, whether the federal state or just the Swiss People in general, because first and foremost, political participation in the federal system is defined by the people in the cantons or half-cantons.[120] Hence, the concept of sovereignty should

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[117] Swiss Constitution available at: http://www.admin.ch/ch/e/rs/101/a3.html [Accessed 22.12.2010].

[118] This is particularly important, because this principle first manifested in the European Union and was imported into Swiss constitutional Law, which will be discussed in context in Chapter 4.

[119] 'Sovereign is who decides on the exception'; Carl Schmitt, op. cit., 2005, p. 5.

[120] As it is the case of Functional and Overlapping Competing Jurisdictions (FOCJ), a normative proposal, but one seen by Frey and Eichenberger as similar to that functioning in Switzerland, which are not territorial, but based along functional lines; see Bruno Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions*, Cheltenham: Edward Elgar, 1999, pp. 49–52.

be seen from the notion of shared and non-exclusive political authority between the cantons and the federal state.

4. Federalism beyond the State

The importance of Federalism as a political theory beyond the state is important, especially considering the multiple manifestations of federal arrangements. It is in this context of multiple manifestations that the concept of sovereignty should be understood when considering the relevance of federalism to the study of sovereignty, and by acknowledging the plethora of different federal arrangements, particularly the federal form known as a confederation.[121]

Federalism, as discussed above, is a concept applicable to different political arrangements other than the sovereign state. These legal arrangements include the union of states, defined by a political partnership in which states could retain their individual sovereignty, but at the same time, creating a legal entity with limited powers sharing sovereignty. A theory of federalism beyond the state will acknowledge that 'Inevitably globalization will result in an increasing shift of sovereignty from the national government to global institutions'.[122] Nevertheless, that shift, understood in the Althusian tradition will also mean that sovereignty should be seen as a pluralistic concept that can be attributed to other polities other than the modern territorial state.

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[121] The problem of sovereignty in confederations is different to the problem of sovereignty in federations. In confederations, states still retain their individual legal personality, hence their independence. In federations, the problem of sovereignty is internal, because only the federal entity has international legal sovereignty, and with sovereignty, comes the problem of who holds supremacy or the *summa potestas* internally, considering the division of powers associated with a federation.

[122] Charles H. Koch, 'Judicial Review and Global Federalism,' *Administrative Law Review*, vol. 54, 2002, p. 510.

4.1. Beyond the Modern Territorial State

In a world of modern territorial states, the irrelevance of all political forms beyond the state seemed assured, but what is meant by this, in fact, is that it was assumed that the only legitimate polities were states.

Kant's normative proposals saw a Law of Nations based on 'a federalism of free states'[123] which was to challenge the state-centred perspective of polities that were imagined only within the tradition of the Westphalian state.

This notion has been challenged in the last decades, however, by limitations imposed on states in different areas of Law – from the need for the protection of the rights of minorities to recent developments in International Humanitarian Law.[124]

It is not the purpose of this research to explore the challenges posed to sovereignty by these different issue-areas, but this point does illustrate the limits of assigning to the modern territorial state a privileged position as the only legitimate polity in the international system. The contribution of federalism to a proper understanding of sovereignty resides in challenging the view that the international system is composed of mere agents –the modern territorial state – which has an exclusive monopoly of action in the international system. As discussed above, this is not historically accurate, considering the different actors in the various international systems since the Peace of Westphalia, and it is still not true of the present international system, therefore, a new paradigm shift is required, as Elazar argues:

> Let us understand the nature of this paradigm shift. It is not that
> states are disappearing, it is that the state system is acquiring a new
> dimension, one that began as a supplement and is now coming to

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[123] Immanuel Kant, 'To Eternal Peace' (first published 1795); translated by Carl Friedrich in Allen W. Wood, *Basic Writings of Kant*, New York: The Modern Library, 2001, p. 444.

[124] The ICC, Humanitarian intervention, but also in the limitations of the constitutional rules of the international system; for a discussion about sovereignty and the individual see Chapter 2 of this thesis.

overlay (and, at least in some respects, to supersede) the system that prevailed throughout the modern epoch. … This overlay increasingly restricts what was called state sovereignty and forces states into various combinations of self-rule and shared-rule to enable them to survive at all. That means federalism, understood in the broadest political sense as a genus involving combinations of self-rule and shared-rule rather than as the one species of federalism accepted in modern times – federation.[125]

This means that 'today, there appears to be no principal methodological or doctrinal objection to applying the concept of federalism to the levels beyond the state'.[126]

A federal political system is based on states' consent, which as an essential characteristic, is fundamental in identifying the nature of federalism.[127] Federal experiences are based on shared rule, motivated by members' belief in the potential for mutual benefits for all the different constituent units. The limitation of sovereignty that the creation of a federal arrangement brings about, therefore, is undertaken on a voluntary basis and membership is based on the anticipation of the potential benefits of a federal arrangement. Traditionally, these goals of membership were related to the promotion of economic and commercial interests and defence and security affairs.[128] Although federal arrangements are based on voluntary associations, as pointed out and emphasised by Althusius, they are not based on the dichotomy between centre and periphery, but on a matrix model.[129] This model is characterised by the notion that in a federal arrangement there is no hierarchy; there are no higher centres of

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[125] Daniel Elazar, 'From Statism to Federalism: A Paradigm Shift,' *International Political Science Review*: 'New Trends in Federalism,' vol. 17, No. 4, 1996, p. 419.

[126] Jost Delbruck, 'Transnational Federalism: Problems and Prospects of Allocating Public Authority beyond the State,' *Indiana Journal of Global and Legal Studies*, vol. 1, No. 1, 2004, p. 48.

[127] Its origins are from compact theory. On the consensual basis for federal arrangements see Daniel Elazar, *Exploring Federalism*, 1987, op. cit. p. 33.

[128] Michael Burgess, *Comparative Federalism*, 2006,op. cit., p. 76.

[129] Proposed by Daniel Elazar in *Exploring Federalism* 1987, op. cit. p. 27.

authority.[130] In a matrix model, federalism is based on a non-centralised concept, where the coexistence of multiple poles ensures that there is no claim to supreme authority, as Elazar states:

> Federal polities are characteristically non centralized; that is, the powers of government within them are diffused among many centers, whose existence of authority are guaranteed by the general constitution, rather than being concentrated in a single center.[131]

5. Representation

The issue of representation is highly relevant, and yet it is probably one of the most misunderstood facets of federalism. This is because one of the characteristics of federalism resides in the view that legitimate representation is based not only on direct representation of citizens in federal common institutions, but also that legitimate representation is based primarily on the notion that representation[132] – and this is the normative aspect of federal arrangements – is based on the direct participation of the different polities in the common institutions of the federal political system. This means that the problem of representation is primarily about the political participation of the individual polities, as units, which compose the federal system. Hence, as discussed above in the context of the American federation, the decreased role of states, as units, in the federal political process, weakened the federal elements present in the American Constitution and increased the national element. This was because the logic of representation in non-federal systems is based on the view that representation is only legitimate when people, as individual citizens, participate directly in the central representative bodies of central government, and this is the case in particular when central government holds supreme authority.

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[130] Daniel Elazar, *Exploring Federalism,* 1987, op. cit., p. 37.

[131] Daniel Elazar, *Exploring Federalism*, 1987, op. cit., p. 34.

[132] For the role of participation, or 'Voice' as a political mechanism, see Albert O. Hirschman *Exit, Voice and Loyalty*, 1970, op. cit.

In federal political systems, no single body or polity holds supreme authority because sovereignty is shared. In this way, legitimate representation is not only about representation of the citizens, but also of the individual polities that compose the federal system. This is in order to preserve the distinctiveness and autonomy of individual polities.

In federal political systems, the focus of the problem resides in insufficient participation of the different polities in a federal political system, as Hueglin observes:

> This type of representative participation in the process of government has hardly anything in common with the Anglo-Saxon tradition of parliamentary representation. On the contrary, it constitutes, a different and, arguably, older tradition of representation and legitimacy. It can still be discerned today in the construction of German federalism, where the upper legislative chamber is a federal council whose members represent their provincial or Land governments, and whose votes are given collectively by each Land. Similarly, one can see this form of representation in the Council of Ministers of the European Union. The ministers primarily represent their respective countries, not the Community as a whole. Their decisions still rely mainly on unanimous agreement, not majority voting. In a way, the common criticism that the European Union therefore lacks political legitimacy –because the European Parliament does not possess full legislative powers –is misleading because it presupposes that the other tradition of representation – parliamentary and majoritarian – is the only possible and legitimate.[133]

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[133]Hueglin, 'Althusius: Medieval Constitutionalist' op. cit., p. 67.

5.1. Elements of Federal Political Systems

Considering all of the above, all federal polities have in common certain features, in order to be considered federal:

1) **Non-hierarchical**: meaning that the constituent polities as part of the federal political system are not simply decentralised local authorities defined by the federal or 'central' state, but that they preserve their own autonomy and sovereignty in the framework of the federal arrangement. The federal arrangement is not superior to the individual polities, however, although it maintains some elements of primacy within its own sphere of jurisdiction.

2) A **compact or covenant**: between the different polities that compose the federal arrangement. This compact is voluntary and based on the polities that decide to create the federal political structure. In some circumstances, the compact also includes 'The People' but the essence of the compact is between individual polities.

3) **Shared sovereignty**: the sharing of sovereignty is based on the compact between the different polities, which decide to delegate limited powers to a central, federal arrangement. This shared sovereignty – the American *Federalist Papers* called it 'dual sovereignty' – was limited to powers and functions attributed to the central federal structure. This notion of shared sovereignty does not abolish the 'irreducible sovereignty'[134] of individual polities, which maintain a sphere of action which cannot be absorbed by the federal arrangement.

4) **Federal polities as independent agents**: this derives as a corollary of the principle of shared sovereignty and means that the polities are part of the

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[134] This means that individual polities, when part of a federal arrangement keep their own sphere of powers and supremacy within their own jurisdiction and their internal sovereignty, which cannot be delegated; if this should occur, we are no longer in the presence of a federal arrangement, but in a unitary state with decentralisation or devolution.

federal political system, participate in the larger federal framework and federal decision-making process as units, and that their independent agency should not be hindered by the federal structure. Federalism is not state unification.

5) **Multiplicity of federal political systems:**[135] 'in which there are two or more levels of government which combine self-rule for the governments of the constituent units with elements of shared-rule through common institutions'.[136] They include different types of federal political systems.[137]

5.2. Federalism and Sovereignty

The point about federalism and sovereignty is critical, because it explains the concept of federalism and makes clear that a federal arrangement is not based on a notion of decentralisation, which implies a hierarchical relationship between the different units in a federal polity. It is this understanding – within the Althusian tradition – that sees federalism in the matrix model and which informs this analysis of the concept of sovereignty. In the federalist tradition based on multiple centres of authority, sovereignty assumes not just a non-absolute character, but also one based on a non-hierarchical understanding; sovereignty, therefore, is based on a pluralistic understanding; on a notion of shared and competing sovereignties of different polities in the federal political system.

Seen in this tradition, federalism is a covenant of different polities sharing together in common institutions. The creation of the federal arrangement does not eliminate the sovereignty of the constituent units as one might expect from a Bodinian perspective, because in that tradition, sovereignty is indivisible and absolute and can only rest in one place: that of the sovereign state. The Althusian tradition rejects this

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[135] Meaning that the constituent units of a larger political system should act directly in the common federal institutions as individual polities, this is in order to preserve their individual territorial interests.

[136] Ronald L. Watts, 'Comparing Forms of Federal Partnerships,' in Dimitrios Karmis and Wyane Norman, *Theories of Federalism: A Reader*, Hampshire: Palgrave Macmillan, 2005, p. 234.

[137] Daniel Elazar, *Exploring Federalism*, 1987, op. cit.

understanding, building on the notion that sovereignty can be shared within the sovereign state through a federation (internal sovereignty), but also between sovereign states through confederations or other types of federal arrangements (external sovereignty).[138] This means that in federal political systems, sovereignty is not seen as indivisible or absolute, as King argues:

> If the mark of sovereignty were a single authority then of course it (or he or she) could not be divided. But if the mark of sovereignty is finality of decision, then clearly such sovereignty can be divided among and shared by (as in any voting situation) a plurality of agents – without prejudice to finality.[139]

Federalism is not merely based on the division of powers between polities; it is also built on a process in which different polities decide to create a political partnership by maintaining their political autonomy and creating common institutions. This process is dynamic and not static, which means that a federal arrangement evolves according to the different institutional processes that drive it.[140] To comprehend the significance of federalism to the study of sovereignty, one needs to grasp the importance of the different institutional processes within a federal arrangement.

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[138] Arguing that federal political systems involve an absence of a sovereign authority, see Geoffrey Sawer, *Modern Federalism*, Victoria: Pitman Australia, 1976, p. 97.

[139] Preston King, *Federalism and Federation*, 1982, op. cit., p. 115.

[140] In the American federation, the most important institutional process was the judicial led by the Supreme Court, and as in the EU today, this poses some problems, particularly with legitimacy of the judiciary and 'judicial activism', as Wheare argues: 'People sometimes ask why it is that the function of deciding the meaning of the division of powers and indeed of the whole constitution in a federal government comes to be performed by courts. It is not a strange thing that one branch of the general government – the judiciary – should have the power to decide whether the other branches – the legislature and administration – are keeping within the limits of their powers'. See K. C. Wheare, *Federal Government*, 1963, op. cit., p. 61.

5.3. Rebirth of the Federal Phoenix: The EU as a Post-Modern Confederation

Federalism as a political theory could be applied to the framework of the European Union as a federal arrangement.[141] The use of federalism as an arrangement has returned – phoenix-like – to revive a lost tradition that had been buried and hidden in a narrative dominated by a notion of a *nation-state*, much as if it were an imagined community[142] that had slowly emerged after the French Revolution, and following the Westphalian pattern of the gradual emergence of the sovereign state, as Elazar observes: 'With the emergence of permanent multinational "communities", of which the European Community (EC) is the prime example, we are now witnessing a revival of confederal arrangements'.[143] The EU is an example of a federal political system beyond the state.[144] However, the EU challenges even the broadest understanding of federalism, here proposed, as Brand argues: 'If the United States of America represented a dramatic development in concepts of federalism at the end of the

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[141] This point will be further explored in Chapter 4 about the European Union.

[142] The appropriate term would be territorial sovereign state, as discussed in Chapter 1 of this thesis.

[143] Daniel Elazar, *Exploring Federalism*, 1987, op. cit., pp. 50–1; similarly Warleigh (following Murray Forsyth in *Union of States*, 1981, op. cit.), argues for a recovery of the federal tradition and the classification of the EU as a confederation. See Alexander Warleigh, 'Better the Devil you know? Synthetic and Confederal Understandings of European Unification,' *West European Politics*, vol. 21, No. 3, 1998, p. 2.

[144] An 'Intergovernmental Federalism', Maurice Croisat and Jean-Louis Quermonne, *Europe and Federalism* (*Europe et le Federalism*), Paris: Montchrestien, 1999; a 'federal union' according to Murray Forsyth, 'The Political Theory of Federalism: The Relevance of Classical Approaches,' in Joachim Jens Hesse and Vincent Wright, *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems*, Oxford: Oxford University Press, 1996, p. 40. For a criticism of the federal form, that it is an outdated form under which to classify the EU, see Peter Hay, *Federalism and Supranational Organization: Patterns for New Legal Structures*, Urbana: University of Illinois Press, 1969, pp. 79–101. Only a handful of studies have applied federalism as a political theory to the EU, see Filippov et. al., *Designing Federalism*, 2004, op. cit., p. 316.

eighteenth century, so too does the EU represent such development at the beginning of the twenty-first century.'[145]

Nevertheless, the application of federal theory to the European Union is a return to a lost tradition, but also perhaps 'the constitutional language of federalism appears to be helpful in order to analyze and discuss the ways in which the division of power is organized among the different levels of government and the EU'.[146]

6. Conclusion

This chapter has sought to demonstrate that federalism as a political theory has multiple manifestations. It is a theory aimed at protecting the autonomy of polities (self-rule), while at the same time, preserving the shared-rule of the constituent units in a federal political system based on consent.

The chapter has highlighted the fact that, as such, federalism cannot be seen as tool to employ for the purposes of devolution or decentralisation because it is not a hierarchical concept. Another common mistake made by some authors is to reduce the federal experience to the type of federation. The American historical experiences on federalism along with the European experiences, especially those of Germany and Switzerland, illustrate that the relationship between polities within the federalist tradition can assume different forms.

The chapter has shown that the concept of sovereignty within the federalist tradition is not based on the idea of absolute, exclusive and ultimate authority; rather it is based on the notion that sovereignty is a historically-bound concept dependent on each international system; that it is contingent, and can be shared and divided between different polities.

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[145] Ronald A. Brand, 'Federalism and the Allocation of Sovereignty beyond the State in the European Union,' *Duquesne Law Review*, vol. 44, 2005, p. 76.

[146] Tanja, A. Borzel and Madeleine O. Hosli, 'Brussels between Berlin and Bern: Comparative Federalism meets the European Union,' Amsterdam: VU University Amsterdam, Working Paper, 02/2002, p. 5.

The chapter has also addressed the possibilities of federalism beyond the state, considering that federalism could be applicable not just to polities within a modern territorial state, but also between states, particularly in the context of international arrangements. Here, some common elements often found in federal political systems were identified. The chapter has also brought the relevance of the Althusian tradition to the fore, in the context of the study of sovereignty, which can be summarised as:

> He somehow had to find a reconciling compromise between the new principle of territorial sovereignty and the autonomous aspirations of socio-economic, cultural-religious, and territorial minorities. By grafting the principle of sovereignty upon the organized body of people rather than a state somehow representing individual citizens, he may indeed deserve to be regarded as one of the first early modern theorists of popular sovereignty.[147]

This understanding of sovereignty – in the Althusian tradition – offers insight into how sovereignty should be seen in the European Union, as will be argued in the following chapter.

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[147]Hueglin, 'Althusius: Medieval Constitutionalist …' op. cit., p. 115.

Chapter 4

The European Union and the Concept of Sovereignty

1. Introduction

This chapter examines the nature of sovereignty in the European Union. Furthermore, in adopting a federal framework, it analyses briefly the institutional architecture of the European Union, and examines some of the relevant innovations introduced by the Treaty of Lisbon.

Subsequently, the chapter analyses the concept of supranationalism as applicable to the European Union, and in contrast to federalism. The recent decision of the German Federal Constitutional Court regarding the Treaty of Lisbon is also examined as an archetype of the challenges posed by national Supreme and Constitutional Courts to European integration.

The chapter will also address some of the issues related to the possibilities of constitutionalism beyond the state, considering that the European Union presents itself as constitutional legal order. The chapter also examines whether a constitutionalism beyond the state is consistent with national constitutionalism, which is particularly relevant to the concept of sovereignty because a constitutionalism beyond the state opens up the possibilities for a pluralistic understanding of sovereignty.

The chapter will conclude with an analysis of the concept of subsidiarity; comparing it to the concept of sovereignty, particularly the changes introduced by the Treaty of Lisbon, which introduced a new mechanism allowing the participation of national Parliaments in the decision-making process of the EU.

1.1 The Problem of Sovereignty in the European Union

The nature of sovereignty in the European Union[1] relates to the perspective adopted when analysing the nature of the relationship between the EU and member-states.

For Intergovernmentalists, the EU remains an organisation based on a compact, one derived from the consent of its members, and with attributed powers set down in Treaties. In this respect, states can revoke the powers delegated to the EU,[2] which means that the nature of sovereignty is still a statehood attribute belonging exclusively to the modern territorial state. This view contrasts with that which assumes that the EU is a proto-constitutional project, and that the nature of sovereignty is related to the different institutional processes at the European level.[3]

For the Neo-functionalist School, the European integration process is based on the 'spill-over' of supranationalism to the different policy areas promoted by the various actors in the European political process.[4] These approaches have tried to explain the

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[1] Hereinafter the EU.

[2] See Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach,' in Metter Eilstrup-Sangiovanni (ed.), *Debates on European Integration*, Basingstoke: Palgrave Macmillan, 2006.

[3] The 'different institutional processes' refer to Comparative Institutional Analysis proposed by Neil Komesar, which provides comparative analysis of different institutional processes, taking into consideration the participation of different actors. Hence, in analysing institutional arrangements such as the EU, it is necessary to look at the judicial and political processes. For example, the political process, whereby national governments represent their national interests in the common institutions of the EU (in the European Council and Council of Ministers) and, particularly importantly, the role of the adjudicative process, especially the European Court of Justice (ECJ). On Comparative Institutional Analysis, see Neil Komesar, 'Imperfect Alternatives: Choosing Institutions in Law,' *Economics, and Public Policy*, Chicago: Chicago University Press, 1994; and Neil Komesar, *Law's Limits: The Rule of Law and the Supply and Demand for Rights*, Cambridge: Cambridge University Press, 2001.

[4] Ernst B. Haas, 'Does Constructivism Subsume Neofunctionalism?' in Metter Eilstrup-Sangiovanni, *Debates on European Integration*, op. cit. On different approaches to European integration see also Dimitris N. Chryssochoou, *Theorizing European Integration*, London: Routledge, 2009.

mechanisms of regional integration in the European continent, and at the same time, offer an account of its uniqueness and originality.

European political integration is a unique process in which the narrative about the concept of sovereignty – as *summa potestas* – is fiercely contested. In order to address the problem in hand, therefore, the distinctiveness of the European legal framework, and the nature of the powers attributed to the EU, will be the subject of analysis. The institutional design and evolution of the European integration mechanism also requires consideration in this context, particularly the crucial role of the judicial process in creating and developing a system of legal principles and rules that define the nature of the European integration process.

The discussion of the concept of sovereignty in the EU should not be limited to the analysis of the Treaties and the political process, either, but should consider the different institutional processes that have helped to define the relationship between the European Communities[5] and member states, from a historical perspective.

The approach delineated here considers several levels of analysis: The first is an analysis of why the EU – when compared to other international institutional arrangements – presents itself as a unique arrangement; second, consideration of the processes of the evolution of European institutions, and third, the role of the institutional processes in developing European integration from a comparative perspective, will be put under scrutiny. In undertaking these different levels of analysis it will be necessary, in addition, to analyse the structure of the European legal system. Together, these discussions will shed light on the current understanding held by many authors about sovereignty in the context of the European institutional arrangement, in particular, the question of ultimate authority, which in itself is linked to the approach chosen by this research in order to analyse sovereignty – whether in the Bodinian or the Althusian tradition.

