

**“The Continuing Relevance of Sovereignty in Theorizing European Integration”**

**Paper for Workshop: Sovereignty and European integration in the post-  
constitutional era**

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## ***Introduction – The Double Bind of Sovereignty Scholarship***

Interdisciplinary scholarship, is, it seems, a Sisyphean task. Not only is it “so very hard to do”<sup>1</sup>, but Jack Balkin has described interdisciplinary scholarship as “the result of an incomplete or failed takeover”.<sup>2</sup> By this he means rather than fostering mutual-learning and appreciation of other disciplines, interdisciplinarity is a form of ‘colonization’, which, if successful, results in the colonization of the methodology of one discipline by another.<sup>3</sup> This disciplinary imperialism is a result of the nature of disciplinary training and formation. Disciplines are authoritative social structures with their own internal rules about what successful analysis constitutes. They suggest “not only what to criticize in others but how to criticize.”<sup>4</sup> They offer assumptions about what is a “good argument, an interesting problem and what constitutes good enough evidence or good enough proof.”<sup>5</sup> As such, then, disciplines employ a particular “cultural software”<sup>6</sup> which provides a particular filter dictating not only how knowledge is gained, but also what knowledge is gained and what is useful and relevant. As such, then, where one has succeeded in being interdisciplinary, one has successfully imposed their disciplinary lens on another discipline whose methodology is thereby abandoned.<sup>7</sup>

Law, in particular, has been a particularly promiscuous candidate in the interdisciplinary game with the growth of ‘law and ....’ scholarship.<sup>8</sup> The most celebrated of these has been ‘law and economics’ analyses quickly followed by ‘law and politics’. But yet, according to Balkin, law itself is ultimately immune to out-

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<sup>1</sup> S. Fish, “Being Interdisciplinary is So Very Hard to do” in S. Fish, *There’s No such Thing as Free Speech ... and It’s a Good Thing Too*, (New York, Oxford University Press: 1994), 231.

<sup>2</sup> J. M. Balkin, “Interdisciplinarity as Colonization” (1996) 53 *Washington and Lee Law Review* 951.

<sup>3</sup> Balkin, 960.

<sup>4</sup> Balkin, 955.

<sup>5</sup> *Ibid.*

<sup>6</sup> Balkin, 956.

<sup>7</sup> *Ibid.*

<sup>8</sup> Balkin, 965.

and-out colonization due to its nature as a professional practice.<sup>9</sup> If law is resistant to colonization on this account, then, the potential colonizer is deluded. These are sobering thoughts indeed for a workshop devoted to an ‘interdisciplinary perspective from law and political science’ on sovereignty and European integration.

If one considers disciplinary training, institutional learning and other aspects of ‘habitus’ that constitute the deep epistemic foundations of how we approach a particular subject and gain specific types of knowledge, as well as the inherently conservative and authoritative nature of disciplinary training,<sup>10</sup> then it can seem that interdisciplinary scholarship is a pointless endeavour and we should just try to rub along with our disciplinary differences. The temptation would be to retreat behind the lines of disciplinary dogma and simply give one’s point of view on a particular political problem or social phenomenon, hoping that a variety of papers from different disciplines on the same subject will result in some ‘economies of scale’ yielding a nugget of wisdom or insight that would not, perhaps, have developed in a context of disciplinary purity.

Unfortunately, such a luxury (if we can call it that) cannot be afforded to the object of the current workshop; the concept of sovereignty. As the “meta-language”<sup>11</sup> of a variety of disciplines including political science, political theory, international relations and, of course, law, a ‘pure theory of sovereignty’ located in one social scientific discipline is simply not possible. Its precise expression in these disciplines, however, is rarely excavated and it remains a deeply seated assumption rather than an explicit object of analysis. Nonetheless, the argument is made *pace* Balkin, that a path does exist, must exist, between the disciplines of law and political science (in

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<sup>9</sup> Balkin, 964.

<sup>10</sup> *Ibid.*

<sup>11</sup> N. Walker, “Late Sovereignty in the European Union” in N. Walker (ed.), *Sovereignty in Transition*, (Oxford: Hart, 2003), 10.

which I include international relations) which lies through the concept of sovereignty. Thus, sovereignty is a *threshold concept*, lying firmly on the border between law and politics, *pouvoir constituant* and *pouvoir constitué*, but ultimately reducible to neither.

Of course, this does not mean that the study of sovereignty from legal and political perspectives will be immune to the dangers highlighted by Fish and Balkin, nor indeed, always result in quality research which either of the disciplines will find useful or relevant. Rather, in respect of sovereignty, academic scholarship is necessarily forced onto an anti-disciplinary space and the challenge for the scholar of sovereignty is to both be aware of its nature as a meta-language for a series of disciplines as well as attempt to manage its transcendental nature without forcing it into a disciplinary straitjacket. In this respect, then, scholarship on sovereignty should exercise a ‘disciplinary tolerance’; for current purposes, this would suggest an approach to the concept where lawyers working with the concept should always be cognizant of its political nature and its resonance in the political sphere, and political scientists (broadly understood) should be sensitive to its nature as a foundational element of the concept of law.