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[5] Considering that historically the EEC was the predecessor of the EU.

This approach, in turn, relates to the nature of the European polity; whether one sees it as a 'multi-level governance system',[6] a 'constitutional order of states',[7] a 'post-modern confederation',[8] a 'polycentric polity'[9] or a '*sui generis*' project.[10] It is not the purpose of this research to offer a full explanation of the European-integration process or to provide a definitive classification for the process, but rather to explore the implications of the historical institutional evolution of the EU and how it has affected the concept of sovereignty. The first step will be an analysis of the uniqueness of the European integration process, particularly with regard to similar international institutional arrangements, such as the United Nations, or other regional organisations.

The European *Sonderweg*[11] derives from the unique nature of the European legal system, especially when considering how different it is to other international legal systems, functional or regional organisations. Observers might point to the fact that the supranational character of the EU makes the European experience different in contrast to other international experiences, to which the retort might be that

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[6] Tanja Alberts sees the EU as a multi-level governance system: Tanja Aalberts, 'The Future of Sovereignty in Multilevel Governance Europe: A Constructivist Reading,' *Journal of Common Market Studies*, vol. 42, No. 1, 2004.

[7] Alan Dashwood, 'States and the EU,' *European Law Review*, vol. 23, 1998, p. 221.

[8] Daniel Elazar, 'The United States and the EU: Models for their Epochs,' in Kalypso Nicolaidis and Robert Howse, *The Federal Vision: Legitimacy, Levels of Governance in the United States and the EU*, Oxford: Oxford University Press, 2001, p. 48; see also Michael Longo, *Constitutionalising Europe: Processes and Practices*, Aldershot: Ashgate, 2006.

[9] Marlene Wind, 'The EU as a Polycentric polity: Returning to a Medieval Europe?' in Joseph H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, pp. 122–23.

[10] Pavlos Eleftheriadis, 'The European Constitution and Cosmopolitan Ideals,' *Columbia Journal of European Law*, vol. 7, 2001.

[11] To use Joseph Weiler's expression; for which a literal translation might be 'special way'. See 'Federalism without Constitutionalism: Europe's *Sonderweg*,' in *The Federal Vision: Legitimacy, Levels of Governance in the United States and the EU*, Oxford: Oxford University Press, 2001, p. 54.

supranationalism, as a result of the European Communities pursuant to the Treaty of Rome, was not a *fait accompli* in the early stages of its development.[12]

The evolution of the various European institutions is intrinsically linked to the role of the many institutional processes within the EU, the history of which cannot be seen as a linear development towards further integration, but one which was one marked by deep disagreements between member states, advances and breaks in the European integration project.[13]

The exceptional nature of the European integration process was further determined by the different institutional processes[14] that conditioned the future evolution of its institutions. The interplay between the political and judicial processes must be borne in mind, which with regard to both of these processes, the following questions and observation are made: to the former, what role did member states play in negotiating the Treaties and accommodating all the different interests, and how did the different bodies of the EU interact with member states and private actors; as for the latter, the fundamental role of the ECJ in creating and developing a new European legal order distinct from the canons of classic Public International Law, should be acknowledged, because in the judicial process, the ECJ in ground-breaking decisions – in needing to consider the role of the private actors involved in the litigation – was instrumental in preserving the integrity of European Law and in coherently interpreting them for all member states, as MacCormick argues:

> Taking the view of the sovereign state which I suggested or any
> reasonable variant on its terms, it seems obvious that no State in Western

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[12] As Pierson argues: 'As a number of critics have noted, choice-theoretic treatments of institutions often make an intentionalist or functionalist fallacy, arguing that the long-term effects of institutions explain why decision makers introduce them', Paul Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis,' in Metter Eilstrup-Sangiovanni, *Debates on European Integration*, op. cit., p. 312.

[13] As the Luxembourg Compromise demonstrated by briefly replacing qualified majority voting for unanimity in 1966. See:

http://europa.eu/scadplus/glossary/luxembourg_compromise_en.htm [Accessed 07.10.10].

[14] Neil Komesar, 'Imperfect Alternatives,' op. cit.

Europe any longer is a sovereign state. None is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources. Equally, of course, it is not true that all the power which is exercised by, or through, on the grant of, one or more organs of the European Community. Nor has the community as such a plenitude of power politically or normatively that could permit it remotely to resemble in itself a sovereign state or sovereign federation of states.[15]

The nature of sovereignty in the EU needs to be understood in the context of 'deterritorialization'; of an authority that saw the exclusion of a Bodinian understanding of statehood: one that viewed sovereignty as the exclusive and supreme authority of the state in its territory where other types of authority were also excluded. As will be discussed below, this paradigm has shifted, and the EU is a paradigmatic example of that shift, as Walker argues:

In the new Post-Westphalian order, in contrast with the emergence of functionally-limited polities, which do not claim comprehensive jurisdiction over a particular territory it becomes possible to conceive of autonomy without territorial exclusivity to imagine ultimate authority, or sovereignty, in non-exclusive terms.[16]

In analysing the EU, it is necessary to 'unpick' it as it were in order to understand its idiosyncrasy, particularly its novel legal nature. The EU as a polity has long fascinated scholars because the union does not easily fit the description of either an international organisation or any similar type of structure, and it is this originality that drives the purpose of this chapter; to undertake a thorough analysis of the concept of sovereignty in the context of the EU.

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[15] Neil MacCormick, 'Beyond the Sovereign State,' *Modern Law Review*, vol. 56, No. 1, 1993, p. 16.

[16] Neil Walker, 'Late Sovereignty in the EU,' in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, p. 23.

2. The Nature of the Polity: The EU as a Federal Political System

Employing the definition of federalism as discussed in the previous chapter, the notion that the EU is a proto-federation while also asserting that it is an international organisation, should be rejected from the outset.[17] The EU can be classified as a 'confederal' polity, and as such, it is a federal political system. The nature of confederations is in itself a rejection of statehood, whether the national state is unitary, decentralised or federal. As it is today, the EU is more akin to the notion of confederation (*Staatenbund*), as in the German Bund,[18] and the preservation of sovereign statehood of its constituent polities is part of the project when creating a new federal polity with common institutions. Arguing, therefore, that the EU is a new state in the making, or just an international organisation, is missing the point entirely as to the nature of the European integration process and its legal order, where the preservation of state sovereign status (self-rule) and the autonomous character of the union (shared-rule) is essential to the concept of sovereignty in the context of a federal arrangement, in particular, of the EU.

Those that state that the solution to the problems of [19] the Union is a move towards statehood,[20] fail to understand the relevance and the importance of the different uses

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[17] On the EU as an international organisation see Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press, 2003, p. 4. According to some authors, the EU is an example of multi-state unification, for example, see Jack L. Goldsmith and Eric Posner, *The Limits of International Law*, Oxford: Oxford University Press, 2006, p. 5. These two positions are defensible only if the modern territorial state is seen as the sole legitimate polity within the Bodinian tradition. This is one that does not recognise that different institutional arrangements can share sovereignty and their legal systems, as will be discussed below.

[18] On the analogy of the German nineteenth-century confederation (*Deutscher Bund*) with the EU and federalism, as models of organisation see Stefan Oeter, 'Federalism and Democracy,' in Armin Bogdandy and Jurgen Bast (eds), *Principles of European Constitutional Law*, Oxford: Hart Publishing, 2006, pp. 60–61.

[19] The problem is related to the nature of sovereignty and the challenges that the EU poses to modern territorial states within the EU.

of the concept of federalism in history, particularly the different conceptions of representation in federal political systems. This chapter will argue with Schmitter that 'The EC/EU is still "*un object politique non-identifie*" and that it will be some time before we discover for sure what type of polity it is going to become'.[21] This, the thesis asserts along with Schmitter, is because of the dynamics of the European integration process, along with the fact that the EU is not a fixed polity, either geographically or politically. In order to understand the EU, therefore, it is important to discuss its institutional architecture.

2.1. Institutional Architecture of the EU[22]

The EU could be seen as a supranational organisation that evolved from the need for cooperation, within a stable framework, between the multiple states in Europe and which culminated in the Treaty of Rome. The EU can also be seen as an institutional framework holding different institutions that supply certain public goods,[23] among which are peace, security and wealth through market integration.[24] An important insight present in the studies of institutionalism, particularly in historical institutionalism, is the distinction between the design and establishment of the rules, in this case the negotiation of the Treaties and the mechanisms of change in the

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[20] For Example, for: Federico G., Mancini, 'Europe: The Case for Statehood,' *European Law Journal*, vol. 4, No. 1, 1998; against: Joseph H. Weiler, 'The Case Against the Case for Statehood,' *European Law Journal*, vol. 4, No. 1, 1998.

[21] Philippe C. Schmitter, 'Imagining the Future of the Euro-Polity with the Help of New Concepts,' in Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck, et. al., *Governance in the EU*, London: Sage Publications, 1996, p. 147.

[22] Institutions are not organisations or bodies, but refer to 'formal or informal constraints that constrain behaviour'. See Douglass North, *Institutions, Institutional Change* op. cit., p. 4. On the application of the tools of institutionalism in the European integration process see Angelina Topan, *The European Integration Process: A Historical and Comparative Institutional Analysis*, London: LIT, 2001.

[23] Public goods are goods that have two primary characteristics: they are available for all to consume (non-exclusion) and are in the public domain (non-rivalry), Inge Kaul et. al., *Providing Global Public Goods*, op. cit. See also Chapter 2 of this thesis on institutions.

[24] AngelinaTopan, op. cit., p. 44.

institutional framework of the EU. As will become clearer during discussion of the nature of the European legal order, the informal changes[25] promoted by the ECJ can be seen as an unintended consequence, not anticipated by member-states,[26] in the political process. The notion of path-dependence[27] may also be relevant to the discussion in order to explain the future integration process, considering the high transaction costs of amending the Treaties.[28]

In the first Pillar of the European Community, a comparative institutional analysis allows the process of market integration to be viewed from the perspective of the 'community method', where decisions or legislation in the political process are decided by simple majority with member-states, represented at the Council of Ministers, save otherwise in the Treaty (Article 205 of the Treaty of Rome). Instances of simple majority voting are now rare, however, and Qualified Majority Voting (QMV) is the rule. In order to fully understand the mechanisms that drive European integration, the roles of the political bodies that constitute the EU need to be clarified, including analysis of the political processes of the institutional framework, particularly the role of member states.[29] In the EU, member states, through the Council of Ministers (Article 203 of the Treaty of Rome) are the primary actors in the creation of the legislation. This is a model that mirrors other international organisations and, also, federal arrangements, and does not replicate the model of the territorial state, where parliaments are the primary bodies of representation and

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[25] Considering that the ECJ has been the most important contributor to changes in the European legal order. This contrasts with formal changes in the Treaties by member states, see Jeffrey Stacey and Berthold Rittberger, 'Dynamics of Formal and Informal Institutional Change in the EU,' 2003, op. cit.

[26] On the unintended consequences in the context of the European integration, see , Angelina Topan , op. cit.

[27] On path-dependence as one of the key mechanisms of institutional change, and the constraints it imposes on further change, see John Campbell, *Institutional Change and Globalization*, Princeton: Princeton University Press, pp. 65–69.

[28] On the role of transaction costs see Angelina Topan, op. cit. pp. 23–26.

[29] It is not the purpose of this thesis to offer a complete explanation of how the EU functions; however, a discussion of the problems of sovereignty in the context of the EU demands a brief exposition of the institutional framework of the EU.

legislation. Had the EU followed the model of the territorial state, the European Parliament would be the primary body for legislation but, as it stands, its role as co-decision-maker in some policy-areas, was expanded with the Treaty of Lisbon.[30]

The role of the European Commission, in fact, is to be the 'guardian of the Treaties', 'ensure the proper functioning and development of the common market' (Article 211) and to own almost exclusive right of initiative in legislation.[31]

The European Parliament represents a direct attempt to replicate for the Union the logic of representation of the modern territorial state. The European Parliament is not a Parliament in the national sense, however, because the legislative organ *par excellence* in the EU is the Council, although the European Parliament does oversee the Commission and does participate in the legislative process through the co-decision mechanism (Article 251, Treaty of Rome) while, in addition, its role is enhanced with the Treaty of Lisbon.

This is not the case for the Second Pillar (Common Foreign and Security Policy) or the Third Pillar (Justice and Home affairs), as these two Pillars remain based in the intergovernmental process, where unanimity is the rule and the jurisdiction of the ECJ is not mandatory.[32] In the case of the Third Pillar, measures regarding asylum, immigration, visas, borders and civil law follow the community method of QMV, while measures regarding policing and criminal law follow the intergovernmental process.[33]

Although much of this still holds true, the changes brought about by the Treaty of Lisbon significantly modified the institutional framework of the EU, which is why it

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[30] On the role of the Council, see Anthony Arnull, et. al, *European Union Law*, London: Sweet & Maxwell, 2006, pp. 32–37.

[31] Anthony Arnull, Ibid., pp. 37–44.

[32] For discussions about the intergovernmental process of the third Pillar and the extent of judicial control of the ECJ under the same, see Steve Peers, *EU Justice and Home Affairs*, Oxford: Oxford University Press, 2006, pp. 17–19.

[33] On these distinctions, see Steve Peers, Ibid.

is necessary to discuss some of the provisions of the Treaty and consider their impact on the relationship between member states and the EU.

2.2. Innovations in the Treaty of Lisbon[34]

The Treaty of Lisbon is composed of two main Treaties: The Treaty of the European Union (TEU) and the Treaty on Functioning of the European Union (TFEU), the former deals with the European Union, while the latter replaces the Treaty on the European Community (Treaty of Rome),[35] where the three-Pillar structure is eliminated.[36]

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[34] It is not the goal of this thesis to offer an extended analysis of the Treaty of Lisbon. The objective is to discuss some of its key provisions and to look at the extent to which they relate to the research, particularly the question of sovereignty in the context of a federal polity such as the EU. The Treaty of Lisbon was approved on 13 December 2007 and is composed of several Protocols and Declarations. For a full analysis, see the 'House of Lords, European Union Committee, Tenth Report of the Session 2007–2008, The Treaty of Lisbon: An Impact Assessment,' London: the Stationery Office Limited, 2008, available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf [Accessed 20.12.2010]. See also the 'The Treaty of Lisbon: A Second Look at the Institutional Innovations, Joint Study, 2010,' Centre for European Policy Studies, Egmont: European Policy Centre, available at: http://www.ceps.eu/book/treaty-lisbon-second-look-institutional-innovations [Accessed 20.10.2010]. The full text of the Treaty is available at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML [Accessed 22.10.2010]. Also see Robert Schutze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis,' *European Law Review*, vol. 33, No. 5, 2008.

[35] Jean-Claude Pris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 35.

[36] Although the Treaty still retains some residual characteristics of the Pillar structure. See Jean-Claude Pris, Ibid., p. 67; Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law*, Cambridge: Cambridge University Press, 2010, p. 46.

The Treaty of Lisbon recovers most of the innovations of the defunct project of the 'European Constitution'.[37] The EU legal personality is recognised (Article 47, TEU).[38] The competences of the Union are limited by the principle of conferral (Article 5, 1/2 TEU), which means that the EU can only act within the limits of the powers conferred by the member states, and competences not conferred to the EU, remain with the member states.[39]

It is of particular significance that the principle of Subsidiarity as seen in the EC Treaty is recognised (Article 5/3, TEU), because it is in the Protocol on Subsidiarity and Proportionality that the role of national Parliaments was introduced into the EU system (Article 12, TEU) via the 'Early Warning System',[40] and which constitutes an innovation that actually strengthens the powers of member states in the EU institutional framework, as Manzanella argues: 'Deciding to give national Parliaments a direct role (without government intermediation) which is listed among the fundamental principles of European Union action, meets a political requirement.'[41] The role of states in the common institutions of the EU is thus enhanced, providing a

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[37] C. W. A. Timmermans, 'The Genesis and Development of the European Communities and the European Union,' in P. J. G Kapteyn, et. al., *The Law of the European Communities*, Alphen aan den Rijn: Walters Kluwer, 2008, pp. 42–44.

[38] The same principle is expressed in Declaration No. 24 annexed to the Treaty of Lisbon.

[39] Jean-Claude Pris, op. cit., p. 82. The US Constitution has a similar provision in the Tenth Amendment. However, as noted in Chapter 3 on federalism, the Tenth Amendment does not constitute a limit to federal power, at least not anymore. Declaration 10, annexed to the Treaty of Lisbon, also recognises the principle of conferral.

[40] On the new powers conferred to the national Parliaments in the EU System as an example of 'multilevel constitutionalism' see Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action,' *The Columbia Journal of European Law*, vol. 15, No. 3, 2009, pp. 390–391. This will be explored further in the section on the principle of Subsidiarity; see also 'House of Lords Tenth Report,' op. cit., p. 236.

[41] Andrea Manzanella, 'The Role of Parliaments in the Democratic Life of the Union,' in Stefano Micosi and Gian Luigi Tosato, *The European Union in the Twenty-First Century: Perspectives from the Treaty of Lisbon*, Brussels: Centre for European Policy Studies, 2009, p. 261.

contrast with the notion held by those who see the Treaty of Lisbon as promoting further centralisation and integration.[42]

The Charter of Fundamental Rights acquires the same legal value as the Treaties, so that it is in effect 'constitutionalised' (Article 6/1, TEU). As in all federal political systems, the Treaty presents the notion of dual representation by citizens and member states in the common institutions of the Union, in this case, citizens in the European Parliament and member states, through the Council.

The European Council is introduced as one of the main institutions of the EU[43] (Article 9, TEU), with the creation of a President of the European Council by QMV for a term of two and a-half years, renewable[44] (Article 15/6, TEU). There is a new method for calculating QMV under which votes are not based on 'weighted voting', but on the notion of 'double majorities' (the number of states and number of citizens). This means that the voting has two criteria: to include at least 55 percent of the total number of member states and 65 percent of the European population[45] (Article 16, TEU); overall, in the Treaty, QMV is extended to around twenty new areas.[46]

The Treaty of Lisbon provides a new High Representative of the Union for Foreign Affairs and Security Policy appointed for a five-year term (Article 18/3, TEU), who is

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[42] Jean-Claude Pris, op. cit. pp. 122–130.

[43] The Previous five institutions included the European Parliament, The Council (of Ministers), The European Commission, the European Court of Justice and the European Court of Auditors. See Jean-Claude Pris, op. cit., p. 205. Now there are seven institutions, which include the European Council (heads of government of the member states, (Articles 15, 2, TEU)) and the European Central Bank. See P. J. G Kapteyn et. al, *The Law of the European Communities*, op. cit., p. 175.

[44] Jean-Claude Pris, op. cit., p. 207. Nigel Smith, 'Europe after Lisbon: Who Will Run the EU Once the Dust has Settled?' *Social and Political Review*, vol. 20, 2010.

[45] Although this new method will only apply from the 1 November 2014, Jean-Claude Pris, op. cit., p. 213.

[46] Jean-Claude Pris, op. cit., p. 212. On QMV see Stephen C. Sieberson, 'Inching toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon,' *Virginia Journal of International Law*, vol. 50, No. 4, 2010.

selected from one of the Vice-Presidents of the Commission (Article 18/4, TEU), and who chairs the Foreign Affairs Council (Article 18/2, TEU).

The right of withdrawal from the EU by member states is explicitly stated (Article 50, TEU), ending the legal debate about the legality of withdrawal.[47]

The Treaty on the Functioning of the EU (TFEU) replaces the EC Treaty, and makes significant changes; many of them already part of the case law of the ECJ. The TFEU delineates the sphere of competences[48] of the Union by dividing it into exclusive competences (Article 2/1, TFEU), shared competences (Articles 2/2; 4, TFEU) and coordinated competences (Article 2/5, TFEU).

The powers of the European Parliament are strengthened in the co-decision procedure, now called 'ordinary legislative procedure',[49] in the appointment of the European Commission, its President, and the New High Representative, as well as in many other areas.[50]

The Democratic Principle of the EU is expressed in the new 'Citizens' Initiative' which allows citizens of the member states to invite the Commission to submit proposals for adoption of certain legal acts (Article 11/4, TEU).

The jurisdiction of the ECJ has been extended after the Lisbon Treaty and now covers the whole Area of Freedom and Justice ('Old third Pillar'). There is also an extension to the scope for actions of annulment by individuals (for instance, actions for

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[47] Joseph H. Weiler, 'The Transformation of Europe,' *Yale Law Journal*, vol. 100, 1991, p. 2412.

[48] On the division of competencies see Finn Laursen, 'The (Reform) Treaty of Lisbon: What's in it? How Significant?' *Jean Monnet / Robert Schuman Paper Series*, University of Miami, vol. 9, No. 1, 2009, pp. 7–8.

[49] Herve Bribosia, 'The Main Institutional Innovations in the Lisbon Treaty,' in Stephan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*, Vienna: Springer Wien New York, 2008, p. 61.

[50] For an overview of these changes, see Pris, op. cit., pp. 118–120. The EP is seen as one of the beneficiaries after Lisbon, see Jean-Claude Pris, op. cit. p. 235.

annulment against acts of the European Council). The ECJ is renamed as the 'Court of Justice of the European Union', while the Court of First Instance is now called the 'General Court'.[51]

The powers of the European Commission have also been increased with the Lisbon Treaty, in particular in relation to the TFEU, which now requires unanimity in the Council when amending proposals if the Commission does not agree with the amendment (Article 293).[52]

3. Supranationalism *v.* Federalism in the EU Context

The origins of the concept of supranationalism can be traced back to 1951 and the creation of the European Coal and Steel Community (ECSC).[53] The 'High Authority' was the first European body considered as 'supranational'. The special provisions of the ECSC Treaty made it a novelty,[54] and the same formula was included in the EC Treaty of Rome. There are, however, problems with supranationalism as a legal concept, particularly regarding its normativity,[55] and precisely because of the negative connotations that surround it; that it is seen as neither national nor international.[56]

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[51] Jean-Claude Pris, op. cit., pp. 231–232.

[52] Jean-Claude Pris, op. cit., p. 225.

[53] See, Article 9/5 of the European Coal and Steel Community (ECSC), the Community was supposed to be a first step for a 'European federation' according to post-war visionaries such as the French foreign minister Robert Schuman, http://europa.eu/abc/symbols/9-may/decl_en.htm [Accessed 20.12.12]. On the ECSC, European Political Community and the European Defence Community see Martin J. Dedman, *The Origins and Development of the EU 1945–95*, London: Routledge, 1996.

[54] For a brief historical overview of the literature at the time regarding the ECSC, see Robert Schutze, 'On "Federal Ground"', The EU as an (Inter)national Phenomenon,' *Common Market Law Review*, vol. 46, No. 4, 2009, pp. 1070–77.

[55] Armin von Bogdandy, 'Constitutional Principles,' in Armin Bogdandy and Jurgen Bast (eds), *Principles of European Constitutional Law*, Oxford: Hart Publishing, 2006, p. 40.

[56] For an early account of supranationalism and its relationship with sovereignty see Forrest L. Grieves, *Supranationalism and International Adjudication*, Urbana: University of Illinois Press, 1969, pp. 10–18.

In order to comprehend European integration, the importance of the ECJ in the process of 'constitutionalization' of the Treaties should be acknowledged, defined as: 'the process by which the EC treaties have evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory'.[57]

This process was defined by a set of bold decisions on the part of the ECJ in upholding the European legal order; a new legal order distinct from Public International Law, and which stated that the Treaties are the 'basic constitutional charter' of the EU.[58] Earlier studies about European integration, inspired by functionalist arguments[59]deemed the European Communities as supranational following the aforementioned ECSC model.

3.1. Federalism and the EU

The contribution of federalism as a concept to the study of European integration rests not only in the desire to recover a lost tradition in political theory, but also the will to justify federalism by demonstrating that the concept fits a polity –not defined by either Public International or National Law – but which exists by way of the legal

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[57] Alec Stone Sweet and James Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration,' in Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance*, Oxford: Oxford University Press, 1998, p. 102.

[58] 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. *Partie Ecologist "Les Verts" v. European Parliament*, Para. 23, Case 294/84, 1986 and *Opinion 1/91 on the European Economic Area Treaty,1991, 2 CMLR, 217.*

[59] Particularly relevant are the theories of David Mitrany and Ernst Haas as the 'fathers' of functionalism, see David Mitrany, 'The Prospect of Integration: Federal or Functional?' *Journal of Common Market Studies*, vol. 4, No. 2, 1965.

arrangement that created a new legal 'supranational' order. The inadequacies found in the concept of supranationalism reside in its perceived negative character; through the reluctance to see the EU as a 'classic' international organisation. This ambivalence relates to the transformations of its legal framework led by the ECJ, as Schutze emphasises: 'The Court has insisted on the "normative" autonomy of the European legal order and this "originality hypothesis" severed the umbilical cord with the international legal order'.[60] With this statement in mind:

> Given its normative vocation and its amenability to characterisation
> pursuant to 'comparative pluralist approaches', federalism may be seen
> to offer a practical starting point for the analysis of the EU politics.[61]

Michael Burgess, in seeking to avoid the dichotomy between federation and confederation[62] prefers the term 'federality' to express the novelty and uniqueness of European integration, but he nonetheless concludes by saying that, 'The EU is already a federal polity in the extent to which its values, institutions, policies and procedures conform to an unprecedented interlacing of basic, federal and confederal principles'.[63]

It is important to remember when seeking to adopt a federal framework for the EU that the role of the member states in the Council is perhaps the most important position, because it ensures the appropriate type of representation within the EU. Considering this, therefore, if member states delegate or transfer their powers to a European Parliament, they are forsaking the federal model of representation in favour of a state-centric view of representation, where adequate representation must be

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[60] Robert Schutze, ,'On "Federal Ground"', 2009, op. cit, p. 29. See section 4 of this chapter of the thesis on the nature of the European legal order.

[61] Michael Longo, *Constitutionalising Europe,* op. cit. p. 29; for a more critical tone on the 'slippery' nature of the literature when applying the federalism framework to the study of the EU, see Philippe Schmitter, 'Is Euro-Federalism a Solution or a Problem? Tocqueville Inverted, Perverted or Subverted?' in Lynn Dobson and Andreas Follesdal (eds), *Political Theory and European Constitution*, London: Routledge, 2004, pp. 11–12.

[62] Michael Burgess, *Federalism and the EU: The Building of Europe, 1950–2000*, London: Routledge, 2000, p. 255.

[63] Burgess, Ibid., p. 270.

undertaken directly by individuals within the institutions. If this were to be the case, that could abolish the role of federalism which is to preserve member states' autonomy as irreducible polities that participate as units in the European integration process. This relates to the current debate in the literature about 'democratic deficit'[64] in the EU, which identifies the need to further democratic participation of member states in the light of the increasing role of EU bodies in the European integration process. The complexities of this debate are great, as Scott stresses:

> Although it need not be the case that democracy in the EU mirrors that of its member states, it must at least do a better job than present EU governance in terms of providing its citizens with opportunities to participate in its law-making.[65]

The idea of a 'democratic deficit' is based on the logic of representation of the modern territorial state, which completely disregards the logic of representation of federal political systems.[66]

In federal political systems – and the EU, it might be argued, is not an exception – representation is based primarily on the participation of the constituent units (member states) in the common institutions of the federal arrangement, given the need to preserve the sovereignty of states. The Treaty of Lisbon, by increasing the role of national Parliaments in the EU decision-making process, acknowledges in many ways the distinction between these two different logics of representation. The Treaty acknowledges the need to enhance national participation, not just through the Council where the executives of the member states are represented, but also through an

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[64] As a result of the centralisation of power in the EU which also relates to the legitimacy of the EU; on the democratic deficit debate see Simon Hix, *The Political System of the EU*, Hampshire: Palgrave Macmillan, 2005, pp. 177–80.

[65] Sinoaidh Douglas-Scott, *Constitutional Law of the EU*, Harlow: Longman, 2002, p. 521.

[66] As was noted in Chapter 3.5 of this thesis, representation in federal political systems should ensure the political participation of the units in the common institutions of the federal arrangement.

increased direct role of national Parliaments in the common European political process.[67]

Adopting federalism as a political theory to analyse European integration, refocuses understanding of how the different legal systems – European and national – are articulated in the EU, which – from the point of view of the author – is a federal arrangement according to its *genus*, but a confederation according to type,[68] although, as Wallace points out, this classification is in itself problematic:

> I do not intend to imply by the label 'confederation' that the current state of European cooperation is satisfactory or stable. In the adverse conditions of the last decade, it may, perhaps be a matter for modest satisfaction that the Community has survived, with so little damage to its basic structure. One can discern contradictory trends of integration or disintegration.[69]

Nonetheless, the rapid changes and the different transformations that the EU has undergone still pose challenging questions as to the nature of the European polity, but this does not mean that federalism is an inappropriate tool to use in order to analyse the Union. For some, like David Mitrany, federalism could not capture the totality of

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[67] See this chapter, 4.2 for the Treaty of Lisbon, particularly the new Protocol on Subsidiarity and Proportionality.

[68] To use Elazar's term: 'post-modern confederation'. See Daniel Elazar, 'The United States and the EU,' in *The Federal Vision*, 2001, op. cit., p. 48, and against this view, Robert Schutze, who argued in favour of federalism, seeing it as a better approach to the study of the EU and who described the EU as a 'federation of states': Robert Schutze, 'On "Federal Ground",' op. cit., p. 1102. Although Schutze's approach in using federalism to study the EU is largely compatible with the view held by the author of this thesis it is not possible, however, to follow his conclusion that the EU is a federation. This is for reasons that are discussed in the subsection to this chapter on constitutionalism, and also because this assertion mischaracterises the nature and diversity of federal political systems, which encompass states and unions of states, as noted in Chapter 2 of this thesis.

[69] William Wallace, 'Europe as a Confederation: The Community and the Nation-State,' *Journal of Common Market Studies*, vol. 20, 1982, p. 63.

the European experience, and as such, 'it is plain that European federalism has been a blend of myth and some very mixed sentiments'.[70] However, these early authors writing about the European Community, understood federalism in the sense of the American federal experiences, which they reduced to a notion of 'a federation', thus committing the reductionist fallacy. Part of the problem was related to the post-war projects in Europe, which proposed the creation of a European federation.[71] This distinction has been pointed out in both the legal and the political literature[72] as noted by Burgess:

> The federal idea is also an organising concept that is essentially anti-absolutist, anti-centralist, its watchwords being autonomy, solidarity, pluralism, citizenship, and a subsidiarity that has implications for the building up of a union from the bottom upwards rather than a hierarchical top down approach.[73]

What is proposed in this thesis is a theory of federalism within the Althusian tradition, in which member-states decide to participate in the European integration process voluntarily, and participate in European integration as individual units. This means preservation of their sphere of action – or sovereignty – and, in particular, it means that European integration does not abolish sovereign statehood.

As will be seen in subsequent sections, the nature of the legal order in the EU does not warrant an interpretation of the EU as a sovereign state, or indeed, as an international organisation. The limitations of other theories of integration rest in the fact that they offer a limited explanation of the concept of sovereignty in the context of the EU.

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[70] David Mitrany, 'The Prospect of Integration,' op. cit., p. 135.

[71] This was the Schuman plan, see the Schuman Declaration. The view that these proto-European plans have 'stained' debates on federalism by reducing federalism to a federation is also found in Robert Schutze, 'On "Federal Ground",' op. cit.

[72] See the distinction inaugurated by Preston King and Daniel Elazar between federation and federalism, and the distinctions between the two concepts presented in Chapter 3 of this thesis.

[73] Michael Burgess, *Federalism and the EU*, op. cit. p. 30; Antje Wiener and Thomas Diez, *European Integration Theory*, Oxford: Oxford, University Press, 2004.

Liberal Intergovernmentalism as a theory of integration is not consistent with the autonomy of the different bodies in the institutional processes in the EU, particularly with regard to the role played by the ECJ in developing EU Law. It also has limited explanatory power in explaining the federal features of the European legal order, because for intergovernmentalism to be plausible, one would expect to find a legal system based on rules of Public International Law, and a larger role for the political process in the EU, in which member states are the primary actors. As will be discussed, this is not the case. A problem with the integrationist-theory approach rests in the fact that it is deeply state-centric, and in being so, it risks committing a category error by equating the EU with a 'classic international organisation'. As Weiler asserts, 'The Union, it is generally accepted, is not a state. The result is a description of oranges with a botanical vocabulary developed for apples.'[74]

A comparative institutional analysis is necessary, therefore, to assess the role of the judicial process in the construction of the European Community – now the EU –[75] and to look at the role played by different actors in the transnational political process which led to the development of the European political and legal order.

4. The Nature of the European Legal Order

The European legal order as an autonomous legal system distinct from Public International Law, was the creation of the different actors in the European judicial process (national supreme courts, private litigants and member states), led by the ECJ.

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[74] Joseph H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge: Cambridge University Press, 1999, p. 268.

[75] For a discussion on the limitations of Liberal Intergovernmentalism, particularly the narrow focus on Treaty negotiations and issues of unanimity as inaugurated by Moravcsik, see Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power, from Messina to Maastricht*, Ithaca: Cornell University Press, 1998; see also Frank Schimmelfennig, 'Liberal Intergovernmentalism,' in Antje Wiener and Thomas Diez, *European Integration Theory*, op. cit., p. 81.

More importantly, the European legal system did not serve the interests of member states only, but those of all the different actors involved.[76]

To explain the role and importance of the Court and the judicial process in European integration, particularly in developing and 'constitutionalising' a supranational legal framework, there is no one better than Stein to paint the picture:

> Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.[77]

The 'constitutionalization' of the Treaties was the result of a process in which the ECJ interpreted the Treaties, not as mere international legal instruments in the light of the Vienna Convention of Law of Treaties, but as the constitutional charter of the member states and the peoples of Europe; a virtual '*demos*'. This interpretation led the Court to establish the doctrine of 'direct effect'[78] in which the Court determined that the application of Community Law would be done by reference to EC institutions, particularly the Court, and not by domestic political institutions of member states

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[76] Alec Stone Sweet, 'The European Court and Integration,' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics and Judicialization*, Oxford: Oxford University Press, 2002, p. 280.

[77] Eric Stein, 'Lawyers, Judges and the Making of the Transnational Constitution,' *American Journal of International Law*, vol. 75, No. 1, 1981, p. 1; see also the discussion by Joseph Weiler, *The Constitution of Europe*, op. cit. p. 225.

[78] The doctrine of direct effect refers to the direct applicability of community norms in the sphere of private litigants and not just member states. Another important corollary is that European Law status is a matter for the ECJ to decide, *Van Gend en Loos v. Nederlandse Administratie Belastingen, ECJ case 26/62, (1963) ECR 1, CMLR 105*. In commenting on the importance of the 'direct effect' doctrine, Arnull stresses: 'The fact that direct effect is nowadays taken for granted, even its very usefulness questioned, is testimony to the sureness of the Court's touch in the early 1960s: the vision and courage which lay behind that crucial first step should not pass unnoticed'. Anthony Arnull, *The European Union and its Court of Justice*, Oxford: Oxford University Press, 2006, p. 168.

themselves including national courts, and that the application would create legal rights for individuals.

As Alec Stone Sweet argues:

> Beyond the founding of the EC itself, the single most important institutional innovation in the history of European integration has been the constitutionalization of the Treaty of Rome. The ECJ, in complicity with the national judges and private litigants, constructed the legal system on the basis of a sustained commitment to making EC law effective within national legal orders.[79]

The process of constitutionalization took place within the first Pillar under the edifice of the Common Market, and it was directly connected to the creation of the most important principles of European Law: the doctrine of Supremacy and Direct Effect, as Shapiro argues:

> Surely everyone assumed that the Court would consider the Treaties as supreme, that is overruling conflicting acts of the Member States. That is what Treaties are for. The Court's great bootstrapping operation was, of course, its case law creating direct effect so that the Treaties and the secondary laws made under them came to have the kind of supremacy that occurs in federal, constitutional states rather than international organisations operating under international law. And, as everyone

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[79] Alec Stone Sweet, *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004, p. 19. It is also important to point out that the 'constitutionalization' of the Treaties is a different process from 'institutionalisation' because the former implies a claim to higher law in the European legal system. Thus it relates to the process of constitutionalism beyond the state, as will be discussed below in the section on constitutionalism. On 'institutionalisation' see J. L. Goldstein et. al., 'Introduction: Legalization and World Politics,' *International Organization*, vol. 54, No. 3, 2000, pp. 378–79.

knows, this shift in the meaning of supremacy was greatly magnified by the flourishing of the Article 177 reference system.[80]

4.1. The ECJ and the National Supreme and Constitutional Courts

The European legal system developed by the ECJ is of a different nature to Public International Law. Its sphere of application is, however, similar to the framework found in federal political systems, particularly considering the direct effect and supremacy of EU law, which begs the question, which Court is the ultimate umpire in disputes over European Law, the European Court or the national Constitutional Courts? This 'decisive question'[81] relates to the issue of articulation of national legal orders within the European legal order. The reason this question arises at all is that, historically, member states were willing to accept the authority of ECJ and the role of the national courts and governments in accepting this new legal order, which participating in the interpretation and application of European Law, was also very instrumental. It is in this way that the roles of both the ECJ and national courts should be understood as a dialogue, whereby national courts request the ECJ, through the preliminary ruling system, a ruling on the proper interpretation of European Law, as Maduro points out:

> A further important element in securing the legitimacy and authority of both the European Court of Justice and EC law was co-operation with national courts. This was also enhanced by the individual rights flowing from the European Economic Constitution (notably free movement rules). The role played by national courts in requesting rulings from the

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[80] Martin Shapiro, 'The European Court of Justice,' in Paul Craig and Grainne de Burca, *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 330. Article 177 (now Article 234) refers to the Preliminary Ruling System in which national courts may refer a case to the ECJ where an interpretation of European Law might be under dispute. See L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, London: Sweet & Maxwell, 2000.

[81] Theodor Schilling, 'The Autonomy of the Community Legal Order – An Analysis of Possible Foundations,' *Harvard International Law Journal*, vol. 37, 1996, p. 404.

ECJ and in applying these rulings provided ECJ decisions with the same authority of national court decisions and gave these decisions added values of both neutrality and of legitimacy in being sanctioned by a court of the State against which the judgement had gone.[82]

First, in order to explore the relationship between the different legal orders at the European level, it is necessary to point out the uniqueness of the European legal order and to distinguish it from Public International Law. Second, it is necessary to understand the limitations of traditional answers, monism and dualism,[83] and to discuss the notion of constitutional pluralism[84] as a plausible alternative in the comprehension of EU Law, as Weiler argues:

> The constitutional discourse in Europe must be conceived as a conversation of many actors in a constitutional interpretive community, rather than a hierarchical structure with the ECJ at the top. [85]

The European legal order, considering the different principles of European Law and its direct applicability by member states, is akin to those found in federal states.[86]

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[82] Miguel Poiares Maduro, *We The Court: The European Court of Justice and European Economic Constitution*, Oxford: Hart Publishing, 1998, p. 9.

[83] On monism and dualism as theories by which to understand the nature of the relationship between domestic legal systems and International Law, see Ian Brownlie, *Principles of Public International Law*, Oxford: Oxford University Press, 2003, pp. 31–34; Antonio Cassese, *International Law*, Oxford: Oxford University Press, 2005, pp. 213–37.

[84] On Constitutional Pluralism see Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999, pp. 97–121. On Maduro's version of constitutional pluralism, see Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action,' in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003. See also Evgeni Tanchev, 'Supremacy of Constitutions in the Context of Constitutional Pluralism,' in Jaap W. Zwaan (ed.) et. al., *The EU, an Ongoing Process of Integration: Liber Amicorum; Alfred E. Kellermann*, The Hague: TMC Asser Press, 2004.

[85] Joseph H. Weiler, *The Constitution of Europe*, op. cit. p. 322.

The process of development of European law led by the ECJ did not occur without obstacles or opposition. A proper understanding of the European legal order, therefore, needs to address the ongoing dialogue between the ECJ and the different national Constitutional and Supreme courts. This is especially relevant to the current discussion about the concept of sovereignty and the limits and nature of the European legal order. Particularly important in this regard is the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*) on European integration.[87] The principle of Supremacy of European Law[88] means that national courts have a duty to abstain from applying national legal rules that are inconsistent with European Law. The question here, therefore, relates to the discussion about who has ultimate authority in a given legal system to interpret the rules or the problems of *Kompetenz-Kompetenz*.

This discussion assumes particular relevance because of the changes introduced after the Maastricht Treaty. Until then, European integration was viewed widely as essentially negative, focused mainly on the build-up to the Common Market, through the removal of the barriers and obstacles to trade, and to enforce the four freedoms.[89]

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[86] On the federal framework of European Law, see Joseph H. Weiler, 'Federalism Without Constitutionalism', op. cit.

[87] The German Federal Constitutional Court (hereinafter FCC) decisions have been identified in the literature as the most relevant because of the importance of Germany in the European integration process, and also because of the substantive issues raised, which the ECJ took as relevant, particularly in the area of fundamental rights.

[88] *Flaminio Costa v ENEL, Case 6/64, 1964, ECJ.* The ECJ also upheld the supremacy of secondary community Law, even over national constitutional norms *Internationale Handelsgesellschaft, Case 11/70, 1970, ECJ.* The ECJ also held that domestic legislation would be rendered inapplicable if in conflict with Community Law, and stated that national courts and national authorities, in general, were under a duty to set aside conflicting domestic rules that might impair the full application of European Law, *Amministrazione delle Finanze dello Stato v. Simmenthal S. p.A. Case 106/77, ECJ.*

[89] The protection of the four freedoms (goods, capital, persons and services) even after the Treaty of Lisbon, are still at the core of European integration and the protection of a Common Market. See K. J. M. Mortelmans, 'The Functioning of the Internal Market,' in C.W.A.

The Maastricht Treaty in 1992 marked a new era in European integration, through the creation of the EU and the expansion of its competences.[90] It is in this context that the debate about the concept of sovereignty in a supranational organisation with an expanded mandate and powers takes place.

4.2. *Kompetenz-Kompetenz*[91]

This discussion has led to the famous *Solange* decisions[92] by the FCC which decided that the core of fundamental rights guaranteed by the German Constitution (the Basic

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Timmermans, 'The Genesis and Development of the European Communities and the European Union' in *The Law of the European Communities*, op. cit., pp. 575–78.

[90] On the changes and innovations brought about after Maastricht, particularly the creation of the EU, see Martin J. Dedman, *The Origins and Development*, op. cit., pp. 93–129; Michael J. Baun, *An Imperfect Union: The Maastricht Treaty and the New Politics of European Integration*, Oxford: Westview Press, 1996; Andrew Duff, John Pinder and Roy Pryce (eds), *Maastrichtt and Beyond*, London: Routledge, 1994.

[91] 'Competences of Competences', the German term is salient because of its importance in the literature, and because of the objections of the German Federal Constitutional Court on the ability to determine its own competences. In the context of the current discussion, this might refer to the debates about who has the power to decide on the interpretation of the powers of the EU, and also, to the most fundamental question of all: who has the power to decide on its own powers. See Gunnar Beck, 'The Problem of *Kompetenz-Kompetenz*: A Conflict Between Right and Right in Which There is No Praetor,' *European Law Review*, vol. 30, No. 1, 2005.

[92] *Solange* I (BverGE 37, 271, 1974) at:

http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588 [Accessed 16.12.2010]; and *Solange* II: (BverGE 73, 339, 1986)

http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572 [Accessed 16.12.2010]. For a discussion of both decisions in the context of German Constitutional Law see Anne Peters, 'The Bananas Decision (2000) of the German Federal Constitutional Court: Towards Reconciliation with the European Court of Justice as Regards Fundamental Rights Protection in Europe,' *German Yearbook of International Law*, vol. 43, 2000.

Law or '*Grundgesetez*') must not be abrogated by Community Law.[93] These decisions are related to two explicit exceptions placed by the German Court on the principle of supremacy of European Law: the protection of fundamental rights, the other exception being acts of the Union that might be *ultra vires*;[94] where the German Court declares the power to review acts of the Union that might violate the principle of attribution of competences or principle of conferral in the Treaties, as Chalmers argues:

> The principle of conferred powers expresses two complementary ideals. One is that of limited government: the EU is to operate only in specific, confined fields. It has no general law-making power. The other is derived government: the EU has only such powers as are assigned to it by the Treaties.[95]

In the famous decision of *Maastricht-Urteil*[96] the FCC declared that the EU was composed of an 'association of sovereign states' (*Staatenverbund*). That decision conflicted with the ECJ interpretation, however, which held the view that only

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[93] On the role that the *Solange* decisions had in actually strengthening the protection for fundamental rights in Europe see Steve J. Boom, 'The EU after the Maastricht Decision: Will Germany be the Virginia of Europe?' T*he American Journal for Comparative Law*, vol. 43, No. 2, 1995, p. 181.