Sovereignty scholarship is, however, caught in a double bind. Not only must analysts of sovereignty adopt an attitude of disciplinary tolerance in their approach to the concept, but they have, in the past couple of decades, had to increasingly defend their object of study in the face of a tide of sovereignty scepticism centring on the alleged inexorable demise of the concept caused by complex phenomena generally termed “globalization”.<sup>12</sup> Thus, the rapid trans-national evolution of technology, communications, travel, economics, finance as well as the internationalization of hitherto reasonably localized phenomena such as terrorism, the shift from

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<sup>12</sup> See D. Held and McGrew, *The Global Transformations Reader*, (Cambridge: Polity, 2002)

environment pollution to global warming, and swine flu (!), means that the sovereign state's claims to ultimate authority and control over a particular territory, the regulative ideal of territorial and political organization, ring increasingly hollow. This attack on the concept of sovereignty has come from a series of perspectives and disciplinary backgrounds. In this paper I will consider three particular forms of this sovereignty scepticism which I believe is a reasonably representative sample of the genre; positivist, critical and jurisprudential.

### *The positivist approach*

The positivist strain of sovereignty scepticism is, as its name would suggest, characterized by an analytical positivist approach to the concept. This, in turn, entails an empirical methodology employed to sustain the relevant hypothesis, in this case the demise of the concept of sovereignty, characterized by the increasing inability of states to manage and control events on their territory. On this account, the defining characteristic of statehood – sovereignty – is increasing eluding states which are therefore in decline.<sup>13</sup> This hypothesis is then backed up with all sorts of ‘factual’ data – usually economic – showing that states are at the mercy of events outside their borders and as such internal policy – such as corporate tax rates or investment controls – is no longer autonomously formulated but is dictated by exogenous agents such as multinational corporations controlling the gates of investment flows.<sup>14</sup> The positivist version of sovereignty scepticism adopts an essentialist “Kensyan/Westphalian”<sup>15</sup> approach to sovereignty as the framework with which to evaluate these events.

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<sup>13</sup> See S. Strange, *The Retreat of the State*, (Cambridge: Cambridge University Press, 1996).

<sup>14</sup> See S. Piciotto, “Constitutionalizing multilevel governance?” (2008) 6 *International Journal of Constitutional Law* 457.

<sup>15</sup> N. Fraser, “Reframing Justice in a Globalized World” (2005) 36 *New Left Review* 69.

Richard Krasner has been a primary exponent of this positivist approach to sovereignty in international relations.<sup>16</sup> Krasner's thesis is predicated on the premises that in the absence of a 'world government' to resolve disputes between sovereign actors, states are compelled to act, less by institutional rules and norms of behaviour (a logic of appropriateness) but according to a "logic of consequences".<sup>17</sup> This, therefore, implies that the relations among sovereign states are motivated by actions which fulfil the rational calculating behaviour of states for the optimal attainment of their pre-configured preferences.<sup>18</sup> Thus, rather being based on a normative concept of international world order of the equality of sovereign states, the 'factual' evidence points to international relations operating according to a matrix of power such that states act according to their ability to achieve specific outcomes predicated on their *de facto* power and possibilities for influence.

So, what are the implications for the concept of sovereignty, then, on this account? Krasner identifies four meanings of sovereignty which are not logically coupled nor have they "covaried in *practice*".<sup>19</sup> These four meanings are domestic sovereignty, interdependence sovereignty, international legal sovereignty and Westphalian sovereignty.<sup>20</sup> The latter two form the basis of his study of sovereignty and refer exclusive to (normative) issues of authority; to wit "does the state have the right to exclude external actors, and is a state recognized as having the authority to engage in international agreements?"<sup>21</sup> The former two conceptions of sovereignty, domestic and interdependence sovereignty, according to Krasner, constitute the focus

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<sup>16</sup> See R. Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton, N.J.: Princeton University Press, 1999); R. Krasner, "Rethinking the Sovereign State Model" (2001) 27 *Review of International Studies* 17-42; R. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law" (2004) 25 *Michigan Journal of International Law* 1077.

<sup>17</sup> Krasner (1999), 5.

<sup>18</sup> Krasner (1999), 6.

<sup>19</sup> Krasner, (1999), 9.

<sup>20</sup> *Ibid.*

<sup>21</sup> Krasner, (1999) 10.

of the globalization critiques of sovereignty outlined above<sup>22</sup> and relate almost exclusively to issues of control. In this respect, it is clear that interdependence (and to a lesser extent domestic) sovereignty are being increasingly comprised by globalization.<sup>23</sup> However, Krasner goes on to make a stronger claim, over and above this “commonplace” in contemporary international relations discourse. He argues that Westphalian and international legal sovereignty, those which refer exclusively to authority, are, in practice, systematically violated in international relations.<sup>24</sup> The normative ideals of sovereign equality are more honoured in the breach than the observance, and as such, then, the international system and the very notion of sovereignty itself is a chimera.<sup>25</sup> For the positivist approach (or at least for Krasner) the question is not whether sovereignty was once the preserve of the sovereign state which is now slowly losing its grip, but rather that sovereignty has *never properly existed* in the international state system which is characterized by power and hegemony rather than normative equality. This conclusion simply reflects the power matrix in the global (dis)order. Crucially, Krasner argues that “the most important *empirical* conclusion ... is that the principles association with both Westphalian and international legal sovereignty have always been violated” and are therefore “best understood as examples of organized hypocrisy”.<sup>26</sup>

### *The ‘critical’ approach*

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<sup>22</sup> Held and McGraw.

<sup>23</sup> Krasner, (1999) 12.

<sup>24</sup> Krasner, (1999) 7.

<sup>25</sup> Krasner, (1999) 7.