[94] For a discussion of these two exceptions in German Constitutional Doctrine see Hans-Peter Holz, 'The Approach to European Law in German Legal Doctrine,' in Peter-Christian Muller-Graff and Erling Selvig (eds), *The Approach to European Law*, Berlin: BWW, 2004; on the concept *of ultra vires* and its definition see Paul Craig, *Administrative Law*, London: Sweet & Maxwell, 2008, pp. 5–18.

[95] Damian Chalmers, et. al., *European Union Law*, Cambridge: Cambridge University Press, 2006, p. 211.

[96] *Manfred Brunner and Others v The EU Treaty (Cases 2 BvR 2134/92 & 2159/92),* available at *Common Market Law Reports* 1994, vol. I. The Maastricht Treaty also created the need for a Constitutional amendment in Germany, for a discussion of the decision of the Court in the context of Germany's Constitution, see Sabine Michalowski and Lorna Woods, *German Constitutional Law*, Aldershot: Ashgate, 1999, pp. 63–66.

Community Courts (ECJ) had the competence to review the legality of acts of the Community.[97]

In discussing the legacy of the Maastricht decision, Cruz observed: 'We have seen that the Maastricht-Urteil is not part of legal history: it is well alive'.[98] The grounding of the discussion by the German Federal Constitutional Court somehow determined the context of the debates that followed in other constitutional Courts.[99] It is for these reasons that the concerns of the FCC are taken as the most salient case to express some of the issues that the various Constitutional and Supreme Courts of the nation states deemed relevant to include in a discussion on the process of European integration.

The challenges of the different national courts are not based – in the view of the author – on a simplistic representation of an old view of 'state's sovereignty' by the national Constitutional Courts, and a 'modern' supranational view of the ECJ as a result of European integration. Rather, it demonstrates the problems of the European constitutional order, its limits, and the problems associated with building new legal arrangements beyond the modern territorial state. In summary, the Maastricht decision could be seen evidence of the FCC's concern to be part of the debate on sovereignty in a multilevel polity, as Kirchoff agues:

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[97] *Case 314/85 Foto-Frost, ECR, 1987, ECJ.*

[98] Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist movement,' European University Working Paper, Robert Schuman Centre for Advanced Studies, 2007/13, p. 23.

[99] On the Italian Constitutional Court decision of reserving the ultimate word, the so called "Frontini reservation" 1974 2 CMLR, 372 concerning Maastricht, see Marta Catarbia, 'The Legacy of Sovereignty in the Italian Constitutional Debate,' in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003. On the Danish Supreme Court concerning Maastricht, Sten Harck and Henrik Palmer Olsen, *American Journal of International Law*, vol. 93, No. 1, 1999, pp. 209–14. On the Judgement of the Spanish Constitutional Court regarding the project of the European Constitution, see CMLR, 2005, 1, pp. 981–1019. On the Polish Constitutional Court regarding the Polish accession to the EU, see Chalmers, et. al., op. cit., 2006, pp. 199–201.

Were the entire power to decide disputes allotted to the European Community, then one basic condition of legal dispute resolution would be absent from the outset: equality of legal armaments among parties to the conflict.[100]

In the EU, if the old notion of sovereignty is 'dead', no one announced the death of the sovereignty of the state as a unitary actor in International Law. Furthermore, federalism, according to the author of this thesis, in following the Althusian tradition, and rejecting the identification of federalism with the particular federal-type known as 'a federation',[101] offers a superior explanation as to the nature of the transference of powers to the EU; the sharing of the 'atom' of sovereignty in limited areas, and the counter-claim by member states of keeping sovereignty for themselves, defined as the ultimate authority. Considering the diversity of federal political systems, the claim that sovereignty still resides with the member states, does not contradict the view that sovereignty can reside also in the common federal political system, which is closer to the type known as a confederation.

Here, the model of state-centrality in ascertaining the contours of sovereignty is rejected, but this should not lead to a replacement of the state and its claim to sovereignty by the supranational or federal political system. It is important to emphasise, therefore, that these claims are not incompatible; that in any case, the sovereign status of the EU is based historically and factually on the transfer of powers by member states. Thus, assuming that the modern territorial state is where the plenitude of powers rest (*plena potestas*), sovereignty should be seen as a concept that can be applicable beyond the state; to a plural governance system that includes different polities sharing and articulating in a constructive relationship, maintaining their own sphere of power, and with consideration for their individual claims to authority.

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[100] Paul Kirchoff, 'The Balance of Powers Between National and European Institutions,' *European Law Journal*, vol. 5, No. 3, 1999, p. 232.

[101] A federation is still a sovereign state and not a union of states, on the 'federation' proposals for Europe after the war see Chapter 3.5.2 of this thesis.

It is difficult, however, to see this working in the case of the EU, which is based on a European *demos* rather than the multiple *demoi*,[102] because European integration has not yet reached the stage of a single European *demos* based on a civic ideal. [103]

Highlighting these decisions has been an important exercise, particularly to illustrate that the ECJ has been assertive in ensuring that the development and application of the rules of the Treaties were not written in stone, and that, therefore, they found resistance in the national courts of the member states. The Constitutional Court in Germany is one example of that resistance, which was grounded not only in national assertiveness, but should be seen as a dialogue that has been taking place since the beginning of the European integration process, and which will certainly continue. The discussions will include the 'borders' of the European legal framework, its competences against those of the member states, and ultimately, an analysis of the nature of sovereignty in the Union.

The sphere of Community powers was determined and discussed by the ECJ in the *Casagrande* case[104] where the ECJ held the view that Community competences should

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[102] Different peoples of Europe sharing together in a common polity – the EU – but primarily through their own states; against this view is Weiler, who argues that people can be part of different *demoi* as well as a single European one based on a civic ideal. See Joseph H. Weiler, 'Does Europe Needs a Constitution? Demos, Telos and the German Maastricht Decision,' *European Law Journal*, vol. 1, No. 3, 1995. See also Habermas's notion of 'constitutional patriotism' and how it could be applicable to Europe, Jurgen Habermas, *The Postnational Constellation*, Cambridge: Polity Press, 2004, p. 74. For an argument about the impossibility of a constitutional patriotism, see Mattias Kumm, 'Why Europeans Will not Embrace Constitutional Patriotism,' *International Journal of Constitutional Law*, vol. 6, No. 1, 2008. On analogies between European identity and American federalism see Paul Magnette and Justine Lacroix, 'EU Constitutionalism and the 'American Experience,' in Grainne de Burca and Joanne Scott, *Law and New Governance in the EU and the US*, Oxford: Hart Publishing, 2006.

[103] This was the argument of the German FCC in its decision regarding the Maastricht Treaty and the Lisbon Treaty.

[104] *Case 9/74, Casagrande, ECR, 1974*. See also Joseph H. Weiler, 'The Transformation of Europe,' op. cit. 1991, pp. 2403–483.

be seen autonomously without any reference to member states, and that the remaining powers of member states must be exercised against the framework of Community Law. It is this interpretation of Community powers that led the FCC to re-evaluate EU Law and its scope, particularly concerning *ultra vires* acts. The debate about the EU and its legal framework also reflects a wider discussion relating to two different conceptions of sovereignty in German legal scholarship, these in turn relate to two distinct legal traditions in Germany as well,[105] and, as Murkens reminds us: 'The relationship between national and European law can be analysed from two diametrically opposed standpoints: one rooted in the tradition of the state, and the other on the tradition of the constitution'.[106]

The line of reasoning in the decisions of the FCC, particularly in the Maastricht decision, do emphasise the notion that only the 'Nation-state' or modern territorial state can have a Constitution, and that non-state entities such as the EU – because they do not have a *demos* or nation – is not a state, and that, therefore, there is no constituent process[107] at the European level, and that being so, the conclusion will be that the locus of sovereignty still resides at the national level. Furthermore, the limited attribution of sovereign rights results from the fact that the European peoples at the

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[105] For the distinction between *Staatsrecht* (State Law) and its state centrality, and the *Verfassungsrecht* (Constitutional Law) and its centrality to the Constitution, see Jo Eric Khushal Murkens, 'The Future of Staatsrecht: Dominance, Demise or Demystification?' *Modern Law Review*, vol. 70, No. 5, 2007, pp. 731–58; similarly, Miriam Aziz, 'Sovereignty Uber Alles,' in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, pp. 279–304.

[106] Murkens, op.cit. p. 740.

[107] On the constituent process, of particular relevance is the distinction between constituent power and constituted power. *Pouvoir constituant*, or constitutive power, is the foundational moment of a Constitution, the constitutional act by the people (*demos*) of the creation of a new constitutional legal order, and *pouvoir constitue* as the power established under the constitutional order that was created. This distinction first appeared in the work of the Abbé Sieyès, 'What is the Third Estate?' ('Qu'est-ce que le tiers état?') in the context of the French Revolution. See Lucien Jaume, 'Constituent Power in France: The French Revolution and its Consequences,' in Martin Loughlin and Neil Walker, *The Paradox of the Constitutionalism*, Oxford: Oxford University Press, 2007, p. 69.

national level have voluntarily decided to create a supranational organisation, which is not a state or a federation, but an association of states (*Staatenverbund*):

> The Union Treaty establishes – as mentioned – an association of states for the realization of an ever closer union of the peoples of Europe (organised in the form of states), not a state based on a European people.[108]

It is in the light of the modern territorial state that the decision of the German Constitutional Court should be understood. However, this must not misdirect one to the wrong conclusion of seeing the objections of the German Court as part of the archaeology of an 'old' conception of sovereignty vested in the territorial state. In Germany, as a result of its history and the different manifestations of federalism, the concept of sovereignty is not understood in the Bodinian sense, but in the plural one, just as Althusius proposed. Therefore, the German Court in its Maastricht decision was not making a normative claim as to how sovereignty should be understood, but a positive one as well. The Court saw that in the present state of European integration,[109] sovereignty still resided with the member states originally, and thus it called the member states the 'masters of the treaties'. Nevertheless, here the author of this thesis is in slight disagreement, because a key characteristic of European integration, since its beginning, was the limitation of sovereignty and the transfer of limited powers to the European Community. This was stated in several decisions of the ECJ, although these transfers were based on the principle of limited attribution of competences or conferred powers.[110]

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[108] *Manfred Brunner and Other vs EU Treaty,* Para. 51, see also Boom, op. cit., p. 208. The notion that member states are also the masters of the treaties was also expressed in the Kloppenburg decision, ibid., p, 209.

[109] The decision was post-Maastricht Treaty of 1992; The Judgement was in 1993.

[110] On the Principle of attribution or speciality of powers (or conferral) in International Law for international organisations, see Malcolm N. Shaw, *International Law*, Cambridge: Cambridge University Press, 2003, p. 1195. On problems related to the contestation of sovereignty as a result of conferral of powers to international organisations, see Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005, pp. 3–17.

However, the decision of the FCC must be understood in the context of the constitutional principle that unites a state to a particular constitutional order as well, which means that in the absence of a European constitutional order replacing that of the states, no permanent sovereignty could be transferred without eliminating the sovereign statehood of Germany.

In the view of the author, this interpretation is still consistent with federalism as an organising principle, although one would differ as to whom holds the power to decide on issues about European Law. The solution proposed in the Maastricht decision, that the national courts have the power to decide on issues about EU Law without reference to the case law of the ECJ, would be inconsistent with the need for uniform application of European Law, as it was argued by the ECJ in the *Foto Frost* decision,[111] and this would necessarily involve a different interpretation, because in International Law, courts and tribunals are the judges of their own competences.[112]

Notwithstanding, this means that the ECJ has the power only to determine its own jurisdiction on the basis of the limited attributions or ends in the Treaties, hence, the ECJ has the power only to determine the competences, or powers attributed to them, by the international treaties and not to go beyond its 'delegated powers', as these are bound by the principle of conferral.[113] This means that states alone have a general unlimited power to determine their own sphere of competences, or the power to determine their own powers, as the German Federal Constitutional Court acknowledged:

> The exercise of sovereign power through an association of sovereign
> states like the EU based on authorisations from States which remain

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[111] *Foto Frost, Case 314/85 (22 October 1987), ECJ.*

[112] The issue of *Kompetenz-Kompetenz* is the power of the Court to determine its own jurisdiction, as Shaw, referring to the ICJ states: 'The Court has underlined that the question as to the establishment of jurisdiction is a matter for the Court itself', Malcolm N. Shaw, op. cit, p. 969.

[113] See also Dan Sarooshi, op. cit.

sovereign and which in international matters generally act through their governments and control the integration process thereby. It is therefore primarily determined governmentally. If such a community power is to rest on the political will-formation which is supplied by the People of each individual State, and is to that extent democratic, presupposes that the powers is exercised by a body made up of representatives sent by the member-States' governments, which in their turn are subject to democratic control.[114]

This understanding is not entirely based on a classic conception of sovereignty and state. The tradition of federalism proposed here is one that preserves states' sovereignty, and recognises the multilevel constitutionalism within the EU, by virtue of the principle of conferral. Hence the logical conclusion will be that:

The Federal Republic of Germany, therefore even after the Union Treaty comes into force, will remain a member of an association of sovereign states, the common authority of which is derived from the member-states and can only have binding effects within the German sovereign sphere by virtue of the German instruction that its law be applied. Germany is one of the 'masters of the Treaties' which have established their adherence to the Union Treaty concluded 'for an unlimited period' with the intention of long-term membership, but could also ultimately revoke that adherence by a contrary act.[115]

In order to understand the challenges facing national courts with regard to European integration, the discussion will now focus on the recent Lisbon decision of the FCC which, like Maastricht, is an archetype of the discussions around the concept of sovereignty in a post-national arrangement beyond the state.

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[114] FCC, Maastricht Decision, Para. 46.

[115] FCC, Maastricht Decision, Para. 55.

4.3. The Lisbon Decision of the German Federal Constitutional Court

The Maastricht decision still resonates today, as mentioned by Cruz, and which was expressed in the recent decision[116] of the FCC regarding the German ratification of the Treaty of Lisbon.[117]

The German Court restates some of the concerns expressed in the Maastricht decision, and adds important considerations about the role of the member states in the build-up of a European political Union, retracing the history of European integration in light of German Constitutional Principles. The FCC dissects and discusses at some length the concept of sovereignty for member states (in this case Germany), and its meaning in the context of the European post-national multilevel system.

The objections of the German Court to European integration, as already stated, represents the archetype of the objections posed by the different High, national courts, which is why a discussion of its merits is warranted, particularly considering the changes introduced by the Treaty of Lisbon.[118] The decision is not in itself an

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[116] The constitutional compliant was brought by the Parliamentary Group *Die Linke*, but the literature refers to it as the Lisbon decision (because it reviews the Lisbon Treaty in light of the German Constitution) to contrast with the FCC's previous decision on the Maastricht Treaty.

[117] The decision, unusually, was also published in English (unofficial translation) on the site of the German Federal Constitutional Court, 2 Be 2/08 of 30.06.2009. http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html [Accessed 20.12.2010]. For a more descriptive analysis of the decision see 'Editorial Comments,' *Common Market Law Review*, vol. 46, 2009, pp. 1023–33.

[118] On the importance of the FCC for 'judicial cross-fertilisation' on other national courts in Europe, but also the German constitutional specificity, see Philipp Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures,' *German Law Journal*, vol. 10, 2009, p. 1292; on the importance of the FCC for Germany's Constitutional Justice, see Donald P. Kommers, 'Germany: Balancing Rights and Duties,' in Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study*, Oxford: Oxford University Press, 2006. Chalmers calls the decision 'a powerful indictment of the European Union,' Damien Chalmers, et. al., op. cit., 2010, p. 46.

endorsement of a pro-integration bias or a Euro-sceptic one, but rather, a reading consistent with a proper interpretation of German Basic Law. It is in this sense that the concept of sovereignty needs to be understood. The argument proceeds in several stages:

First, the German Court reiterates the view that it will not exercise its jurisdiction, concerning the impact of secondary EU Law with regard to human rights, as long as the EU 'guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law'.[119]

Second, the German Court, in discussing the constitutional principle of constitutional identity, points out that the constituent power of the German people 'set an insurmountable boundary to any future political development … the so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood but guarantees it'.[120] For this reason, the Court concludes: 'In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this'.[121]

Third, and of particular importance in this context, is the discussion of the German Court regarding the concept of sovereignty – as a statehood attribute – in the context of the German constitution: 'openness to International Law and European Law'[122] and its voluntary participation in the international community by binding the state to those specific commitments, as the Court states: 'The Basic Law calls for the participation of Germany in international organisations, an order of mutual peaceful balancing of

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[119] German Federal Constitutional Court, idem., Para. 191.

[120] Ibid., Para. 216.

[121] Ibid, Para. 218.

[122] This, too, found parallel with the Maastricht decision.

interests established between the states and organised co-existence in Europe'.[123] The Court therefore asserts sovereignty as a concept deprived of its absolute character by stating that 'This understanding of sovereignty becomes visible in the objectives laid down in the Preamble. The Basic Law abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as 'freedom that is organised by international law and committed to it'.[124]

Fourth, the Court reasserts that the EU is still an association of sovereign states, and for this reason, it is still bound by the principle of conferral; by the competences explicitly attributed by the Treaty, and in that sense, it recovers the language used in the Maastricht judgement by saying:

> The Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.[125]

This is particularly the case with the new Treaty of Lisbon that explicitly establishes the right of withdrawal (Article 50 of the Treaty of the EU) of the Union by the member states, and which is why the EU cannot be regarded as a state. The right of withdrawal, therefore, must be understood as 'merely the withdrawal from a

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[123] Ibid., Decision on the Lisbon Treaty, Para. 222.

[124] Idem., Para. 223. This point is emphasised by Frank Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon,' *German Law Journal*, vol. 10, No. 8, 2009, p. 1224.

[125] Ibid., Para. 229.

Staatenverbund which is founded on the principle of reversible self-commitment'.[126]
This is an important point, illustrating that the reasoning of the Court takes the view
that the nature of the polity is based on the principle of association or political
partnership, which in the view of the current thesis, is central to its understanding of
the federal principle. The Court also emphasises the limitations of a Union based on
the principle of conferral and its inability to give itself powers beyond those of the
Treaty.[127] This relates to the notion that states are still the 'master of the Treaties'[128]
as in the Maastricht decision.

Finally, the Court discussed the problems associated with the acts of the Union which
might be *ultra vires*; acts that went beyond the powers explicitly attributed in the
Treaties, and looked at how this related to the German Constitution. Here the Court
denied the EU an unlimited sphere of competences – or *Kompetenz-Kompetenz* –
because it was still bound by the principle of conferral of powers in the EU, and
asserted that:

> The Basic Law does not authorise the German state bodies to transfer
> sovereign powers in such a way that their exercise can independently
> establish other competences for the European Union. It prohibits the
> transfer of competence to decide on its own competence (*Kompetenz-
> Kompetenz*)'.[129]

Considering this limitation, which, similarly, formed part of the Maastricht decision,
and assumes an ultimate right of judicial review of *ultra vires* acts of the EU, 'where
Community and Union institution transgresses the boundaries of their

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[126] Ibid., Para, 234. It is true that national states can provide for the right of secession as it was
recognised in the case of Canada by the Canadian Supreme Court; see discussion in Chapter
3.

[127] This does not mean that the EU does not possess implied powers; the principle of conferral
does not limit the possibility of implied powers. See Carl Lebeck, 'Implied Powers beyond
Functional Integration,' *Journal of Transnational Issues*, vol. 17, 2008.

[128] Ibid., Para. 231.

[129] Ibid., Para. 233.

competences',[130] but only if there is no protection afforded at the Union level; hence it is a subsidiary level of protection to which the Court refers in this regard; the 'principle of loyal cooperation' with EU bodies. In addition, the Court opens up the review on the constitutional identity of the German Basic Law, basing its reasoning on the notion that the identity review 'ensures that the primacy of the application of Union Law only applies by virtue of, and in the context of, the constitutional empowerment that continues in effect'.[131]

It is easy for some to dismiss these arguments as mere parochialisms and forget the limits of European integration. The Court – perhaps responding to its critics [132] also defined sovereignty as a relative concept, claiming that the 'state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community'.[133] This does not mean, however, that sovereignty is an entirely dispositive concept, as there are irreducible aspects of sovereignty which cannot be changed. This is not the result of an outdated view of sovereignty, but one borne out of the sovereign statehood of the territorial state,

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[130] Ibid., Para. 240.

[131] Ibid., Para. 240.

[132] Joseph Weiler called the earlier Maastricht decision an 'embarrassment' and 'pathetic'. See 'Does Europe Needs a Constitution?' op. cit., 1995. For a more nuanced view see Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now,' *European Law Journal*, vol. 1, No. 3, 1995. For criticism about the Lisbon decision in a similar tone to Weiler, see Alfred Grosser, 'The Federal Constitutional Court's Lisbon Case: Germany's "*Sonderweg*" – An Outsider's Perspective,' *German Law Journal*, vol. 10, No. 8, 2009, pp. 1263–266; similarly, Christoph Schonberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea,' *German Law Journal*, vol. 10, No. 8, 2009, pp. 1201–218. Against which, see Frank Schorkopf, 'The EU, as an Association', 2009, op. cit., pp. 1219–240, and also, Philipp Kiiver, 'German Participation in EU Decision-Making', 2009, op. cit., pp. 1287–296.

[133] Ibid, Lisbon decision of the FCC, Para. 229. The German Court rejected the Bodinian idea of unlimited sovereignty and the notion that the 'State is the actuality of the ethical idea', found in Friedrich Hegel (trans. T. M. Knox), *Outlines of the Philosophy of Right*, Oxford: Oxford University Press (first published in 1821), 2008, p. 228. On this 'reification' of the State in legal theory derived from Hegel and its influence, see Shlomo Avineri, *Hegel's Theory of the Modern State*, Cambridge: Cambridge University Press, 1972, pp. 176–84.

because the European integration process is not based on the unification of states into a 'super-state'. It follows therefore that the EU is not a federation, because member states still remain unitary actors under International Law, although they are bound by the commitments of a federal political system in which sovereignty is jointly shared.

States accept the principle of supremacy of European Law although their participation in the European constitutional project is multi-layered and remains based on their participation as units in the common institutions of the EU.

This does not mean that sovereignty has been abolished. It means simply that it has been reframed within new terms, using a new vocabulary, based on a federal partnership between states and the EU. In the American federal experiences this meant the notion of 'dual sovereignty', but in the EU, it would imply an understanding of sovereignty in the context of a plural governance system based on different legal orders; a notion of shared sovereignty within the Althusian tradition. And this is why the institutional dialogue between the ECJ and national Courts is so relevant – to ascertain the limits of the boundary between the two legal orders – national and European.

The *Tobacco Decision*[134] illustrates some of these issues. It is perhaps the only example of an ECJ Decision to enforce the principle of conferral, where a Directive to ban Tobacco[135] advertising was deemed to be illegal because of the violation of the principle of conferral. It was adopted under Article 95 of the EC Treaty, which only provided competence for measures for the 'establishment and functioning of the common market', and not for the general legislative competence for market regulation.[136] However, the findings of the Court were reversed partially by the *Swedish Match* case, which involved a challenge to Community prohibition of

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[134] *ECJ, Case C-376/98, CLMR, 3. 1998.*

[135] Directive 98/43/EC.

[136] This also relates to the question of *ultra vires*, see Jukka Snell, 'European Constitutional Settlement, an ever Closer Union, and the Treaty of Lisbon,' *European Law Review*, vol. 33, 2008, p. 627. The ECJ did not annul the Directive because it violated the principle of conferral or subsidiarity, but because it was not adopted with the appropriate legal basis.

tobacco for oral use.[137] The importance of those two cases for the institutional dialogue, and the question of *ultra vires*, is related to capacity, particularly the will of the ECJ to police the boundaries of European Law considering the limited ends of the EU, and one of the oldest questions in political theory: '*Quis custodet ipsos custodes?*'[138]

5. The Language of Constitutionalism

For some authors, such as Kirchoff, the EU does not have a Constitution because only states can have Constitutions[139] however, as discussed above, the ECJ did treat the

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[137] *ECJ Case C-210/03,* 2004, Snell, op. cit., pp. 628–29.

[138] 'Who guards the guardians?'The phrase appears to be attributed originally to the Roman poet Juvenal (AD 55–AD 127), in the *Satires* 6:346–8, see Juvenal, *The Satires*, London: Penguin Books, 2004. 'The essential question in any constitutional system must be: "*Quis custodet ipsos custodes*?" The dangers to constitutionalism of a final but lawless constitutional court are multiple'. Richard S. Kay, 'American Constitutionalism,' in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press, 1998, p. 153. On the debate about the nature of authority of the ECJ, the question is posed in other terms by Miguel Maduro, 'Europe and the Constitution: What if this Is As Good As It Gets?' in Joseph. H. H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State*, op. cit., p. 95.

[139] He notes: 'In addition, the EU would be incorrectly characterised by the legal concept of a "constitution". The union is a union of states (*Staatenverbund*) in which constitutional states have so obligated themselves, that the intensity of this commitment clearly exceeds a confederation (*Staatenbund*), nonetheless does not reach the statehood of a federal state (*Bundestaat*)'. The author of this quotation was one of the judges of the German Federal Constitutional Court in the Maastricht decision, Paul Kirchof, 'The Legal Structure of the EU as a Union of States,' in Armin Bogdandy and Jurgen Bast, *Principles of European Constitutional Law*, Oxford: Hart Publishing, 2006, p. 773. On the same position, affirming that only states can have constitutions see Alain Pellet, 'Epilogue, Europe and the Dream of Reason,' in Joseph H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State*, op. cit., p. 215; against this position, see Pavlos Eleftheriadis, 'The Idea of a European Constitution,' *Oxford Journal of Legal Studies*, vol. 27, No. 1, 2007.

Treaties as a Constitution[140] which interpretation, meant that the European Treaties were akin to national constitutions.

Perhaps the question is, therefore, necessarily: why a European Constitution?[141] Will the 'European constitution' be recognised with the presence of a *Grundnorm*[142] or a 'rule of recognition'[143] for the constitutions and legal systems of member states? The answer will be indicative of the nature of the European legal system and its peculiar variety of constitutionalism.

This discussion has inevitably led to one about the definition of a Constitution. This is particularly relevant because a Constitution is not a simple law, but a 'fundamental law'[144] bestowed on a given community. This is because it enjoys a higher normative status than a simple law. By treating the European treaties as higher law, therefore, the ECJ was, in effect, giving them a special status. Considering the nature of the European legal order, this meant that all national laws would be rendered inapplicable or non-effective if in conflict with EU Law and that this, therefore, could be directly

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[140] *Parti écologiste 'Les Verts' v European Parliament, Case 294/83, ECJ.*

[141] This is the starting point for Michael O'Neill, *The Struggle for the European Constitution: A Past and Future History*, Abingdon: Routledge, 2009.

[142] To use Kelsen's view that the all legal systems have a 'fundamental norm' (*Grundnorm*) from where their authority derives, see Hans Kelsen, *The Pure Theory of Law*, Los Angeles: University of California Press, 1970.

[143] To make use of Hart's understanding of the rule of recognition as an organising rule that determines the hierarchy of rules found in a given legal system, see Herbert Hart, *The Concept of Law*, Oxford: Oxford University Press, 1997.

[144] On the definition of a Constitution see Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries,' in Larry Alexander (ed.), *Constitutionalism, Philosophical Foundations*, Cambridge: Cambridge University Press, 1998, p. 153. On the problems of applying the framework of a Constitution to the context of the EU, see Stefan Griller, 'Is this a Constitution? Remarks on a Contested Concept,' in Stephan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty,* Vienna: Springer Wien New York, 2008. See also Michelle Everson and Julia Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power*, Abingdon: Routledge-Cavendish, 2007.

applicable to the national legal orders via direct effect. Moreover, the ECJ failed to make a distinction between primary and secondary European Law in interpreting the principle of supremacy, but the assumption was that the Treaties as adopted by member states were the 'constitutional charter' of the community. Therefore, the implications of treating the Treaties as 'constitutional law' because of the 'European constitution', for the national legal systems – including their own constitutions – were of great significance to the Court's autonomy and claims of supremacy.

When referring to a constitution, the reference may be to the fundamental laws or norms of a particular society. In this sense, all societies have constitutions: from a sports association to a local authority.[145] This is what is referred to as a constitution in the 'material sense'.[146]

A constitution in the 'formal sense' is more specific, referring not only to a Law that contains the fundamental provisions of a community, but also one that enjoys higher normativity in a legal system; it is a Law that has followed a formal legal process of adoption by the constituent power of the people or *demos*.[147] It is in this latter sense that the debate about a European constitution becomes problematic in the legal and political debate, because no 'inferior' law – in this case national legislation, including national constitutions – could override European Law. As Kelsen emphasised, 'If there is a constitutional form, then constitutional laws must be distinguished from ordinary laws'.[148] Nevertheless, if this statement is valid regarding member states, is it also valid for the European polity? As Grim argues on the complexities of a European Constitution:

> To the extent that constitutions are concerned with legalising political
> rule, the Treaties leave nothing to be desired. Fundamental requirements
> of modern constitutionalism are thus met in the Communities. This

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[145] In this sense all social organisations have constitutions.

[146] Hans Kelsen, *General Theory of Law and the State*, New Brunswick: Transaction Publishing, 2006, pp. 124–5.

[147] This definition is used more often in Constitutional Law.

[148] Hans Kelsen, op. cit., 2006, p. 124.

gives the justification for the position that European legal science has taken on the constitutional question. The Treaties are not however a constitution in the full sense of the term. The difference lies in reference back to the will of Member States rather than to the people of the Union. Many European lawyers gloss over this. The European Public Power is not one that derives from the people, but one mediated through States.[149]

The introduction of the language of constitutionalism for studying European integration, therefore, poses a problem of translation.[150] This is because constitutionalism was devised as a tool to analyse the legal and political framework of the modern territorial state. The possibility of a European constitutionalism must go beyond the state, which notion derives from the idiosyncrasy of the European integration process, the nature of the EU, and its role as a political and legal community.

In analysing the specific claims of European constitutionalism, the first question is: what is the source of the constituent power in European integration? Considering that the source of the constituent power in state constitutionalism is the presence of a people (*demos*), European constitutionalism will not have one, because there is not a *demos* 'of Europe'.[151] This should not mean, however, that a European

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[149] Dieter Grimm, 'Does Europe need a Constitution?' *European Law Journal*, vol. 1, No. 3, 1995, p. 291.

[150] Neil Walker, 'Postnational Constitutionalism and the Problem of Translation,' in Joseph H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State*, op. cit; Matej Avbelj, 'Questioning EU Constitutionalisms,' *German Law Journal*, vol. 9, No. 1, 2008, pp. 126; Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty,' *European Law Journal*, vol. 11, No. 3, 2005, pp. 262–307. For the possibilities of global constitutionalism and the implications for sovereignty under the UN Charter, an overview, see Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law,' in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, pp. 115–143.

[151] This thesis is known as the *no demos thesis*, see Grimm, 1995, op. cit. for a critique, and see Michiel Brand, 'Formalising European Constitutionalism: Potential Added Value or "Death by Constitution"', in Kirstyn Inglis and Andrea Ott, *The Constitution for Europe and*

constitutionalism is impossible, but it does pose a challenge to the notion that a European constitutionalism should follow the model of a state constitutionalism.

In addition, European constitutionalism should not follow a model where the multiple European *demoi* are unrepresented through different member states in the European integration process. This means, therefore, that the constituent power in Europe, by nature, should pass necessarily through member states and not just by way of direct representation of citizens to European bodies such as the European Parliament. This is because the nature of representation in federal arrangements passes, necessarily, through the mediation of member states' political institutions as units, whether by the executive branch, or through their national Parliaments.

In federal political systems representation is dual, as was discussed in Chapter 3; it passes primarily through the member states that created the EU, but also through the common bodies, which in the case of Europe, is through the European Parliament. Hence, a constituent power that claims authority to create a new legal order cannot do so without reference to the different peoples of the states within the confederation. This is why the new decision of the FCC sheds new light onto the debate about sovereignty, because instead of defending an 'old' statist view of sovereignty, the opportunity should be seen as one that points out the limits and claims to authority of a European integration process, that necessarily, should be sought through the member states, as Walker states:

> We lack an ideal understanding of the supranational conception of constituent power. That is, if against the sceptic, it can be demonstrated that European constituent power is not merely derivative of national constituent power, we nevertheless still acknowledge the national legacy of its foundations and, alongside the newer supranational authority, the resilience of the original constituent powers. The 'people' of second-order supranational understanding can never be just like the otherwise politically, unencumbered and unmediated 'people' of our first order

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an Enlarging Union: Unity and Diversity? Amsterdam: Europa Law Publishing, 2005, pp. 5–10.

imaginary; the second-order people necessarily describes a compound structure.[152]

For all of these reasons, a European constitutionalism does not abolish or eliminate state constitutionalism, but complements it, and it may even redefine it into a new matrix structure that replaces the hierarchical nature of the current system.[153]

The Treaty of Lisbon touched the limits of European constitutionalism, but in so doing, also illuminated the nature of the EU as a polity. This outcome was contrary to the predictions of some who claimed that there was a need for further integration: European integration, although resilient and deeper than many had anticipated, had not superseded the expectations of member states; the most important and constituent actors in the process of European integration. This is fully consistent with the understanding of federalism presented by this thesis, because the outcome showed that European constitutionalism still followed the logic of representation of federal political systems, that is, one based on the partnership of different states in a process of deep integration.

A European constitutionalism is, first and foremost, based in the federal political process, the nature of the dynamic of which is defined primarily by member-states, albeit also by the different European actors[154] involved in the various processes,

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[152] Neil Walker, 'Post-Constituent Constitutionalism? The Case of the EU,' in Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism*, Oxford: Oxford University Press, 2007, p. 264. Some authors also point out that, at the European level, there are problems in relation to constituent power where there is a lack of a truly European 'public sphere'; an arena where Europeans can be part of a common political integration ideal. This relates to the notion of the 'democratic deficit' and the need for the EU to be substantively democratic and not just procedurally democratic. See Simon Hix, *What's Wrong with European Union and How to Fix it*, Cambridge: Polity Press, 2008. On the Public Sphere as an arena for democratic politics, see Jurgen Habermas, *Between Facts and Norms*, Cambridge: Polity Press, 1997, pp. 360–366.

[153] Miguel Poiares Maduro, 'Europe and the Constitution', 2003, op. cit., p. 101.

[154] Citizens, transnational corporations, NGOs, political parties and so on, this is what is meant when referring to the importance of actors in the transnational European process.

political or judicial. It is in this context that the concept of sovereignty must be analysed, along with the different claims to authority of the European legal order, and member states. In this regard, the articulation of the different legal orders should be based on the notion of constitutional pluralism,[155] which means that the question of who has the ultimate authority should remain open.[156] The fact that member states ultimately have the 'right' to veto either integration into Europe or exit[157] from it, defines the EU is a confederation, meaning that sovereign statehood of its members is not eliminated, and that, therefore, a European constitutionalism is still led by its member-states. European constitutionalism is not atypical, therefore, because its Constitution is what might be termed as 'mixed'.[158]

The role of national Parliaments in the European political process, recognised by the Article 12 of the Treaty of the EU, was significantly increased by the 'Early Warning Mechanism'[159] of the Treaty of Lisbon. This has increased the 'voice' of member states and strengthened the federal element of the EU, because representation should be primarily through member states' national institutions, of which parliaments are

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[155] See Neil MacCormick, *Questioning Sovereignty*, 1999, op. cit., p. 97. Also Chalmers, et. al., 2010, op. cit., pp. 198–203.

[156] This point is emphasised by Maduro, 'Europe and the Constitution,' op. cit, pp. 97, however, if Carl Schmitt's view is adopted, that the 'sovereign is he who decides on the exception', then the conclusion will be that sovereignty resides completely with member states, because they have a veto over the European integration process, and can, ultimately, withdraw, see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: University of Chicago Press, 2005, p. 5.

[157] On 'Exit' and 'Voice', as political mechanisms – exit as the right of withdrawal and voices as participation – see Albert O. Hirschman, *Exit, Voice and Loyalty*, Cambridge, MA: Harvard University Press, 1970.

[158] On the notion of a mixed constitution which is applied to the EU because of its multiple dimensions, see Neil MacCormick, *Questioning Sovereignty*, 1999, op. cit., pp. 137–156; on the historical origins of the notion of a mixed constitution within ancient political philosophy, see Marcus Tullius Cicero (trans. Niall Rudd), *The Republic*, Oxford: Oxford University Press, 1998, p. 32.

[159] See infra, section on subsidiarity.

usually the most representative from the democratic point of view. This innovation is particularly relevant towards the possibility of a European constitutionalism.

5.1. Sharing Power: The Principle of Subsidiarity and the Problem of Sovereignty

The argument so far leads us to consider the principle of subsidiarity, which while being perhaps one of the most interesting additions to the political and legal scholarship, is also one of the most problematic. There are many definitions of subsidiarity, so for the purposes of this thesis, one definition of the Treaty of Rome has been selected:

> In areas which do not fall within its exclusive competences, the Community shall take action, in accordance with the principle of subsidiarity, only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[160]

The concept of subsidiarity has been hailed as a potential replacement for the concept of sovereignty[161] but, as will be argued below, this understanding tends to obscure the historical background of the concept, while also ignoring the problems to do with its potential application to the EU.

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[160] Article 5, Treaty of Rome as amended in Maastricht and subject to an additional Protocol (No. 30) by the Treaty of Amsterdam. See Koen Lenaerts and Piet Van Nufell, *Constitutional Law of the European Union*, London: Sweet & Maxwell, 2004. p. 100.

[161] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis,' *European Journal of International Law*, vol. 15, No. 5, 1999, pp. 907–31.

Subsidiarity and its insertion into the Treaty of Maastricht provoked expressions of dissatisfaction from member states because of a perceived increase in the powers of the EU.[162]

The concept of subsidiarity, which originated in Catholic political thought before it was secularised,[163] has an underlying ontology based on a hierarchical concept that describes the relationship between the centre and periphery. The understanding of federalism, according to the present thesis, is one based on the matrix model where there is no hierarchy, but that said, subsidiarity, it is argued, can have the effects of both protecting states' sovereignty and, in the case of the EU, further centralisation. Subsidiarity has two tests, which against Union actions, are judged: a 'decentralisation criterion' and an 'efficiency criterion'.[164] The former refers to actions by the Union that can act only if the proposed objectives cannot be sufficiently achieved by member states; the latter refers to actions which can be 'better' achieved by the Union. In addition, the concept of subsidiarity only applies to areas of shared competence with member states. This means that in areas where the Union has exclusive competences, such as in Common Commercial Policy, subsidiarity does not apply.[165]

The concept does not establish clear boundaries between states and the Union, but merely acts as a general principle with consequentialist logic rather than

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[162] Lenaerts and Nufell, op. cit., p. 101; and note that it would apply only to areas where the Union did not have exclusive competences.

[163] On the historical origins of the concept as applicable to the relations between centre and periphery in the teachings of the social doctrine of the Catholic Church beginning in the Papal encyclical *Rerum Novarum* of 1891, but explicitly in the Encyclical *Quadragesimo Anno* of 1931, see Antonio Estella, *The EU Principle of Subsidiarity and its Critique*, Oxford: Oxford University Press, 2002, pp. 79–80; and also Douglas-Scott, 2002, op. cit., pp. 174–75. On its introduction to the EU (EC) in the Single European Act (SEA) with environmental policy, and then the Maastricht Treaty (Article 5), see David Lazer and Viktor Mayer-Schöenberger, 'Blueprints for Change: Devolution and Subsidiarity in the United States and the EU,' in Kalypso Nicolaidis and Robert Howse, *The Federal Vision: Legitimacy, Levels of Governance in the United States and the EU*, Oxford: Oxford University Press, 2001, p. 133.

[164] Lenaerts and Nufell, op. cit., supra note 144, p. 103,

[165] For a criticism of this particular restriction, see Douglas-Scott, 2002, op. cit., pp.177–78.

deontological.[166] This means that subsidiarity is a concept that is concerned with the state of affairs, of 'finding out the appropriate level of action for a given result', and does not impose constraints *ex ante*, by stating which areas are to be prohibited or allowed for either EU or state action. As discussed above, this is clearly not what the concept of sovereignty is all about, because contrary to subsidiarity, the concept of sovereignty imposes strong restrictions on the sphere of states' actions either by international or supranational polities, whereas subsidiarity, is concerned with finding out the appropriate or adequate level in which an action is possible; sovereignty is concerned with the complete exclusion of interference on states unless they consent.

In contrast, the ontology of the concept of subsidiarity does not warrant an interpretation that necessarily would protect member states' interests and preserve their sovereignty, for all the reasons discussed above.[167] This does not mean, however, that the concept is completely useless in asserting a delimitation of powers between the Union and member states, although this would be difficult because of its hierarchical nature, as Elazar points out:

> At the same time, the principle of power sharing adopted by the EU as a whole-subsidiarity – has its own problematic elements. Subsidiarity is a concept developed in Catholic Europe, the Europe organised along hierarchical lines, and it was designed to soften hierarchy by vesting and protecting the powers of the lower levels.[168]

Another problem, which is less theoretical but relates to the practical application of subsidiarity, is how can the different institutional processes deal with eventual or potential violations of principle? The ECJ has discussed the principle in some

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[166] On consequentialism and deontology in Philosophy and Law, see Bernard Williams, 'Consequentialisn and Integrity,' in Samuel Scheffler, *Consequentialism and its Critics*, Oxford: Oxford University Press, 1988.

[167] In a similar tone see Anthony Cary, 'Subsidiarity—Essence or Antidote to European Union?' in Andrew Duff, *Subsidiarity within the European Community*, London: Federal Trust Report, 1993.

[168] Daniel Elazar, 'The United States and the EU:' in The Federal Vision, 2001, op, cit, p. 104.

cases,[169] but is it safe to assume that the Court will challenge an act of the Council based on violations of the principle of subsidiarity?[170] The question is not without merit, particularly if the problems of the legitimacy of the ECJ are considered.[171] This is not an inconsequential criticism, because the ECJ has not yet judged an action or act of the Union to be incompatible with the principle of subsidiarity.

The *BAT case*[172] was prominent in this regard, whereby the ECJ discussed the principle of subsidiarity in the context of the legality of the Directive under Article 95 of the EC Treaty that harmonised measures regarding tobacco. The Court found no violation of the principle,[173] and in considering other cases[174] where the principle had been discussed, concluded: 'the overall consequence is that the word that saved Maastricht has lost much of its practical utility'.[175] In the view of the author of this thesis, the problems associated with the principle of subsidiarity reside in ontology – not only in the practical application of it – but because the concept imposes a consequentialist logic that is, in essence, backed by a 'purpositivist' interpretation.[176] This mandates an analysis based on the actual outcomes, where it does not matter at

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[169] For example *ECJ, Case C-233/94, Germany vs. European Parliament and Council, (1997)*, ECR, *ECJ, Case C-377/98 Netherlands v. European Parliament and Council (2001)*. Nonetheless, as Chalmers states: 'Although the principle of subsidiarity has regularly been invoked before the Court of Justice, the Court has yet to annul a measure for breach of the principle'. See Chalmers, et. al., 2010, op. cit. p. 364.

[170] Particularly considering that Union acts are political, usually involving different actors and a complex decision-making judgment and procedure. See Koen Lenaerts and Piet Van Nufell, 2004, op. cit. p. 106.

[171] For example the 'counter-majoritarian' difficulty pointed out by Antonia Estella, 2002, op. cit, p. 138. This relates to the question of the judicial, in contrast to the political nature, of ECJ authority within the European legal order.

[172] *Case, C-491-01, 2003, CMLR, 14, ECJ.*

[173] For a critical analysis of the case, see Jukka Snell, 2008, op. cit., p. 629.

[174] For example, *Germany vs. Parliament and Council (second case), ECJ, case C-380/03, 2006,* 2007, 2 CMLR, *Working Time Directive, ECJ, Case C-84/94, 1996, 3 CMLR, 1996.*

[175] Jukka Snell, 2008, op. cit., p. 630.

[176] On Purposivism in legal interpretation see John F. Manning, 'What Divides Textualists from Purposivists?' *Columbia Law Review*, vol. 106, No. 1, 2006, pp. 70–111.

which level the decision is taken, but what matters, is the end result, which is to achieve the best result.