<sup>26</sup> Krasner, (1999) p. 24. *Emphasis added.*

The critical approach to the concept of sovereignty is essentially equated with the bourgeois liberal state which reached its apotheosis in the 19<sup>th</sup> century.<sup>27</sup> In this respect, then, the critical approach to sovereignty and its demise is closely related to more general Marxist-inspired critiques of liberalism.

A particularly forceful exponent of the critical approach to sovereignty in recent times is the concept of Empire put forward by Michael Hardt and Antonio Negri.<sup>28</sup> Empire represents a new era of normative thinking about power, authority and politics of which globalization processes are the symptom rather than the cause.<sup>29</sup> According to this thesis, normatively speaking, sovereignty is undergoing a radical transformation from the sovereignty of the nation to “imperial sovereignty.”<sup>30</sup> Empire denotes a new phase of sovereignty according to a “single logic of rule.”<sup>31</sup>

The precursor to Empire is modernity, characterized by the “transcendental”<sup>32</sup> concept of sovereignty which ultimately leads “to the imposition of social hierarchy and domination.”<sup>33</sup> Sovereignty, oppresses, according to Hardt and Negri through the imposition of “binary structures and totalizing logics on social subjectivities, repressing their difference.”<sup>34</sup> Modernity, is furthermore characterized as being inflicted by an incorrigible crisis.<sup>35</sup> The essence of this crisis, is caused by the transcendental and representative concept of sovereignty itself, where the differentiated and heterogeneous “multitude” has been homogenized through the Hegelian dialectic into rigid categories: a signatory of the social contract, a citizen or

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<sup>27</sup> J. Habermas, “The European Nation State. Its Achievements and its Limitations. On the Past and Future of Sovereignty and Citizenship”, (1996) 9 *Ratio Juris*.

<sup>28</sup> M. Hardt & A. Negri, *Empire*, (Cambridge, MA: Harvard University Press, 2000)

<sup>29</sup> *Empire*, xii.

<sup>30</sup> *Empire*, 8.

<sup>31</sup> *Empire*, xii.

<sup>32</sup> *Empire* 83.

<sup>33</sup> *Empire*, 91.

<sup>34</sup> *Empire*, 144.

<sup>35</sup> *Empire*, 69.

– worst of all - a national.<sup>36</sup> Empire is therefore witnessing the passage of sovereignty from the oppressive nation-state version to the liberating form of imperial sovereignty. Imperial sovereignty, unlike modern sovereignty is not characterized by a particular crisis, but by “omni-crisis”<sup>37</sup> or “corruption”.<sup>38</sup> Thus, in imperial sovereignty, the contradictions are “elusive, proliferating, and nonlocalizable: the contradictions are everywhere”.<sup>39</sup> In this way, imperial sovereignty reflects the differentiation and diversity of the “multitude”<sup>40</sup>.

The passage to Empire is both a factual event; a consequence of “world market” ideology – and therefore an effect of globalizing forces<sup>41</sup> – but also, and perhaps more importantly, something to be celebrated as a normative good. Thus, the world market is deconstructing the boundaries of the nation state and through this process it is “liberated from the kind of binary divisions that nation-states had imposed ... [and] ... a myriad of difference appears.”<sup>42</sup> The boundaries of modernist sovereignty are dissolved in imperial sovereignty. Rather than containing boundaries, the space of imperial sovereignty is “smooth” which “ might appear to be free of the binary division or striation of modern boundaries, but really it is crisscrossed by so many fault lines that it only appears as a continuous, uniform space.”<sup>43</sup>

As such, then, Hardt and Negri’s thesis is not a wholly conventional Marxist critique of global capitalism. It is the radically liberalizing tendencies of globalization rather than the internationalization of finance and markets *per se* – which are rather symptomatic of the passage to Empire - which gives cause for celebration. In the

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<sup>36</sup> *Empire*, 84.

<sup>37</sup> *Empire*, 201.

<sup>38</sup> *Empire*, 201.

<sup>39</sup> *Empire*, 201.

<sup>40</sup> *Empire*, 83.

<sup>41</sup> *Empire*, xii.

<sup>42</sup> *Empire*, 151.

<sup>43</sup> *Empire*, 190.

evolution of sovereignty to Empire, the multitude is re-asserting itself as an “alternative political organization of global flows and exchanges”.<sup>44</sup>

In sum, then, Empire has a descriptive and a normative component. The former relates to the increasing trans-nationalization of activity mediated through varying disciplines of commerce, economics, finance, immigration etc. which is governed not by a hierarchical notion of state sovereignty but rather according to a logic of increasingly transnational rule structures.<sup>45</sup> This, in turn, is causing a new form of imperial sovereignty which through capital accumulation and commodification excavates and exploits the differences in the multitude, thereby liberating them.<sup>46</sup> In this way imperial sovereignty turns the conventional theory of sovereignty on its head. Rather than being liberated through leaving the state of nature to become a ‘people’ as Thomas Hobbes would have us believe, we are actually liberated, on the account of imperial sovereignty, through the demise of the Hobbesian notion of sovereignty with its uniformizing, homogenizing and therefore oppressive tendencies. In this way imperial sovereignty is a form of ‘anti-sovereignty’.<sup>47</sup>

### *The Jurisprudential Approach*

The jurisprudential approach to sovereignty is one which is particularly favoured by lawyers. This views sovereignty as the highest legal authority, or fundamental law of an entity which has traditionally been associated with constitutionalism. On this reading, sovereignty is nothing more than its highest legal authority. Indeed, followed to its logical conclusion, the state, as the ‘container’ of

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<sup>44</sup> *Empire*, xv.

<sup>45</sup> *Empire*, 150-151.

<sup>46</sup> *Empire*, 154.

<sup>47</sup> Loughlin describes it as “nothing less than the nemesis of modern sovereignty”. M. Loughlin, *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), 97.

sovereignty is nothing more than its legal system.<sup>48</sup> The legal system is essentially the personification of the state.<sup>49</sup> This, then, represents a departure from more Hobbesian ideas of sovereignty which posits the sovereign as the omnipotent power (and exclusive source of law). For Kelsen, and the legal positivist tradition more generally, sovereignty was simply that which authorized the production of law within the state. This authorization itself must be either “presupposed”<sup>50</sup> or contingent upon some non-legal, non-normative “social fact”<sup>51</sup> as otherwise it would result in an infinite regress of authorizing norms. Kelsen famously postulated the idea of the *Grundnorm* or ‘basic norm’ which constituted the basis of any legal system. In this way, the jurisprudential approach to sovereignty, in effect suppresses the political character of sovereignty through a process of juridification.<sup>52</sup>

This jurisprudential conception of sovereignty has been applied and explored in the context of European integration by Neil MacCormick.<sup>53</sup> Taking his cue from the Kelsenian conception of sovereignty (or indeed lack thereof), he argues that if sovereignty is nothing more than the ultimate legal authority in a polity, then, “sovereignty is neither necessary to the existence of law and state nor even desirable”.<sup>54</sup> Such a scenario can occur according to MacCormick, if we adopt a conception of *Rechtstaat* or ‘law state’, where “a state which has law, and in which

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<sup>48</sup> H. Kelsen, *General Theory of Law and State*, A. Wedberg trans. (New York: Russell & Russell, 1945), 182.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> H. L.A. Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1994),

<sup>52</sup> Indeed, Carl Schmitt accused Kelsen of suppressing the very notion of sovereignty itself through this approach; ‘Kelsen solved the problem of the concept of sovereignty by negating it,’ C. Schmitt, *Political Theology*, (Chicago: University of Chicago Press, 2005), 21.

<sup>53</sup> D. N. MacCormick and O. Weinberger, *An Institutional Theory of Law*, (Dordrecht: Kluwer, 1986); N. MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999). (QS)

<sup>54</sup> QS, 129.

law regulates and restricts the conduct of political officials as well as citizens, presupposing no monolithic political sovereignty power outside or above the law”.<sup>55</sup>

This has interesting implications for the subject matter of the current workshop regarding the state of sovereignty in European integration. If we can decouple law and sovereignty, and the concept of law from the concept of the state through the conception of law as an “institutional normative order”,<sup>56</sup> as MacCormick has done, then we can conceive of a variety of forms of law as institutional normative order including canon law, public international law, the law emanating from the European Convention of Human Rights and, crucially, European Union law.<sup>57</sup>

What, then, does this imply for the concept of sovereignty in a normative universe of legal pluralism? MacCormick argues that, in Europe at least, we are entering a “post-sovereign”<sup>58</sup> phase, where the (often violent) exercise of ultimate authority is now taken over by *legality*, where rival claims and contestation are resolved through legal process and legal system. Thus, European states, at least those which are members of the “European commonwealth”<sup>59</sup> are no longer sovereign in the Hobbesian sense.<sup>60</sup> However, and importantly from the point of view of sovereignty, there is no net ‘sovereignty beneficiary’ from this loss of sovereignty of the European nation state. The grand mediator of inter-state relations in Europe – the European Union and its legal system – does not gain sovereignty on the *Rechtstaat* account of

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<sup>55</sup> *QS*, 128.

<sup>56</sup> *QS*, Chapter 1.

<sup>57</sup> *QS*, 128.

<sup>58</sup> *QS*, 95.

<sup>59</sup> N. MacCormick, “Democracy, Subsidiarity and Citizenship in the ‘European Commonwealth’ (1997) 16 *Law and Philosophy*.”

<sup>60</sup> *QS*, 132. For a similar view see W. Wallace, “The Sharing of Sovereignty: the European Paradox” (1999) XLVII *Political Studies*, 503-521.

law and state.<sup>61</sup> For MacCormick, sovereignty is not a zero-sum game but is rather closer to virginity, “something that can be lost by one without another’s gaining it”<sup>62</sup>

### *A critique of the critique (or ‘is this workshop in vain?’)*

If these critiques are correct, that sovereignty is either hypocritical, imperial or irrelevant, is there some way to salvage the conception to justify a workshop in its name? Unsurprisingly, the rest of this paper will (self-servingly) argue that sovereignty is still a vital concept in 21<sup>st</sup> century Europe. It will do so with the caveat that the discussion will be limited to the establishment and process of European integration under the auspices of the European Union. Not only will it argue that it is still relevant in Europe but that it is, furthermore, a necessary and vital component in theorizing the “euro-polity”<sup>63</sup> itself, a claim that will be further pursued in the following section.

However, prior to arguing for the relevance of sovereignty in theorizing the euro-polity itself, a few points can be made on the relevance of the concept more generally in response to the critiques outlined above. In order to be able to do this, a preliminary definitional exercise is warranted.