Some proponents of the concept of subsidiarity make normative statements on its use in International Law and claim that 'subsidiarity is in process of replacing the unhelpful concept of "sovereignty" as the core idea that serves to demarcate the respective spheres of the national and international'.[177]

This argument is based on the notion that if problems of 'collective action' are related to externalities, there might then be a strong reason for International Law to act in the domestic arena, the initial assessment for which is based on an 'efficiency test' or a 'cost-benefit analysis'.[178] However, the application of the principle of subsidiarity at either the European or international level is based on incorrect assumptions, particularly for those who see it as a replacement for the concept of sovereignty.

This is because, first, the assumption disregards the historical origins of the concept of subsidiarity within the EU, when member states insisted on adding the concept of subsidiarity because they were dissatisfied with the excessive centralisation of competences within the EU, particularly its centralist bias, and the problems associated with the conceptualisation of subsidiarity where nobody appeared to agree on the terms.[179]

Second, it assumes an inherent legitimacy[180] of the upper levels (whether European or International) to intervene in matters of municipal or domestic law and risks

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[177] Mattias Kumm, *The Legitimacy of International Law*, 1999, op. cit.

[178] Idem.

[179] Just like sovereignty, subsidiarity risks becoming an essentially contested concept. See Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oregon: Hart Publishing, 2005, pp. 69–89.

[180] On the problem of legitimacy in International Law see Allen Buchanan, *Justice, legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004, pp. 233–327.

completely disregarding the possibility of an 'illegitimate act'[181] or even illegal acts at the upper levels.

Third, by adopting an efficiency-criteria test, it bases the justification for action on consequentialist logic, as discussed above. The problem with consequentialist analysis is that the desired result (in this case, to achieve the best results) depends on the preferences of the agents. In this case, it will depend on how one constructs the meaning of 'achieving the best results', which might be done against the domestic level if it is proven it is more efficient and if it will produce a better result, as Lenaerts argues:

> The limitation placed on Community action by the principle of subsidiarity is not large if it is principally considered whether such action affords 'clear benefits' or is 'better' than action at the national level.[182]

The concept of subsidiarity was borne out of practical necessity but it cannot be seen as a plausible replacement for sovereignty, because it does not protect the autonomy of states, which argument can now be set aside by a functionalist angle. Another criticism of the theory of sovereignty advanced by the proponents of subsidiarity is that it is a concept that is biased in favour of the state which has the freedom to not accept obligations of the international community.[183] This view[184] is however consistent only within a Bodinian understanding of sovereignty – one that proclaims

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[181] For example within the UN system, Sarooshi presents the hypothesis of legally valid acts of the UN Security Council, which are deemed illegitimate by the international community. See Dan Sarooshi, *The United Nations and the Development of Collective Security*, Oxford: Oxford University Press, 2000, p. 6.

[182] Lenaerts, op. cit., p. 104.

[183] An extended criticism of sovereignty in defense of subsidiarity is offered by Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State,' in Jeffrey Dunoff and Joel Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, pp. 291–5.

[184] As discussed in Chapter 1 on the history and evolution of the concept of sovereignty.

the absolute, perpetual and indivisible character of sovereignty. An analysis of the concept of sovereignty also implies a discussion as to the nature and pervasiveness of the state – the most important polity in the international system. To assume a 'waning of the state' in favour of an international legal system that subsumes the domestic legal system, is problematic to say the least, if not, somehow, simply an idealist argument. Furthermore, an understanding of sovereignty does not imply, necessarily, the adoption of the concept of absolute and unlimited sovereignty, as Constant argued: 'It is clear that the absolute character which Hobbes attributes to the sovereignty of the people is the basis of his entire system. The word absolute distorts the whole question, and leads us to a series of fresh implications'.[185] It is, however, possible to reframe sovereignty as a 'bound' concept; one tied-in by the limits imposed on it by International Law and the 'deterritorialization' of authority beyond states. This is because of the inherent limits imposed on member states by the constitutive or 'constitutional' rules of the international system. These rules include those of membership, conduct and meta-rules.

The process of fragmentation of the Law through the creation of regional legal systems – which include both the European and functional legal regimes – and which impose limits on states' sovereignty will be addressed in the Chapter 5. But those who argue that sovereignty is irrelevant, who advocate its abandonment as a concept, claiming that 'the idea of sovereignty adds nothing'[186] are teetering on the borders of an idealist argument upheld by a naïve faith in the international legal process as a whole, or, as Koskenniemi puts it:

> Indeed it does not seem possible to believe that international law is automatically or necessarily an instrument of progress. It provides resources for defending good and bad causes, enlightened and regressive policies. Some have found this suggestion insupportable. They have

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[185] Constant vehemently rejects the notion that sovereignty is unlimited or absolute. See Benjamin Constant, 'Principles of Politics Applicable to All Representative Governments,' in *Benjamin Constant: Political Writings* (edited and translated by Bincamaria Fontana), Cambridge: Cambridge University Press, 1988, pp.179–81.

[186] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism,' op. cit. p. 292.

wished to see international law *as already containing their ideal of the good society* so that it would suffice, outside political choice, to commit oneself to international law so as to ensure oneself of the rightness one does.[187]

5.2. Subsidiarity and Lisbon

The Treaty of the European Union, Article 5, also laid down the principle of subsidiarity, however, interestingly enough, it was the solution proposed in the Treaty of Lisbon that enhanced dramatically the role of national Parliaments in the European legal process by increasing the democratic element via Protocol Number 2 on the Application of the Principles of Subsidiarity and Proportionality. The German Constitutional Court briefly mentioned in its decision regarding the Lisbon Treaty[188] the so-called 'Early Warning System',[189] in which the draft legislative acts of the EU should be sent to national Parliaments at the same time as to the Council of Ministers (Article 4 of the Protocol), and which impose an obligation for the Union legislator that legislative drafts must comply with the principle of subsidiarity (Article 5 of the Protocol). According to the Protocol, National Parliaments may within eight weeks from the date of the transmission of a legislative draft send a 'reasoned opinion' to the Presidents of the European Parliament, the Council and the Commission stating why it may consider a draft incompatible with the principle of Subsidiarity (Article 6).[190]

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[187] Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument*, Cambridge: Cambridge University Press, 2004, p. 613.

[188] FCC , supra note 101 , Para. 37.

[189] For a critical overview see Philipp Kiiver, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity,' *Maastricht Law Journal*, vol. 15, No. 1, 2008. Bilancia argues that this 'kind of *ex ante* control will eventually create a sort of multilateral mechanism at the EU level, exerted by national Parliaments: the European parliament at this point is due to play the role of counterpart in the evaluation process of subsidiarity'. Paola Bilancia, 'The Role and Power of the European and the National Parliaments in the Dynamics of Integration,' *Perspectives on Federalism*, vol. 1, 2009, p. 7.

[190] For some, this new power may only amount to a veto power by national Parliaments on EU legislative acts, and may 'disrupt the multi-tier constitutional balance', see Andrea Manzanella, op. cit., p. 265. In the view of the author of this thesis, this is not the case: considering that the Protocol tries to address the problem of legitimacy of the EU legislative

This additional instrument increases the role of the political process and addresses part of the problem of the aforementioned democratic deficit. This is because representation in federal arrangements is primarily by member states as individual units, but particularly through the direct intervention of the directly elected national Parliaments and European bodies involved in the legislative process, who should take into account those opinions (Article 7, N. 1).

More importantly, the ECJ will have jurisdiction on actions brought by national Parliaments[191] or a Chamber, on grounds of infringement of the principle of subsidiarity by legislative acts (Article 8). The Protocol clearly strengthens member states' participation in the European legal process, especially the role of national Parliaments in the European legal system. Moreover, it is fully consistent with the federal principle in which representation in common institutions is ensured directly by the different polities as units. Considering the judicial review enforced by the ECJ which the Protocol provides, it may augur an interpretation of the principle of subsidiarity more consistent with the original intent of the member states, and while so doing, also address states' dissatisfaction about the increased powers of the EU.

6. Conclusion

This chapter has examined the nature of sovereignty in the context of the EU, taken as the most salient case of a regional integration mechanism, where the Westaphalian conception of sovereignty has been challenged and redefined.

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acts, notes the 'democratic deficit' and insufficient participation of member states in the EU decision-making process, and introduces a mechanism in line with the logic of representation of federal political systems, i.e. participation of member states in the EU legislation as independent units. Moreover national Parliaments enjoy greater democratic legitimacy than the national governments represented in the Council and the European Parliament and other EU institutions. Centre for European Policy Studies, Egmont: European Policy Centre, op. cit., pp. 107–19.

[191] Robert Schutze, 'Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?' *Cambridge Law Journal*, vol. 68, No. 3, 2009.

Furthermore, the chapter has analysed the institutional architecture of the EU and considered the innovations brought about by the Treaty of Lisbon.

The chapter has also discussed the limitations of the concept of supranationalism as an adequate concept to express the complexities of European integration, and presented federalism as an alternative framework to apply, in order to understand the workings of the European Union. This, in turn, has led to an exploration of the implications for the concept of sovereignty, following in the federalist tradition.

Moreover, the chapter has examined the recent decision of the FCC, taking as the archetype some of the issues raised by different national Supreme and Constitutional courts in various member states, concerning European integration.

The chapter has also analysed the concept of sovereignty as it applies to member states in the context of the possibilities of a constitutionalism beyond the state. The chapter then concluded with an analysis of the concept of subsidiarity, comparing it with the concept of sovereignty, and considering the changes introduced by the Treaty of Lisbon. In the context of sovereignty, if the EU is taken as a paradigmatic case, we will learn that:

> Rather than grope for the seat of sovereignty, we should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures.[192]

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[192] Christoph Schreuer, 'The Waning of the Sovereign State,' *European Journal of International Law*, Vol. 4, No. 1, 1993, p. 453.

Chapter 5

Sovereignty in a Post-Westphalian World

1. Introduction

The chapter explores the changes to the concept of sovereignty in the post-Westphalian world considering the different processes of institutionalisation in international affairs that have challenged the exclusive authority of the modern territorial state.

The chapter examines the limits imposed on sovereignty by the structure of the international system, considering the rise of regional and functional legal orders that have challenged the Bodinian understanding of sovereignty.

Furthermore, the chapter examines the relationship between the concept of sovereignty and the international norms that protect the individual, exploring the limitations of the Bodinian tradition of sovereignty, and the potential of the Althusian tradition of sovereignty, in a world of overlapping and competing legal orders.

Moreover, the chapter analyses the phenomenon of global legal pluralism, considering the multiplicity of institutional arrangements beyond the state, all with their own legal systems and mechanisms of dispute resolution, which are fragmenting the unity of International Law.

Of particular importance is the analysis relating to the phenomenon of 'deterritorialization' of authority, exploring the rise of different international regimes at the regional and functional level. The chapter examines the concept of sovereignty in the post-national world, and considers the insights offered by the federalist tradition inaugurated by Johannes Althusius.

Finally, the chapter concludes with a re-statement of the key points found throughout the thesis.

4.1. International Law and the Concept of Sovereignty

The dominant 'Bodinian' tradition in International Law proclaimed sovereignty as an absolute concept. This view is now being challenged by the rise of regional and functional legal orders and by a 'counter-tradition' in the history of political thought – referred to as 'Althusian' – which sees sovereignty as a flexible concept with non-absolute connotations.

This means that in order to understand the changes to the framework of the concept of sovereignty, it is necessary to understand the *mechanisms* of the changes. These mechanisms of change include the fragmentation of International Law and the rise or the creation of adjudicative bodies (such as International Courts and Tribunals and Panels) with authority, which challenge the national authority of the sovereign state.

International Law is in the process of fragmenting into a multiplicity of self-contained regimes, which is due to the rise of regional and functional institutional arrangements.[1] These institutional arrangements with their own legal systems,[2] pose

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[1] For Klabbers, the self-containment of these different areas of International Law is a form of 'quasi-independence' which goes hand-in-hand with the dispersion of authority, arguing that 'where it was undisputed in yesterday's world order, that legitimate authority rested with states and states alone, authority now springs from a variety of sources and institutions'. Jan Klabbers, 'Setting the Scene in,' Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2011, pp. 11–12.
See also Chapter 1 on Fragmentation of International Law.

[2] Martti Kosksenniemi refers to them as 'functional regimes', and identifies three forms of fragmentation in International Law: first, new institutions or regimes that interpret the law in an unorthodox way; second, the functional differentiation has institutionalised, firm exceptions to that of general Public International Law; third, the potential for conflicts

a challenge, not only to the legal order of the state, but also to the unity of International Law. The nature of these challenges rests in the fact that these legal systems (regional and functional) are self-referential.[3]

These legal regimes do not necessarily recognise the ultimate authority (*summa potestas)* of the modern territorial state, with the result that conflict between these different legal systems presents a challenge to monism or dualism, the traditional approaches of international legal scholarship in the relationship between national and international law.

Considering all of the above, it is important to emphasise that International Law in a Post-Westphalian world should recognise sovereignty as the cornerstone of the international system because of the pervasiveness of the state as the most important actor in international affairs.

Notwithstanding, a new conceptualisation of sovereignty should incorporate the role of institutionalised processes in dealing with transnational issues, considering that the state is not able to deal with transnational issues without international institutions, as Hobe explains:

> As a bottom line, the new transnational law will recognise state
> sovereignty as one core pillar of the international legal order. But

between these different regimes, see Martti Koskenniemi, *The Politics of International Law*, Oxford: Hart Publishing, 2011, pp. 228–229. See Chapter 1 of this thesis on the theme of fragmentation of International Law.

[3] The notion of self-reference is inherent to the legal system as a whole, moreover, we could argue like Luhmann that the legal system is 'autopoietic' in the sense that the legal system 'produces by itself all the distinctions and concepts it uses and that the unity of law is nothing but the fact of this self-production', see Niklas Luhmann*, Law as a Social System*, Oxford: Oxford University Press, 2004, p. 70. In his criticism of this view, Habermas sees the interconnectedness of Law with other domains, namely with Politics, Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity Press, 1997, p. 51. This relationship between Law and Politics is a key theme in legal theory, particularly at the international level.

this state sovereignty will again be subject to important changes and, if you will, important restrictions. Because in view of the global problems, for example of environmental degradation, and in view of the state's incapability exclusively to shape regulations for the use of the internet or for international financial transactions of transnational corporations, the new approach to sovereignty should be designated as 'enlightened sovereignty.[4]

Furthermore, the concept of sovereignty requires an understanding of the 'self-limitation' of sovereignty; the concept of sovereignty as both a right and a duty, and the idea of 'ultimate authority' should be seen in the context of the *immanent* limits of sovereignty, which are to be found in the foundational norms and rules (the structure) of the international system:

Sovereignty can, then, be understood as a dual structure in which a supreme authority that is 'independent of any other earthly authority' is coupled with the self-restrictive mentality that dignity requires.[5]

Thus, a theory of sovereignty requires a thorough understanding of the different institutional processes by which authority is shared. This implies comprehension and appreciation of how different international institutions shape international affairs. Hence, it is important to point out that the modern territorial state becomes one of the many actors in the international system sharing authority, as Hirst argues:

The new national sovereignty is above all the power to confer legitimacy and governmental competence to other agencies, international and local, but then to continue to support and sustain

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[4] Stephan Hobe, 'Globalisation: A Challenge to the Nation State and to International Law,' in Michael Likosky (ed.), *Transnational Legal Processes, Globalisation and Power Disparities*, Butterworths, 2002, p. 388.

[5] Panu Minkkinen, *Sovereignty, Knowledge, Law*, Abingdon: Routledge, 2009, p. 72.

those agencies as a co-operative partner in a new scheme of authority. The nation state does not thereby become functionless, rather it becomes the key node (the main source of legitimacy that ties the whole together) in a complex web of governing powers. [6]

In addition, the concept of sovereignty needs to be seen in light of the reconfiguration of power[7] in international affairs, considering that power and authority are no longer solely exercised by states, but also by the different mechanisms of global governance, as Maduro recalls:

Traditionally, the form of power has been the Constitution of the Nation State. The States were the holders of the ultimate authority and of monopoly over power (encapsulated in the traditional conception of sovereignty); others could exercise such power but either in the form of a delegation or authorisation from the State (regulated, in turn, by its Constitution). Constitution and power coincided in the same locus: the State. The idea of global governance reflects a perception of change in the locus and forms of power.[8]

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[6] Paul Hirst, *From Statism to Pluralism*, London: Routledge, 2003, pp. 230-31.

[7] Authority is not the same as power. Power can be exercised by different actors or institutions without regard to legitimacy, the same applies to sovereignty, which is an absolute category that involves the right to rule legitimately, see Kalevi J., Holsti, *Taming the Sovereigns, Institutional Change in International Politics*, Cambridge: Cambridge University Press, 2004, pp. 138–39.

[8] Miguel Poiares Maduro, 'From Constitutions to Constitutionalism: A Constitutional Approach to Global Governance,' in Douglas Lewis (ed.), *Global Governance and the Quest for Justice*, vol. 1, *International and Regional Organisations*, Oxford: Hart Publishing, 2006, p. 229. For a sceptical view of the mechanisms of global governance, particularly when using the language of Constitutionalism proposed by some scholars, see David Kennedy, 'The Mystery of Global Governance,' *Ohio Northern University Law Review*, vol. 34, 2008, pp. 854–57.

In summary, International Law should recognise the role of all the different legal systems (regional and functional) in the international legal process, and appreciate how they challenge the authority of the state, defined as '*summa potestas*', and reconfigure the concept of sovereignty. Thus, sovereignty should be seen as a concept that is determined by the structure of each international system, which defines the rules of behaviour, rules of conduct and secondary rules.

International Law should also incorporate fully the contribution of federalism to the concept of sovereignty. This means, in addition, that sovereignty should be seen as a flexible concept with a non-absolute character, which can be shared by different polities such as states and international organisations. The importance of the 'Althusian' tradition for International Law rests on the fact that in the view of the author of this thesis, it offers a better understanding of the concept of sovereignty, considering the rise of international legal orders (regional and functional) in international affairs.

4.2. Sovereignty and the Individual

The concept of sovereignty can also be seen as a barrier to international governance, and to the full development of human values, if one adopts the Bodinian understanding of sovereignty.[9] Notwithstanding, sovereignty should be seen as an attribute of statehood that incorporates the protection of the individual in international affairs. The old notion that proclaimed the power of the state as absolute does not any longer hold in an international environment that imposes strong rules of behaviour on the modern territorial state. In this conception, the normative status of sovereignty derives from 'humanity, understood as the legal principle in that human rights, interests, and security must be respected and promoted, and that this humanistic

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[9] Louis Henkin, 'Human Rights and State Sovereignty,' *Georgia Journal of International Law*, vol. 25, 1995, p. 31. Similarly, Koffi A. Annan, 'Two Concepts of Sovereignty,' *The Economist*, 18 September, 1999. From this perspective, the protection of human rights is directly linked to sovereignty as an attribute of statehood. See also W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law,' *American Journal of International Law*, vol. 84, No. 4, 1990, p. 876.

principle is also the *telos* of the international legal system'.[10] As a corollary, sovereignty is seen as encompassing the 'responsibility to protect',[11] particularly considering that:

> In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.[12]

The recent developments in International Criminal Law[13] particularly with the creation of the International Criminal Court (ICC), significantly challenges the

[10] Anne Peters, 'Humanity as the A and Ω of Sovereignty,' *European Journal of International Law*, vol. 20, No. 3, 2009, p. 514. Similarly, Ronald A. Brand, 'Sovereignty: The State, The Individual and the International Legal System in the Twenty-First Century,' *Hastings International & Comparative Law Review*, vol. 25, 2002.

[11] International Commission on Intervention and State Sovereignty (ICISS), *Report on The Responsibility to Protect*, 2001, http://www.iciss.ca/pdf/Commission-Report.pdf, [Accessed 21.12 2010]. Similarly, Philip Bobbitt, *Terror and Consent, the Wars for the Twenty-First Century,* London: Penguin Books, 2008, p. 470. Against this view and arguing that sovereignty has never been immune from intervention, therefore sovereignty is not really changing see China Mieville, *Between Equal Rights, A Marxist Theory of International Law*, London: Pluto Press, 2005, pp. 308–314.

[12] Report of the High Panel on Threats, Challenges, and Change, A More Secure World, Our Shared Responsibility, 2004, Para. 29, p. 17, UN Doc A/59/565 2004 at: http://www.un.org/secureworld/report2.pdf [Accessed 21.12.2010].

[13] Particularly with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which were created by resolutions of the Security Council, and pose significant challenges to state sovereignty. See Robert Cryer, 'International Criminal Law *vs*. State Sovereignty: Another Round?' *The European Journal of International Law*, vol. 16, No. 5, 2006, p. 985; Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,' *European Journal of International Law*, vol. 9, 1998; M.

traditional conception of sovereignty, defined as the supreme authority within the national territorial borders,[14] as Simpson puts it: 'The apparent conflict between sovereignty and international criminal law could not be so easily wished away, however. This conflict is inevitably acute in the case of a treaty whose consequences might be the prosecution of State nationals in international courts'.[15] The traditional notion of state sovereignty is challenged by the normative claims of international institutions, particularly by International Courts in International Humanitarian Law, by imposing international obligations to states, *erga omnes*[16] and claiming a sphere of authority that challenges state sovereign authority.

Cheriff Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,' *Harvard Human Rights Journal*, vol. 10, 1997.

[14] The ICC is based on states' consent (Article 12) and the principle of complementarity (Article 17, Rome Statute of the International Criminal Court). It challenges and sets aside traditional notions of sovereignty, considering the potential for 'judicial review' and the direct authority (jurisdiction) which the ICC has over individuals. See David A. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?' *Brigham Young University Journal of Public Law*, vol. 14, 1999, p. 134. In favour of the ICC considering that sovereignty 'can function in more than one manner', see Alex Ward, 'Breaking the Sovereignty Barrier: The United States and the International Criminal Court,' *Santa Clara Law Review*, vol. 41, 2001 p. 1144. The notion of sovereign immunity in International Law is also considered irrelevant for the purposes of criminal responsibility under the terms of the Statute (Article 27 of the Rome Statute). This is in contrast to a recent ICJ decision, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ, 14 February 2002*, where it appeared the ICJ upheld the doctrine of sovereign immunity for state officials.

[15] Gerry Simpson, 'Politics, Sovereignty, Remembrance.' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court,* Oxford: Hart Publishing, 2004, p. 55.