I mentioned at the beginning that sovereignty is a ‘threshold’ concept in the sense of lying on the border of law and politics. It is also a threshold concept in the sense that it entails both internal and external dimensions. In ontological terms, sovereignty, can be defined as a *plausible claim to a particular status*. As such, the

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<sup>61</sup> “it is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community. Neither politically nor legally is any member state in possession of ultimate power over its own internal affairs”. *QS*, pp. 132.

<sup>62</sup> The quote continues “and whose loss in apt circumstances can even be a matter for celebration?”. This latter sentiment hinting that MacCormick also envisages a particular normative dividend in post-sovereignty. *Questioning Sovereignty*, 126. For his view on the relationship between post-sovereignty and nationalism see Chapter 12.

<sup>63</sup> P. Schmitter, “Imagining the Future of the Euro-Polity with the Help of New Concepts” in G. Marks *et al* (ed.), *Governance in the European Union*, (London; Thousand Oaks, CA: Sage, 1996).

concept of sovereignty is an inherently *relational* concept; the product of a political relationship.<sup>64</sup> Given the internal and external nature of the concept of sovereignty, the political relationship also reflects internal and external dimensions.

This sovereign claim must be made within some sort of institutional configuration<sup>65</sup> with a variety of available repertoires whether in the shape of a constitutional preamble, a declaration of independence or even a court ruling. The content of the claim will resonate differently in the internal and the external registers. Thus, the sovereign claim in the domestic register relates to the *ultimate authority* of the sovereignty in a particular territorially delimited sphere. This is reflected in the German public law concept of *Kompetenz-Kompetenz*; sovereignty is the power to determine the limits of ones own competence; the power to determine “who decides, who decides?”<sup>66</sup> In the external register, the sovereign claim is a claim of parity of status with other states, the assertion of a “right to participate and engage in relations and to make agreements with other sovereign states”.<sup>67</sup>

The sovereign claim, in order to be ‘plausible’, must be accepted or internalized by a specific audience. Like the content of the claim, the audience which is to internalize each claim will vary internally and externally. Internally, the audience consists of those over whom the sovereignty is purported to be exercised: a ‘people’, subjects, citizens or other institutional actors. Externally, the audience of the sovereignty claim consists of those entities that can plausibly make *similar claims to such status* – that is *other sovereigns*.

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<sup>64</sup> See generally, M. Loughlin, *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), Chapter 5.

<sup>65</sup> (Weber, 1968: 220)

<sup>66</sup> M. Maduro, “Europe and the constitution: what if this is as good as it gets?” in J. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State*, (Cambridge: Cambridge University Press, 2003), 95.

<sup>67</sup> R. Jackson, “Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape” (1999) XLVII 453.

This idea of sovereignty as a “speech act”,<sup>68</sup> then, refutes a positivist epistemology to the concept such as that adopted by Krasner outlined above. As a normative claim, it is not reducible to a “corresponding state of affairs in reality”.<sup>69</sup> Such an analytical approach succumbs to what Werner and deWilde describe as the “descriptive fallacy”<sup>70</sup>; that sovereignty as a *normative* concept, should correspond to some objective reality in order to be useful or meaningful. The descriptive fallacy fails to grasp the essence of normativity, which entails a *standard or ideal* against which behaviour is evaluated. Deviance from this standard constitutes cause for reproof reflecting a “critical reflective attitude”<sup>71</sup> by agents to the standards themselves. As Hans Kelsen observed, a “certain antagonism between the normative order and the actual ... behaviour to which the norms of the order refer must be possible.”<sup>72</sup> A complete overlap between normative claim and behaviour would render the concept of a normative order “completely meaningless”.<sup>73</sup> Accompanying the descriptive fallacy is what Walker calls the “fallacy of abstraction”<sup>74</sup> which assumes that given that sovereignty’s status (internally) as the “power over powers”<sup>75</sup>, that in order to be plausible, the claim must reflect an ability to subsume all other forms of power economic, symbolic etc. As a *normative concept* entailing prescriptions of practice rather than a practice itself, then, Krasner’s assertion that “the most important *empirical* conclusion for the present study is....[that]

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<sup>68</sup> N. Walker, “Late Sovereignty in the European Union”, 6.

<sup>69</sup> W. Werner and J. De Wilde, “The Endurance of Sovereignty” (2001) *European Journal of International Relations* 283, 284.

<sup>70</sup> *Werner and deWilde*, 285.

<sup>71</sup> H. L. A. Hart, *The Concept of Law*, (Oxford: Clarendon, 1994), 57.

<sup>72</sup> *General Theory of Law and State*, 120.

<sup>73</sup> *Ibid.*

<sup>74</sup> N. Walker, “Late Sovereignty in the European Union” in N. Walker (ed.), *Sovereignty in Transition*, (Oxford: Hart, 2003),

<sup>75</sup> Walker, 7.

Westphalian and international legal sovereignty are ... organized hypocrisy”<sup>76</sup> is oxymoronic if not completely nonsensical.

Both the critical and jurisprudential accounts of sovereignty appreciate its normative nature, but argue that it has evolved into legality or Empire and as such the ‘old’ Hobbesian version of sovereignty is not appropriate for current realities. The justification or evaluation of this position differs in each account. The jurisprudential account sees the concept of sovereignty being overtaken by law; a development which is at a particularly advanced stage in European integration. It is submitted, that this approach to sovereignty denies the threshold nature of the concept on the border of law and politics and reflects either a disinterest in the political aspect or even more egregiously, an attempt to reduce the concept to its legal variant, shoe-horning politics into a legal strait-jacket.

With respect to the libratory logic of Hardt and Negri’s imperial sovereignty, it is a normative view of sovereignty that will doubtlessly fall gain adherents. What it ultimately boils down to, however, is the question of whether Hobbes exaggerated the dangers of the state of nature and its potential threat to human existence. Extrapolating from this proposition then, this view would imply that the state of nature has received a bad press for over 400 years and rather than being “nasty, brutish and short”<sup>77</sup> is actually vital, vibrant and fun!

This ‘true’ nature of the state nature is beyond the scope of this paper. Rather, the point to be made in relation to the area of study of this paper, the European Union, is that even if one accepts Hardt and Negri’s account of Imperial sovereignty within a broader idea of globalization, it is not relevant to the theorization of the euro-polity. This in turn reflects one of the central contentions of this paper that *European*

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<sup>76</sup> Krasner (1999), p. 24.

<sup>77</sup> T. Hobbes, *Leviathan*, R. Tuck ed. (Cambridge: Cambridge University Press, 1996), 89.

*integration is not a facet of the general phenomenon of globalization, but is rather a reconstitution or replication of sovereignty at the supranational level. Clearly, then, sovereignty is central to theorizing the European polity and its development.*

*The relevance of sovereignty in European Integration*

The question of the political ontology of the euro-polity is a perennial issue in European integration studies. The nature of the entity which Delors dubbed “un objet politique non-identifié”,<sup>78</sup> constitutes one of the deeper puzzles of current political and constitutional theory. Some of the most relevant work in this regard in recent years has been in the field of debates regarding the political legitimacy (or lack thereof) of the polity.<sup>79</sup> There are two general trends in debates regarding the legitimacy of the euro-polity, the Westphalian and the constitutional. Whereas, I am less interested in the specifics of the debates themselves, it is necessary to trace the contours of these positions to illustrate the claim that sovereignty is essential to theorizing the euro-polity.

The Westphalian approach to legitimacy in the euro-polity uses the sovereign state as the primary unit of analysis and as the only potential holder or ‘container’ of sovereignty. Adopting a neo-realist or liberal intergovernmentalist approach, which views international organisation as “above all a tool of national government, an instrument for the pursuit of national interest by other means”<sup>80</sup>, it is exemplified by the recent work of Andrew Moravcsik.

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<sup>78</sup> R. Bellamy and D. Castiglione, “Legitimizing the Euro-‘Polity’ and its ‘Regime’: The Normative Turn in EU Studies” (2003) 2:7 *European Journal of Political Theory* 7-34

<sup>79</sup> *Ibid.*

<sup>80</sup> S. Strange, *The Retreat of the State*, (Cambridge: Cambridge University Press, 1996), xiv.

Moravcsik's take on the legitimacy problems of the EU is an evolution of his liberal intergovernmental theory.<sup>81</sup> His elaborate and detailed critique of those who would condemn the euro-polity for lacking sufficient amounts of democracy and accountability, ultimately hinges on his thesis that the European Union, in the final analysis, represents the confluence of Member State interests which taken to its logical conclusion is attributable to the will of the peoples of the respective Member states determined through national elections. Essentially, EU law and policy is aligned with government preference due to the control of EU law and policy by national governments. Therefore, in a sense it is a logical impossibility that the EU would enforce policies on national electorates which they themselves have not specifically mandated by voting for their leaders.<sup>82</sup> The legitimacy of the EU is the equivalent to the legitimacy of any international organization, including the United Nations. Formed through treaty by sovereign states, and controlled by national governments, EU law and policy needs no more legitimacy than that which public international law currently enjoys which can, at its most basic level, derive from the resolution of coordination problems.

The second trend in EU legitimacy discourses adopts a constitutional epistemology in addressing the legitimacy question in the EU. That is that the frame within which we understand and analyze the EU in political terms, is domestic rather than international, and this in turn determines the way in which legitimacy will be addressed in respect of the polity. Essentially, this position implies that constitutional solutions are required to fix what is essentially a constitutional problem. A

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<sup>81</sup> A. Moravcsik, *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht*, (Ithaca, NY: Cornell University Press, 1998); A. Follesdal and S. Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik" (2006) 44:3 *Journal of Common Market Studies* 533-562.

<sup>82</sup> A. Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", (2002) 40:4 *Journal of Common Market Studies* 603.

paradigmatic example of the constitutional approach to legitimacy in the euro-polity is the notorious democratic deficit critique.<sup>83</sup> Europe's democratic deficit is a mainstay of euro-sceptics and democracy theorists alike. There are many strains and forms of this critique however they centre on the idea that the EU is not legitimate given that few if any of its decision-making bodies are democratically elected by a European electorate and that until reform is made which makes the EU's institutions more democratically accountable, then the EU will never be sufficiently legitimate.<sup>84</sup>

A stronger version of this account is that no amount of "European parliamentary sovereignty" nor 'chair shuffling' at the European level can legitimize the euro-polity given that it suffers from a more insidious problem; the lack of a *demos*. This critique, particularly prominent in German constitutional scholarship,<sup>85</sup> argues that democracy cannot take place in the absence of a *demos*, a real political community or 'we feeling' which binds individuals together in a political community. The euro-polity patently lacks any such community and as such can never be democratically legitimate – at least until such a 'thick' political community emerges which is currently not the case.<sup>86</sup>

I am less interested in the merits or otherwise of the arguments put forward in respect of the 'true nature' of the euro-polity. Rather, I am more interested in how these debates use the concept of sovereignty as the foundation upon which to build their arguments about legitimacy in the polity. In respect of the democratic deficit critique, for example, what is rarely, if ever, mentioned is the fact that such a critique is based on an assumption of the sovereignty of the EU. Based on a conception of

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<sup>83</sup> J. Weiler, *The Constitution of Europe*, (Cambridge: Cambridge University Press, 1999).