[16] Obligations *Erga omnes* or peremptory norms apply even against state consent, they include International Humanitarian Law and also the prohibition of the use of force by states, except in the cases permitted under the UN Charter. See Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford: Oxford University Press, 2007, pp. 50–66. The prohibition of Genocide and Slavery in International Law are seen as *jus cogens* norms, Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes, Oxford: Oxford University Press, 1997, pp. 90–117, Alina Kaczorowska, *Public International Law*, fourth edition, London: Routledge, 2010, p. 50. Peremptory Norms are recognised by the Vienna

This was recognised by the ICJ, in its *Advisory Opinion concerning the Genocide Convention* which stated that: 'It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of State sovereignty could lead to a complete disregard of the object and purpose of the Convention'.[17] In this case, the ICJ recognised that the nature of the obligations in the Genocide Convention implied that the traditional notion of sovereignty could not accept the possibility of reservations by states in the Convention, particularly if the nature of those reservations threatened the purposes and finality of the Convention.

Obligations *erga omnes* are part of the structure of the international system, in the sense that they proscribe and prescribe certain behaviours by states in international law (rules of behaviour). The nature of these obligations significantly changes the general principle of International Law, in that rules are only valid if states have accepted them (the principle of consent)[18].

Some of these norms are not new, such as the Kellog-Briand Pact,[19] which prohibited aggressive war in International Law. The growing elements of hierarchy in the

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Convention on the Law of Treaties (Article 53), the ICJ also recognised these obligations in the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),(New Application: 1962), ICJ*. The nature of *jus cogens* obligations is problematic, and its peremptory character is disputed by Peter Malanczuk, *Akehurst's Modern Introduction to International Law, London:* Routledge, 1997, p. 58, similarly Dinah Shelton, 'International Law and 'Relative Normativity' in Malcolm Evans (ed.), *International Law*, Oxford: Oxford University Press, 2006, pp. 164–73.

[17] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice (ICJ), 28 May 1951., pa. 24, available at: http://www.icj-cij.org/docket/files/12/4283.pdf [Accessed 21.12.2010].

[18] Juan Antonio Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law,' *European Journal of International Law*, vol. 8, No. 4, 1997, p. 586.

[19] Its formal name is 'General Treaty for the Renunciation of War', 1928. The Treaty is still in force, although most of its norms are now incorporated into the UN Charter, which forbids the

international legal system are determined by the rise of functional legal regimes such as the ICTR, the ICTY and the ICC. These new regimes contribute to the fragmentation of International Law, and are part of the increasing 'institutionalisation' in international affairs. This means that in order to understand the concept of sovereignty in the present international system, it is necessary to look at the impact of these legal regimes on the idea of 'ultimate authority'. That impact rests in the positive rules that define what is and what is not acceptable behaviour. However, more important, is the growing role of the adjudicative bodies that interpret those rules, which is also redefining the way the concept of sovereignty, as an essential attribute of state, is seen.

Consequently, a new understanding of sovereignty that incorporates the protection of individuals in International Law is necessary, and also, one that recognises the contribution of the different adjudicative bodies to the reformulation of the concept of sovereignty, as Worth argues:

> This reformulation would replace the misguided structural balance between the empowering and limiting aspects of sovereignty, which posited international cooperation as a tolerable concession, with a functional understanding of sovereignty strengthened by cooperation. Truly transnational concerns would no longer simply be tolerated derogations of sovereignty; rather, 'they [would become] emanations of that sovereignty.' Perhaps most importantly, under this reformulation, sovereignty would no longer exist in diametrical opposition to global denationalization.[20]

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right to wage war (*jus ad bellum*), Antonio Cassese, *International Law*, Oxford: Oxford University Press, pp. 33–34.

[20] John R. Worth, 'Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker,' *Indiana Law Journal*, vol. 79, 2004, p. 262. Similarly, David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds), *The Global Transformations Reader*, Cambridge: Polity Press, 2000, p. 172.

4.3. **Global Legal Pluralism**

International Law cannot be seen as the sole product of the modern territorial state, but rather should be viewed as the result of an exchange of the different actors in the international legal process, including states, international organisations and international institutions. This means that the international legal process should be decentralised, in the sense that it derives from multiple sources.

This is why it is important to consider the diversity in the transnational legal and political process in the creation of law, as Santos argues: 'the concept of law put forward by liberal political theory – the equation between nation, state and law – and elaborated upon in nineteenth-century and twentieth-century legal positivism is too narrow for our purposes, since it recognizes only one of the time-spaces: the national one'.[21]

Thus, International Law should be seen not as a project of a unified and complete legal system,[22] but as a set of competing and overlapping legal orders, expressed in the different regional and functional institutional arrangements at the international level.[23] Hence, legal pluralism 'involves renouncing the binary opposition between hierarchical relationships (by subordination of one order to another) and non-hierarchical relationships (by coordination) and considering the process of interaction in a more nuanced fashion, a bit like the reflection of diverse pluralisms'.[24]

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[21] Boaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation*, Butterworths, 2002, p. 86.

[22] The goal of the positivist understanding of International Law as a complete and rational unified legal system, see Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press, 2001, p. 57.

[23] This pluralism of International Law can be described as a 'jurisgenerative' process, in which the creation of law by different transnational communities is seen through their own narratives and precepts, see Paul Schiff Berman, 'A Pluralist approach to International Law,' *Yale Journal of International Law*, vol. 32, 2007, p. 322.

[24] Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Oxford: Hart Publishing, 2009, p. 15. For Delmas-Marty,

The presence of the different plural legal orders in international affairs, each representing its own epistemic community, results from the decentralised law-making process of international legal processes, this means that international systems cannot be thought of as supreme over the national systems of states (monism), and cannot be seen as completely separated from the national legal system (dualism).[25]

International Law, viewed from the perspective of legal pluralism, can be seen as an alternative to both monism and dualism. Legal pluralism offers a superior theory of coordination between different legal orders to monism or dualism, in the sense that it assumes that the different legal systems[26] are in a 'heterarchical'[27] rather than a hierarchical relationship, each with a claim to a sphere of authority, while ensuring that no one system can claim supreme authority.

Furthermore, legal pluralism assumes that each system is supreme, and as such, it offers a theory of coordination rather than a theory of supremacy of a particular legal system. Legal pluralism at the international level recognises the autonomy and uniqueness of each legal system.

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legal pluralism or ordered pluralism involves three processes: coordination, harmonisation and unification, Delmas-Marty, op. cit., p. 18.

[25] Peter Malanczuk, op. cit., p. 63. This is also related to the fragmentation of International Law, Paul Schiff Berman, 'Federalism and International Law through the Lens of Legal Pluralism,' *Missouri Law Review*, vol. 73, No. 4, 2006, p. 1183.

[26] The interaction of the different legal systems includes the national legal system and the international legal system, which is becoming increasingly fragmented into regional and functional legal systems.

[27] The term is coined by Neil Walker, and as he makes clear: 'legal pluralism assumes that the state is "no longer the sole locus of constitutional authority"', see Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart Publishing, 2003, p. 4. The notion of 'Contrapunctual Law' offered by Maduro is another attempt to demonstrate at the European level the possibilities of legal pluralism in the political process, where sovereignty is fiercely contested, which is the case with the EU, see Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action,' in Neil Walker (ed), *Sovereignty in Transition*, op. cit.

A theory of sovereignty should recognise that authority is multi-layered, and that the modern territorial state constitutes only one level in which authority can be legitimately be exercised. This means that in understanding the articulation between different legal systems, it is crucial to consider the possibilities of legal pluralism in contrast to both monism and dualism.

As a result, sovereignty cannot be seen in light of either the Bodinian or Hobbesian traditions, considering that these traditions identify states as the sole repository of authority in international affairs, and assume the inherent supremacy of state or national law.

Instead, the concept of sovereignty should be seen from the Althusian tradition, in the sense that sovereignty is not a unitary concept, but a pluralistic one that is based on the multiplicity of levels within the state and the diversity of polities and their legal systems beyond the state. This will demand recognition of the multiple sources of law beyond the state, each claiming authority.

5. Deterritorialization of Authority

'Deterritorialization' means the process of disaggregation of authority, by which territoriality as a variable of authority, loses its relevance in a world of multiple, overlapping centres of authority. The result of this is that the umbilical link between supreme authority and territory is severed,[28] whereby the state, as the supreme

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[28] This does not mean that territoriality is rendered obsolete, but that sovereignty defined as supreme authority, cannot be seen as absolute and only exercised by the modern territorial state. Deterritorialization 'is the name given to the problematic of the territory losing its significance and power in everyday life', Gearóid Ó Tuathail, 'Borderless Worlds: Problematizing Discourses of Deterritorialization in Global Finance and Digital Culture,' in *Geopolitics at the End of the Twentieth Century: The Changing World Political Map*, Nurit Kliot and David Newman (eds), London: Frank Cass, 2000, p. 40. Deterritorialization presupposes reconfiguration of territoriality and its re-scaling, see Neil Brenner, 'Beyond State-Centrism? Space, Territoriality, and Geographical Scale,' in *Globalization Studies, Theory and Society*, vol. 28, No. 1, 1999, p. 50.

embodiment of sovereignty, now grapples with other mechanisms and processes that restructure territoriality; 'deterritorialization implies 'reterritorialization'.[29] Therefore, sovereignty should also be seen as deterritorialized, as Simpson points out: 'sovereignty has somehow been deterritorialized in the process of decomposition/recomposition'.[30]

The phenomenon of deterritorialization of authority should be considered within the context of the emergence of mechanisms of global governance, which includes regional and functional institutional arrangements, such as the EU, the ICC and the WTO. The creation of new 'legal spaces' beyond the modern state is part of the process of deterritorialization of authority. These new legal spaces are not based on territoriality, however, which means that the notion of sovereignty or ultimate authority within a national circumscribed territory, will not explain these new mechanisms of international governance.

In this 'new medievalism', states are no longer the sole depositaries of exclusive authority. The international system is now composed of a multiple centres of authority, as Brolman explains:

> How has the principle of territoriality in international law come
> under pressure? At least two phenomena, international and
> transnational, are instrumental. We see a decline in the role of the
> territorial parameter brought about by both traditional structures,
> which have emanated from states, and by new, transboundary

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[29] Globalisation can be seen as reterritorialization of socio-economic and political institutional spaces, see Neil Brenner, 'Globalisation as Reterritorialization: The Re-scaling of Urban Governance in the European Union,' *Urban Studies*, vol. 36, No. 3, 1999, p. 432; Gearóid Ó Tuathail, and Timothy O Luke, 'Present at (Dis)Integration: Deterritorialization and Reterritorialization in the New Wor(l)d Order,' *Annals of the Association of American Geographers*, vol. 84, No. 3, 1994.

[30] Gerry Simpson, 'The Guises of Sovereignty,' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur, *Re-Envisioning Sovereignty: The End of Westphalia?* Aldershot: Ashgate, 2008, p. 68.

private structures.[31]

2.1. Sovereignty after Westphalia

Just like the rise of the modern territorial state reconfigured supreme authority into the notion of exclusive territorial sovereignty, the rise of mechanisms of global governance is also reconfiguring authority and detaching it from the notion of the exclusive territorial jurisdiction of the state,[32] as Elden argues: 'In this understanding, territory does not cease to be important, rather it is no longer bound within a single state'.[33] This does not mean that territoriality as the hallmark of sovereign statehood ceases to be relevant it suggests that territoriality is being transformed by new authoritative institutional arrangements beyond the state.

A theory of sovereignty should incorporate and recognise the dynamic institutional processes at every level, for it is at all levels that the reconfiguration of supreme authority and territoriality beyond 'sovereigntist territorialism and universalism' is taking place.[34] This implies a new understanding of the role of overlapping multiple institutional arrangements and its legal systems, which claim authority beyond the state, and redefine the link between authority and territory in a way that challenges the *summa potestas* of the state. For modern territorial states, this poses a paradox, as Behr argues: 'In order to react towards deterritorialized politics and to reassert their

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[31] Catherine Brölmann, 'Deterritorialization in International Law: Moving Away from the Divide between National and International Law,' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law*, Oxford: Oxford University Press, 2007, p. 91.

[32] This is the case with the EU, see James A. Caporaso and Joseph Jupille, 'Sovereignty and Territoriality in the European Union: Transforming the UK Institutional Order,' in: Christopher K. Ansell and Giuseppe Di Palma (eds), *Restructuring Territoriality: Europe and the United States Compared*, Cambridge: Cambridge University Press, 2004, pp. 72–73.

[33] Stuart Elden, 'Missing the Point: Deterritorialization and the Space of the World,' *Transactions of the Institute of British Geographers*, vol. 30, No. 1, 2005, p. 16.

[34] Paul Schiff Berman, 'Global Legal Pluralism,' *Southern California Law Review*, vol. 80, 2007, p. 1192.

power in global politics, states must overcome their traditional principles of territorial politics and further develop deterritorializing politics'.[35] The paradox lies in the fact that politics is still national while the impact of transnational politics requires states and different actors at the international level to transcend the territoriality of politics at the national level.[36]

This implies an understanding of sovereignty that takes into account the mechanisms of global governance, particularly one that recognises the shift of authority from states towards international 'authoritative institutions', which institutions are changing the structure of the international system and, thus, transforming sovereignty itself, as Cooper et. al. argue: 'Once authoritative institutions arise, we expect they will feed back into changes in the international system that will facilitate the future creation of more such institutions and will increase levels of authority for existing institutions. In the process the international system may be transformed'.[37]This means that the structure of the international system, although anarchical, should be seen as multi-layered and composed of hierarchical elements.[38] Furthermore, the changes in the

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[35] Hartmut Behr, 'Deterritorialization and the Transformation of Statehood: The Paradox of Globalisation,' *Geopolitics*, vol. 13, No. 2, 2008, p. 376.

[36] For instance, the role of dispute resolution in International Investment Law, particularly Arbitration between private actors and national states as the result of Bilateral Investment Treaties (BIT) and at the International Centre for Settlement of Investment Disputes (ICSID), which created a new forum that transcends national dispute resolution mechanisms, such as national courts, which significantly restrict states' sovereignty, as Cheng argues: 'International Investment Law diminishes the authority and power of the state by restraining its internal decision-makers', see Thai Heng Cheng, 'Power, Authority and International Investment Law,' *American University International Law Review*, vol. 20, 2005, p. 482. Similarly, Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford: Oxford University Press, 2008, p. 9.

[37] Scott Cooper, Darren Hawkins, Wade Jacoby and Daniel Nielson, 'Yielding Sovereignty to International Institutions: Bringing System Structure Back In,' *International Studies Review*, vol. 10, 2008, p. 504.

[38] Hierarchy should also be included within the understanding of the traditional notion of sovereignty, David A. Lake, 'The New Sovereignty in International Relations,' *International Studies Review*, vol. 5, 2005, pp. 316–21.

Westphalian system of states does not mean that states cease to be relevant, or that they suddenly become insignificant in international affairs, but that attributes of statehood, particularly sovereignty, should be seen in the context of the increasing institutionalisation of international affairs.[39]

Consequently, a theory of sovereignty should address the issue of authority by international institutions and international organisations. This requires an analysis that goes beyond the positivist understanding of the *Wimbledon* Decision, which is somehow prevalent in International Law.[40] International obligations and authoritative structures that challenge state sovereignty do not always reflect states' preferences and interests, and it is this fact that puts states at odds with international institutions and organisations, and it is in this context that it is necessary to understand the concept of sovereignty.

Furthermore, International Law and international institutions reflect the asymmetries of power in international affairs, as seen in the case of the Security Council,[41] with the

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[39] This means that a new theory of the state is required; one that acknowledges the plurality of actors and institutions in international affairs which are challenging states' sovereignty.

[40] States voluntarily accept participation in international institutions, nonetheless, these institutions, created by states (or accessed through membership) will restrict state sovereignty, Wang refers to this dilemma in the context of the WTO when he notes that 'The WTO Agreements and other international agreements have, through the operation of the principle of national treatment and other basic requirements, imposed substantive restrictions on sovereignty, including the power to legislate and to tax'. See Guiguo Wang, 'The Impact of Globalization on State Sovereignty,' *Chinese Journal of International Law*, vol. 3, 2004, p. 477.

[41] The Security Council is the organ responsible for the maintenance of international peace and security and, as such, is the most influential within the UN system. The Security Council Resolutions can impose obligations on states in International Law, as the ICJ stated: 'Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law.', *Advisory Opinion in Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, (ICJ), 22 July 2010.*, Paragraph 85. This is why White argues that 'in practice, the hierarchy provisions of the UN Charter are being

result that 'the relationship between the distribution of power (in particular unipolarity) and sovereignty demands attention'.[42] The analysis of the concept of sovereignty should consider that the concept of sovereignty needs to be seen from the constitutional rules of the United Nations system, which emphasises the prohibition of certain behaviours such as aggressive war[43] and genocide among other issues of international concern.

This also means that the concept of sovereignty is in the process of being challenged by the rise of different mechanisms of international governance, particularly regional and functional.

Furthermore, it is important to emphasise that the federalist tradition offers an alternative view of sovereignty that challenges the traditional understanding of sovereignty.

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moulded by the Security Council', see Nigel White, 'Hierarchy in International Organisations: Regional Bodies and the United Nations,' in Nicholas Tsagourias, *Transnational Constitutionalism: International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 142.

Nonetheless, the fact remains that the Security Council is still an arrangement of the Great Powers (defined in 1945), although is institutionalised in the UN Charter (legalised hegemony), and as Krisch argues: 'international institutions and great powers often coexist in an ambivalent relationship.', Nico Krisch, 'The Security Council and the Great Powers,' in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War*, 2008, p. 133.

[42] Melea Lewis, Charles Sampford and Ramesh Thakur, 'Introduction,' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur, *Re-Envisioning Sovereignty*, op. cit., p. 4.

[43] For instance, the ICJ discussed the principle of non-intervention and the notion of aggression in the Nicaragua case against the background of the Article 2(4) of the UN Charter, Christine Gray, *International Law and the Use of Force,* Oxford: Oxford University Press, 2008, pp. 75–78.

6. Conceptual Theory: The History of Sovereignty

The concept of sovereignty should not be seen as absolute, indivisible or inalienable, but as a flexible concept that encompasses the notion of shared or partial sovereignty, as Krasner emphasises: 'A second problem with simply treating final authority within a defined territory as unproblematic is that there are territories and spheres of human activity in which only partial sovereignty – that is control over only some issues – is claimed'.[44] Sovereignty was never an absolute concept in the first place, at least not in the international practice of states,[45] although the Bodinian and Hobbesian tradition argued for an absolute and exclusive conception of sovereignty to be attributed to the sovereign state.

In the history of the concept of sovereignty, it is necessary to appreciate that the Bodinian tradition appeared as a challenge to the medieval worldview of the *Respublica Christiana,* which was composed of multiple polities other than the state. The gradual rise of the modern territorial state was then followed by an adherence to the tradition that ascribed states the ultimate authority within a national territory as Schmitt argues:

> Thus arose the territorial order of the 'state' – spatially self-contained, impermeable, unburdened with the problem of estate, ecclesiastical, and creedal civil wars. It became the representative of a new order in international law, whose spatial structure was determined by and referred to the state.[46]

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[44] Stephen Krasner, 'Sovereignty: An Institutional Perspective,' *Comparative Political Studies*, vol. 21 No. 1, 1988, p. 87. Considering that there are many institutional arrangements where sovereignty is shared, the EU as a confederation is an example that was examined in Chapter 4 of this thesis.

[45] This is why Stephen Krasner sees sovereignty as 'organised hypocrisy', considering the violations of sovereignty since the Peace of Westphalia, Stephen Krasner, *Sovereignty: Organized Hypocrisy,* op. cit., 1999.

[46] Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (first published in 1950), New York: Telos Press Publishing, 2003, pp. 129

It is necessary to understand that the concept of sovereignty – even within the Bodinian tradition – was never unlimited in the sense that it allowed states to have absolute power within their jurisdictions and territory. Furthermore, the concept of sovereignty had many facets, each determined by the 'constitutional or foundational' precepts of the different international systems since the Peace of Westphalia in 1648.[47]

Notwithstanding, in the present international system, the concept of sovereignty as an attribute of statehood should be seen detached from the idea of complete exclusive territorial authority, which means that states can share sovereignty with other polities, and that ultimate authority is never absolute, as Judge Alvarez said:

> We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law bound by the rules which they accept. Today owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law.[48]

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[47] The systems identified in the Thesis are the Peace of Westphalia (1648), The Congress of Vienna (1815), The Peace of Versailles (1918) and the United Nations (1945). Sovereignty assumes different characteristics in each system determined by the structure of each international system. This means that each system has its own constitutional rules (rules of membership, behaviour and secondary rules) and that these change the definition of sovereignty. For instance, sovereignty in the system inaugurated by the Congress of Vienna assumes characteristics different from the international system inaugurated by the Peace of Versailles concerning the Prohibition of aggressive war, which only occurred with the Kellog-Briand Pact of 1928. Moreover, these foundational rules are not static, but they evolved considerably, and that is the case with the contemporary international system.

[48] Individual Opinion of Judge Alvarez in *Corfu Channel Case (United Kingdom v. Albania); Merits, International Court of Justice (ICJ), 9 April 1949*, p. 43. Available at: http://www.icj-cij.org/docket/files/1/1649.pdf [Accessed 21.12.2010].

Hence, a new conception of sovereignty is warranted, one that considers the changes in the present international system, and 'whatever names this new form of sovereignty professes – be it global governance, cosmopolitan democracy, transnational citizenship, universal community, contingent sovereignty, empire or whatever – it is said to be characterized by its gradual withdrawal from the boundaries established for politics by the modern state'.[49]

3.1. Conceptual Theory: Federalism and the European Union

The revival of the federalist tradition inaugurated by Althusius provides a good starting point for an analysis of the concept of sovereignty. This is because federalism as a political theory attempts to combine different polities into a larger political system by the principle of partnership. For federal polities, the very notion of the absolute and unlimited character of sovereignty is meaningless, because federalism is based on the notion of a covenant between polities, which share sovereignty.

As discussed in Chapter 3, federalism was rediscovered by the American federal polity as a mechanism of governance for the original thirteen colonies, which had at least three federal regimes since the approval of their first constitution, seen in *The Articles of the Confederation*. That said, it is important to emphasise that the concept of sovereignty in the American tradition always emphasised the concept of 'dual sovereignty' between states and the Union, although as was argued above, only the American federation had international legal sovereignty.

The European tradition of federalism also offers significant insights into the concept of sovereignty because there was a diversity of federal polities sharing sovereignty at the international level. This meant that in Europe, sovereignty was never seen as an obstacle for unions of states in the federal sense, a good example of which is the German Federation of 1815; a creation of the Congress of Vienna. The concept of

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[49] Juri Lipping, 'Sovereignty Beyond the State,' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, Cambridge: Cambridge University Press, 2010, p. 187.

sovereignty in the European tradition was always seen as flexible and non-absolute sovereignty, which could be divided and shared between sovereign states. It is notable that the Bodinian tradition rejects this understanding, which is why it is necessary to appreciate the importance of the Althusian tradition in the history of political thought.

More recently with the process of EU integration, sovereignty has broken away from the Bodinian understanding and its absolute connotations. This is why Rabkin claims that 'Sovereignty was first developed as a political doctrine by Europeans, but in today's Europe, most states are no longer fully sovereign'.[50] European integration did not eliminate the sovereignty of the modern territorial state,[51] but it did significantly reconfigure sovereignty in the context of a pluralistic governance system, just like Althusius proposed in his work.

Sovereignty, in the context of European integration, becomes a legal concept shared and divided by the member states and the EU, although the sovereign powers exercised by the European Union are not a simple case of a delegation of powers. It is necessary therefore to keep in mind that European integration is not state unification; member states still have the ultimate power of withdrawal, now recognised by the Treaty of Lisbon. This follows Schmitt's assertion that 'sovereign is he who decides on the exception',[52] and this is why Koskenniemi asks the question of whether 'a sovereign really [can] be able to alienate its sovereignty in a permanent way?'[53]

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[50] Jeremy Rabkin, 'Recalling the Case for Sovereignty,' *Chicago Journal of International Law*, vol. 5, No. 2, 2005, p. 452. Similarly, Robert O. Keohane, 'Ironies of Sovereignty: The European Union and the United States,' *Journal of Common Market Studies*, vol. 40, No. 4, 2002, p. 748.

[51] Andras Jakab, 'Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentations about the Concept of Sovereignty for the European Integration,' *European Constitutional Law Review*, vol. 2, 2006.

[52] Carl Schmitt*, Political Theology, Four Chapters on the Concept of Sovereignty*, Chicago: Chicago University Press, 2005, p. 5.

[53] Martti Koskenniemi, 'Conclusion: Vocabularies of Sovereignty-Powers of a Paradox,' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments*, op. cit., p. 227.

The conception of sovereignty put forward in this thesis, therefore, is one based on the counter-tradition in political thought inaugurated by Althusius, as Hueglin argues: 'by contrast, what is claimed here as a counter-tradition in Western political thought is a *Weltanschauung* (World-view) based on multidirectional pluralism and diversity. According to this view and tradition states are important agents of political authority and power, but not the exclusive ones'.[54]

This presupposes a change of paradigm; an altered world-view that accepts an alternative to the traditional understanding of sovereignty, particularly considering the endless debates about its usefulness or relevance, and as Kuhn argues, it is one where the willing see what was there already in a different way: 'Led by a new paradigm scientists adopt new instruments and look in new places. Even more important during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before'.[55]

This new model recognises the limitations of previous scholarship in the analysis of the concept of sovereignty,[56] and maps out new avenues towards an understanding of sovereignty in a world of overlapping and competing 'authoritative' international institutions that challenge state sovereignty.

In order to comprehend the new paradigm, it is important to acknowledge the three main streams of the literature on the subject of the concept of sovereignty: *the end of*

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[54] Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism*, Ontario: Wilfrid Laurier University Press, 1999, pp. 201-2.

[55] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, Chicago: Chicago University Press, 1996, p. 111.

[56]Hudson is critical of the limitations of the literature in seeing sovereignty as an a-historical concept, together with the fact that many authors reduce their analysis to the historical examples of France and England, see Wayne Hudson, 'Fables of Sovereignty,' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-Envisioning Sovereignty*, op. cit., p. 23.

sovereignty, the centrality of sovereignty and the qualification of sovereignty.[57] The literature concerned with the *end of sovereignty* proclaims sovereignty as an obsolete concept that does not reflect the political and legal realities in international affairs;[58] the literature about the *centrality of sovereignty* recognises that sovereignty is not an absolute concept or a-historical, seeing it, nonetheless, as a concept bound within certain limits to ensure constitutional government,[59] but still as the most important concept in International Law; the literature concerned with *the qualification of sovereignty* seeks to reframe the concept of sovereignty in light of the changes in the international system, and acknowledges the traditional limitations of the concept.[60]

The analysis of the concept of sovereignty proposed by this thesis belongs within this last stream of literature: two primary goals were sought in the research; first has been to retrace the concept of sovereignty in its historical origins, and offer an alternative insight into the notion of sovereignty following the Althusian tradition and federal theory. Second, has been to consider the limitations of states in dealing with transnational issues in a globalised world, offering an account of the mechanisms of global governance, and bearing in mind the role of 'authoritative' international institutions in challenging state sovereignty and in considering the increasing institutionalisation of international affairs.

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[57] Joseph Camilleri, 'Sovereignty Discourse and Practice—Past and Future,' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-Envisioning Sovereignty*, op. cit., pp. 37–38.

[58] There are normative and descriptive arguments in the literature, including those who propose the extirpation of sovereignty of the legal and political lexicon, and argue for the replacement of sovereignty with other concepts such as subsidiarity, see Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis,' *European Journal of International Law*, vol. 15, No. 5, 1999.

[59] This argument is made by Rabkin, who claims that sovereignty as an attribute of statehood can be seen in the context of a constitutional culture that protects rights and depends on popular sovereignty, which he says is the case in the US, considering its Constitutional history, see Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States*, Princeton: Princeton University Press, 2005, pp. 18–44.

[60] Jens Bartleson, *A Genealogy of Sovereignty*, Cambridge: Cambridge University Press, 1995, pp. 12–52.

In the international system, the concept of sovereignty cannot be seen as obsolete or as an obstacle to the fulfilment of international cooperation between states or the attainment of goals, such as the protection of the individual. Sovereignty is and will continue to be a key ordering principle of International Law in the relations between states. [61]

Notwithstanding, sovereign statehood should be seen within the context of the demands of international cooperation and the development of 'authoritative international institutions', which challenge the absolute and exclusive 'reserved domain' of the state.[62]

As a consequence, the structure of the international system poses 'immanent limits' to the concept of sovereignty, particularly if the constitutional rules of the international system are considered .

The fact that sovereignty is an essentially contestable concept,[63] full of emotional connotations,[64] does not mean that its obsolescence or eradication should be

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[61] Juliane Kokott, 'States' Sovereign Equality,' *Max Planck Encyclopaedia of Public International Law*, 2007, paras 79–82, at: http://www.mpepil.com/ViewPdf /epil/entries/law-9780199231690e1113.pdf?stylesheet=EPIL-display-full.xsl [Accessed 21.12.2010].

[62] Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford: Oxford University Press, 2007, pp. 26–7; similarly, Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples,' *Texas Journal of International Law*, vol. 42, 2006, p. 159.

[63] Samantha Besson, 'Sovereignty in Conflict,' *European Integration Online Papers (EIoP)* at: http://eiop.or.at/eiop/texte/2004-015a.htm [Accessed 21.12.2010]. As Pavlich and Barbour argue: 'Worse, the term denotes many things, from the "untrammelled power of rulers" to the "highest possible authority", to specific powers of agents (sovereigns) such as monarchs, states, dictators, parliaments and the people'. See George Pavlich and Charles Barbour, 'Introduction,' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings*, Abingdon: Routledge, 2010, p. 2.

advocated, as Crawford warns, 'But the term is ineradicable, and anyway its eradication might only make matters worse'.[65] This is because states are still the most important actors in the international system and that sovereignty presupposes the existence of states.

Furthermore, even if sovereignty is seen as a social construct,[66] it is important to emphasise that states remain the natural realm for the political participation of individuals (politics is mostly national), which means that states are seen as the natural depositories for the aspirations of groups that desire recognition under International Law.[67]

This is an important point when it is considered that the rise of the modern territorial state has been associated with particular national groups, and that it is for this reason that most of the literature still refers to the modern territorial state as a 'Nation-State'.[68] This also suggests that different national groups hold deep attachment for the modern territorial state,[69] despite that in federal and international arrangements, such as the EU, it is possible to discern the emergence of transnational identities that complement national identities, as Allot notes:

> One way or another, therefore, a state-society is able to generate
> powerful emotions in its citizens in conducting its struggle to
> identify itself by asserting its rights over territory and to defend its

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[64] Jenik Radon, 'Sovereignty: A Political Emotion, not a Concept,' *Stanford Journal of International Law*, vol. 40, 2004.

[65] James Crawford, *The Creation of States in International Law*, Oxford: Oxford University Press, 2006, p. 32.

[66] Thomas J. Biersteker and Cytnthia Weber, 'The Social Construction of State Sovereignty,' in Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct*, Cambridge: Cambridge University Press, 1996.

[67] This is why the principle of self-determination applies to states and not to other polities, because states are seen as the 'natural polities' in the international system.

[68] The 'Nation-State' is in fact a social construct, as discussed in Chapter 1 of this thesis.

[69] Attachment to states is not a universal phenomenon otherwise secessionist movements would not exist in several states, including those where the modern states first emerged.

identity by defending those rights. Loyalty to the state-society and its government has been connected with love of country, with love of the most personal possessions. And since the state-society has identified itself by so-called sovereignty, an original and natural and unlimited authority, it has seemed only natural that sovereignty over territory should be conceived as being an aspect of sovereignty and hence of the very identity of the state society.[70]

Nonetheless, in the post-Westphalian international system the concept of sovereignty should be seen in the context of the plurality of polities and institutional arrangements that have claimed a sphere of authority, which has challenged the sovereignty of the state. Thus, a Bodinian understanding of sovereignty is untenable when it is considered that the Althusian tradition offers a 'better' explanation as to the relevance and pervasiveness of sovereignty in the current international system, because sovereignty is seen as:

1. An institution that derives from the structure of the international system (its constitutional rules);
2. A part of the multi-layered and pluralistic governance system composed of states, regional and functional legal orders, and other institutional processes;
3. A concept in which supreme authority is shared[71] between different institutional arrangements, including the state, and which is contingent (non-absolute).

3.2. Reconceptualising Sovereignty: The Argument Re-stated

There are two distinct historical traditions in political theory about the concept of sovereignty: the Bodinian tradition and the Althusian tradition.

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[70] Philip Allott, *Eunomia: New Order for a New World*, Oxford: Oxford University Press, 1990, p. 323.

[71] Stephen Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law,' *Michigan Journal of International Law*, vol. 25, 2004, p. 17.

The Bodinian tradition sees sovereignty as an absolute and unlimited power of the territorial state; as Bodin argued it is the 'absolute and perpetual power of the commonwealth'.[72] This tradition considers that the *loci* of authority should be concentrated in the modern territorial state by exclusion of other polities and institutional arrangements. That said, it is important to emphasise, as Krasner does, that: 'organized hypocrisy has always characterized the sovereign state system',[73] considering that the Great Powers never fully respected the principle of non-intervention contained in the principle of sovereignty.

Conversely, the Althusian tradition considers sovereignty as neither absolute nor unlimited, and proposes that it should not be an exclusive attribute of the modern territorial state. Althusius argued, 'for this right of sovereignty is not the supreme power; neither is it perpetual or above law … Indeed, an absolute and supreme power standing above all laws is called tyrannical'.[74]

Analysis of federalism and its contribution to the study of sovereignty is of paramount importance towards an understanding of the concept of sovereignty, which perceived within the Althusian framework, has a flexible and non-absolute character. This, in the view of the author of this thesis, better represents the concept of sovereignty in the present international system.

The EU as a 'confederal' polity, where sovereignty is effectively shared between the member states and the Union[75] is a paradigmatic case, in part because of its idiosyncrasy, and also because of the interactions between the national constitutional courts and the ECJ in jointly interpreting the concept of sovereignty in a multi-level governance system, as the decision on the Lisbon Treaty by the FCC demonstrates.[76]

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[72] Jean Bodin, *Six Books of the Commonwealth*, op. cit., p. 1.

[73] Stephen Krasner, *The Durability of Organized Hypocrisy*, in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments*, op. cit., p. 112.

[74] Johannes Althusius, *Politica*, op. cit., p. 18.

[75] The FCC called the EU an 'association of sovereign states' (*staatenverbund*) as discussed in Chapter 4.

[76] For Allot, 'As in international society so also in the society of the European Union, the reality has overtaken the fantasy. The sharing of sovereign powers between states is now a

The concept of sovereignty should also be seen in the context of 'deterritorialization of authority', as the element of authority that is detached from the territory of the state. This process of 'disaggregation of authority' away from the national territorial jurisdictions further undermines the Bodinian conception of sovereignty, as Watts emphasises: 'two of the perceived underpinnings of the old international community are disappearing before our eyes (if only we open them wide enough) – namely, sovereignty and territory. The modern world is no longer a place in which either of these two notions can prosper'.[77] This means that the *Grundnorm*[78] in International Law recognises both the supreme authority of the state and the authority of the different international legal regimes.

The argument throughout this thesis reaffirms that the concept of international legal sovereignty – or sovereign equality – is determined by the 'constitutional rules' of the international system, and that these rules are rule of membership, rules of conduct and secondary rules.[79] In the present international system, these rules began with the UN

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major structural feature of international society. It is the major structural feature of the European Union, where the member states have shared almost all their basic sovereign rights with the Union', Philip Allot, *The Health of Nations: Society and Law beyond the State*, Cambridge: Cambridge University Press, 2002, p. 177; similarly, Gidon Gottlieb, *Nation Against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty*, New York: Council of Foreign Relations Press, 1993, p. 38.

[77] Arthur Watts, 'The Importance of International Law,' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford: Oxford University Press, 2000, p. 10.

[78] Fundamental Rule (Hart calls it 'rule of recognition'), is found in Hans Kelsen, *Pure Theory of Law,* Los Angeles: University of California Press, 1970.

[79] That said, it is important to point out that the claim of supreme authority of the sovereign state was never fully reconciled with the idea of an international society because of the consensual nature of International Law, see Andrew Hurrell, *On Global Order, Power, Values, and the Constitution of the International Society*, Oxford: Oxford University Press, 2007, p. 49. The 'Lotus principle' (as a result of the Lotus decision of the ICJ) states that 'Restrictions upon the independence of States cannot therefore be presumed'. This principle should be understood in the context of the foundational rules of the international system,

Charter, which established the foundational rules of the present system, but these rules now encompass a plethora of legal regimes that go beyond the UN system. This is why it is important to understand that the international society established after 1945 by the United Nations system is becoming increasing pluralistic.

The emergence of regional legal systems, such as the EU and functional regimes such as the WTO and the ICC, have created new challenges to the absolute conception of sovereignty when it is considered that these organisations claim a sphere of authority that is not bound by the national jurisdiction of the sovereign state. These legal systems challenge the monopoly of the modern territorial state in wielding supreme authority over its territory, with the result that the jurisdiction of the state – traditionally defined as jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate – is now being exercised by these institutional arrangements.[80]

In the view of the author of this thesis, legal pluralism offers a theory that explains well the articulation of the different legal systems (the national, the international, regional and functional legal orders), each of which claim supreme authority.[81] Legal pluralism emphasises the diversity of legal systems in a world where International Law is becoming increasingly fragmented by the emergence of self-contained regimes, as Krisch argues:

> Pluralism eschews the hope of building one common, overarching
> legal framework that would integrate postnational governance,
> distribute powers, and provide for means of solving disputes
> between the various layers of law and politics. It is based instead on

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Lotus case, Para. 44, at: http://www.worldcourts.com/pcij/eng/decisions/1927. 09.07_lotus.htm; see also, Martti Koskenniemi, *From Apology to Utopia*, op. cit., pp. 255–58.

[80] On the manifestations of jurisdiction of the states: jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate, see Antonio Cassese, *International Law,* Oxford: Oxford University Press, 2005, second edition, p. 49.

[81] For a sceptical view of legal pluralism at the international level, see Martti Koskenniemi, *The Politics of International Law*, op. cit., pp. 350–54.

the heterarchical interplay of these layers according to rules ultimately set by each layer itself. In pluralism, there is no common legal point of reference to appeal to for resolving disagreement; conflicts are solved through convergence, mutual accommodation – or not at all. It is a vision that takes societal fragmentation to the institutional level.[82]

Some authors argue that International Law is in the process of 'constitutionalization'[83] but that implies that there is an increasing group of norms and rules that enjoy higher status in International Law. In the view of the author of this thesis, this might be the case only if 'constitution' is defined as a set of foundational rules that establish the international society of states.[84] The

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[82] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law*, Oxford: Oxford University Press, 2010, p. 69.

[83] Fassbender sees the UN Charter as a 'constitutional' charter for the international community, see Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law,' op. cit., p. 130; also Bardo Fassbender, 'We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law,' in Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism,* Oxford: Oxford University Press, 2007, p. 281.

[84] The idea of a Constitution in International Law makes sense only if Constitution is defined in the material sense (not in the formal sense): defined as a set of foundational principles of the international society of states, see Hans Kelsen, *General Theory of Law and the State*, op. cit., pp. 124–5. The problems of translation of a Constitutionalism beyond the state occur also in International Law because the language of constitutionalism is inherently national, as argued in Chapter 4 of this thesis when discussing the possibilities of a European constitutionalism.

For a skeptical view of the 'constitutionalization' of International Law and arguing that the existence of a constitutionalised political order is vastly overstated, see Jean L. Cohen, 'Whose Sovereignty? Empire versus International Law,' *Ethics and International Affairs*, vol. 18, No. 3, 2004, p. 11. For a more positive view of the constituionalization of International Law, arguing that individuals and not states should be the cornerstone of International Law, see Anne Peters, 'Membership in the Global Constitutional Community,' in Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law*, op. cit., p. 157, p. 178. For Anne Peters, the concept of sovereignty 'exists only within the confines of

constitutionalization of International Law does not imply an endorsement of a 'world state', but contrarily, it can be seen as an answer to the fragmentation of International order.[85]

Hence, it is important to adopt a pluralist conception of sovereignty within the framework of the Althusian tradition as opposed to an absolutist conception found in the Bodinian tradition.[86] The Althusian tradition is more consistent with the realities of the present international system, whereby states share sovereignty with different international institutions. This meaning of sovereignty 'posits any sovereign as fully dependent upon the historical concept from which it emerges'.[87] Moreover, International Law should incorporate the contribution of federalism as an apolitical theory, particularly in analysing the union of states, and should not relegate the study of federalism to Constitutional Law.

The notion of an international society of states is a very important one to International Law, but the dichotomy between sovereignty and international community is false, when it is acknowledged that: 'neither sovereignty nor world community has any fixed meaning, and that the choice between the two cannot be made as a principled commitment, only as a hegemonic strategy'.[88] This means that the international society created in 1945 with the UN, accepted the principle of sovereign equality as

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international constitutional law', see Anne Peters, 'Membership in the Global Constitutional Community', ibid., p. 185.

[85] Bardo Fassbender, 'The Meaning of International Constitutional Law,' in Nicholas Tsagourias, *Transnational Constitutionalism*, op. cit., p. 311.

[86] Changes to the concept of sovereignty should be considered in the Althusian tradition with its history and its own 'tradition of discourse', see Terence Ball, 'Conceptual History and the History of Political Thought,' in Iain Hampsher-Monk, Karin Tilmans and Frank Vree (eds), *History of Concepts: Comparative Perspectives,* Amsterdam: Amsterdam University Press, 1998, p. 81.

[87] Charles Barbour and George Pavlich, 'Introduction,' in Charles Barbour and George Pavlich (eds), *After Sovereignty*, op. cit., 2010, p. 5.

[88] Martti Koskenniemi, *The Politics of International Law*, op. cit., p. 225.

an ordering principle, while acknowledging a 'world community' with some universal norms.[89]

Thus, International Law should recognise the inherent malleability of the concept of sovereignty, and appreciate that the pull towards centralisation and unity in International Law is not possible in a world of increasingly fragmented legal orders. Thus, International Law should reflect the 'idea of an emerging law of a transnational society'.[90]

Sovereignty cannot, therefore, be seen just as an emanation of the transfer of powers by states to international institutions (regional and functional).[91] On the contrary, sovereignty is an attribute of statehood that is exercised increasingly by different polities and institutional arrangements, without reference to the primacy of the state.

4. Conclusion

The chapter has examined the changes to the concept of sovereignty in the international system, considering different mechanisms of global governance. The institutionalisation of these mechanisms, it has been argued, need to be seen in the

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[89] Ian Clark, *Legitimacy in International Society*, Oxford: Oxford University Press, 2005, pp. 144–51. The contemporary international society was established by the UN and represented the political consensus of its age, although the practice of the UN during the Cold War was never compatible with its ideals.

[90] Andrew Hurrell, 'Conclusion: International Law and the Changing Constitution of the International Society, in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford: Oxford University Press, 2000, p. 357.

[91] Joyce emphasises this point by arguing that in this approach, the state is the 'unmoved mover' and sovereignty can only be exercised by the state, see Richard Joyce, 'Sovereignty after Sovereignty,' in Charles Barbour and George Pavlich (eds), *After Sovereignty*, op. cit., p. 37. International institutions exercise authority not just trough the delegated authority of the state but also through the authority of own self-referential legal system, this is what Raz calls the 'authoritative nature of law', Joseph Raz, *Between Authority and Interpretation, On the Theory of Law and Interpretation*, Oxford: Oxford University Press, 2009, pp. 109.

context of international cooperation, when action by two or more states is required in order to deal with transnational issues, for example, negative externalities.

However, as a corollary, these mechanisms of global governance challenge state authority when authoritative structures are developed within their own legal systems and dispute-resolution mechanisms by claiming a sphere of authority that overlaps with the authority of the modern territorial state.

The chapter has analysed the contribution the federalist tradition – inaugurated by Althusius – has made to the concept of sovereignty, considering its emphasis on the non-absolute and pluralistic character of sovereignty.

In the international system, a plurality of institutional arrangements regulate a certain area (functional arrangements) or region (regional arrangements), which are challenging the Westphalian system of sovereign states. Moreover, the challenges posed by the changes in the constitutional rules of the international system are opening up new possibilities for different polities and institutional arrangements.

The chapter has also examined the increasing international arrangements and enforcement mechanisms in place to protect the individual, particularly in the field of International Criminal Law.

The rise of these different international regimes – regional or functional – have contributed to the increasing fragmentation of the international legal system, and bearing this in mind, the chapter has addressed global legal pluralism as an alternative both to either monism or dualism. Global legal pluralism is seen as a theory capable of articulating the different legal orders in a world where each legal system claims exclusive authority.

The chapter concluded with a re-statement of the argument concerning the nature and evolution of the concept of sovereignty in International Law.

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