<sup>84</sup> For a good overview of the issues involved, see V. Bogdanor, 'Legitimacy, Accountability and Democracy in the European Union', Federal Trust Report, January 2007.

<sup>85</sup> See the German constitutional Court's *Brunner* decision, [1994] 1 CMLR 57 ; D. Grimm, "Does Europe Need a Constitution?" (1995) 1:3 *European Law Journal* 282.

<sup>86</sup> *Ibid.*

popular sovereignty, or more specifically some sort of national manifestation thereof, the essence of the charge is therefore the EU is illegitimate because it *is* a sovereign entity which *is not* mandated by popular consent. Thus, sovereignty is a central component to the democratic deficit critique. Similarly, the Westphalian approach to EU legitimacy outlined above makes the converse assumption about sovereignty. Rather than assuming the sovereignty of the EU, it argues that the functions of the institutions of the current stage of EU integration do not (and presumably will not) reflect those of a sovereign entity and therefore, with respect to the legitimating ideal of popular sovereignty, the product of EU integration does *not* have a democratic deficit<sup>87</sup> because it is *not* a sovereign entity. Rather, the sovereignty of the EU's member states remain intact in a conventional Westphalian sense. In this way we can see how legitimacy debates in the EU are essentially second order debates which depend on their outcome on the resolution of the first order issue – the nature of sovereignty in the EU and how this reflects upon the ontological question regarding the political nature of the EU. This, in turn, highlights the continuing relevance of the concept of sovereignty in theorizing the euro-polity.

### ***The sovereign claim of the euro-polity***

In theorizing the euro-polity then, both frames of analysis – Westphalian and constitutional – contain the concept of sovereignty as a central component. In this penultimate section I will briefly explain a preference for the domestic constitutional approach to the euro-polity with its assumption that the euro-polity makes claims to sovereignty. This entails a refutation of the Westphalian approach to sovereignty in the EU as being out-dated or insufficient to characterize the euro-polity.

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<sup>87</sup> A. Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", (2002) 40:4 *Journal of Common Market Studies* 603.

From a conceptual point of view, it is not clear that the law and policy of economic, commercial and monetary union, given its profoundly invasive nature in domestic policy, can be said to stem exclusively from the resolution of coordination problems in a manner similar to the legitimacy of international law. No international treaty has had such a profound impact on domestic law and policy nor directly challenged the basis of political authority in the nation state as the Treaties which make up the EU. Indeed, the essence of the entire ‘constitutionalization’ debate in the EU is a testament to the fact that, even if it once could have been said to have been a classic international organization, its evolution has been such that this is no longer the case.<sup>88</sup> To claim that the entrenchment of a particular normative bias of ordo-liberal economic policy combined with a ‘lock-in’ effect of EU membership is tantamount to the expression of national will is not credible.

Secondly, it is argued that the ‘Westphalian legitimacy’ approach does not take sufficient account of supranational institutions such as the European Court of Justice (ECJ) and the European Parliament in diverting and even on occasions setting policy agendas which cannot be traced back to individual government preferences. This, then, vitiates the claim that individual Member state sovereignty is salient in EU law and policy.

Thirdly, a purely liberal governmental approach to the EU, does not explain the relative stability and indeed growth of the EU over the past 50 years. If “interests make parties friends one day and enemies the next”,<sup>89</sup> then a post-state governing arrangement would be inherently unstable as individual state preferences shift according to changing circumstances and this would not therefore allow for the stability and depth of integration which has occurred at the European level.

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<sup>88</sup> J. Weiler, *The Constitution of Europe*.

<sup>89</sup> E. Durkheim, *The Division of Labour in Society*, (New York, The Free Press: 1964)

Rather, this paper argues that the constitutional approach is more appropriate to the polity with its (more often implicit) assumptions about the sovereignty of the polity. If, internally speaking, sovereignty represents a normative claim to ultimate authority, evidence of such a claim in respect of the euro-polity is required. This paper contends that such a claim has been made by the European Court of Justice (ECJ) in its “constitutionalization” of the Treaty system.<sup>90</sup>

Therefore, claims that EU law has to have direct effect in national legal systems,<sup>91</sup> and overrides conflicting provisions of national law,<sup>92</sup> have it is argued, become a *locus classicus* in their own right in the constitutional narrative of the euro-polity. In the original constitutionalization of the treaty system in its seminal early jurisprudence, the ECJ made claims to EU sovereignty, declaring that it constituted a “new legal order”<sup>93</sup> for which member states “have limited their sovereign rights”.<sup>94</sup> It enjoyed “real powers stemming from the limitation of sovereignty or a *transfer of powers from the States to the Community*”.<sup>95</sup> The law stemming from the treaty was an *independent source of law* which could not be overridden by domestic legal provisions.<sup>96</sup> This claim for the *independence and autonomy* of the law of the treaties, notwithstanding its technocratic and functional nature is a euphemism or a proxy for sovereignty.<sup>97</sup> This claim was bolstered by subsequent references to the treaties as the euro-polity’s “constitutional charter”<sup>98</sup> and was given a recent robust

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<sup>90</sup> The literature on this is legion. See J. Weiler, “The Transformation of Europe”, (1991) 100:8 *Yale Law Journal* 2403-2483; J. Weiler, *The Constitution of Europe*, (Cambridge: Cambridge University Press, 1999); M. Maduro, *We the Court*, (Oxford: Hart, 1998).

<sup>91</sup> Case 26/62, *Van Gend en Loos*, [1963] ECR I-30.

<sup>92</sup> Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

<sup>93</sup> *Van Gend en Loos*.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Costa*.

<sup>96</sup> *Ibid.*

<sup>97</sup> See A. Peters, “Sectoral Constitutionalization in International Law”, *Europe’s Constitutional Mosaic Paper*, University of Edinburgh. Indeed, this is borne out in the etymology of the term ‘autonomous’, literally meaning auto (self) nomos (rule); therefore self-ruling or governing.

<sup>98</sup> Case 294/83, *Parti Ecologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339, para. 23.

restatement in the celebrated *Kadi* decision of the ECJ in September of last year.<sup>99</sup> In this case, which dealt with an appeal by an individual who had his assets frozen through an EU measure passed pursuant to a ordinance of the UN Security Council, the ECJ had to consider the compatibility of the Community measure with the fundamental rights protected under Community law. Significantly, the court found that the measure did violate the basic process rights of Mr. Kadi which were protected in the independent community legal order and that the measure must therefore be annulled notwithstanding its pedigree as a UN security council measure.<sup>100</sup> In justifying this position, the ECJ restated the EU's sovereignty claim by finding that:

“the review by the Court of the validity of any community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an *autonomous legal system which is not to be prejudiced by an international agreement.*”<sup>101</sup>

In many way, this simply represented the constitutional orthodoxy of the EU's early claims to sovereignty. What was significant was that it was willing to assert the sovereignty of the EU in the teeth of international law, and the edicts of the UN Security Council in particular. The boldness of the claim to sovereignty in this respect, is particularly striking when viewed in the light of the UK House of Lords' decision in *R (Al Jeddah) v. Secretary of State for Defence*.<sup>102</sup> In this decision, the applicant made a remarkably similar claim to Mr. Kadi, however, his litigation before the highest court in the UK was to the effect that a UN Security Council resolution to uphold peace and security in Iraq which permitted internment, violated his right to

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<sup>99</sup> Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat v. Council of the European Union*, Judgment of the Court, 3 September 2008. Available at [curia.europa.eu](http://curia.europa.eu).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Kadi*, para. 316.

<sup>102</sup> [2007] UKHL 58, [2008] 1 A.C. 332.

liberty and security under the European Convention of Human Rights as incorporated into UK national law in the Human Rights Act 1998. The House made a converse decision to that of the ECJ, finding that a resolution of the U.N. Security Council overruled the protection of fundamental rights in the UK. For the majority, Lord Bingham phrased the problem in the following manner:<sup>103</sup>

“ ... there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 [the relevant security council resolution] and successive resolutions.”

When, juxtaposed with the ECJ’s decision in *Kadi*, it would appear that the EU’s sovereign claim is more robust than that of the United Kingdom.

As for the internalization of the sovereign claim of the ECJ, notwithstanding the assertion of “European constitutional supremacy”<sup>104</sup> in a slew of cases from national courts in the past two decades or so,<sup>105</sup> arguably the sovereignty claims of the EU have been, on the whole accepted by its Member States. There has been no deliberate attempt to legislate contrary to EU law which has prevailed,<sup>106</sup> and arguably the only way to refute the sovereign claim of the EU is to withdraw from the Union altogether.

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<sup>103</sup> *Al Jedda*, para. 39.

<sup>104</sup> M. Kuum, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and After the Constitutional Treaty” (2005) 11:3 *European Law Journal* 262.

<sup>105</sup> A classic of the genre is the German Federal Constitutional Court’s *Brunner* decision but the highest court of almost every member state has made similar assertions at some time or another. For an overview see A. Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases*, (Cambridge: Cambridge University Press, 2005).

<sup>106</sup> In the U.K. context, see the *Factortame* saga: *Factortame Ltd. v. Secretary of State for Transport (No. 2)* [1991] 1 A. C. 603 and D. Chalmers *et al*, *European Union Law*, (Cambridge: Cambridge University Press, 2006)

As such, then, not only is sovereignty relevant in theorizing the euro-polity but it is indeed, essential given the sovereign claim made by the polity and its internalization by the relevant target audience; its Member States.

### ***Conclusion***

In conclusion, it is apt to recall the proposition that sovereignty is a concept of on threshold of law and politics. It was also noted that it is a relational concept between the sovereign claimant the relevant target audience. Joining these two propositions together, we can see that sovereignty is doubly relational. This insight has important implications for the way we think about sovereignty in 21<sup>st</sup> century Europe and, as a corollary, how we think about the legal and political nature of the Euro-polity itself. The relational nature of sovereignty in this sense means that sovereignty is only ever a matter of *degree* and cannot be reduced to an ‘either/or’ logic. There is no Archimedean point from which we can evaluate a ‘last word’ on the locus of sovereignty in a Hobbesian or Schmittian sense.<sup>107</sup> The dynamic relationship between law and politics, the legal and political dimensions of sovereignty does not allow for a final point of *stasis*. Rather the process is a continuing definition and redefinition of the nature and institutions of power and authority in the European constitutional configuration. Therefore, one cannot assume the priority of one or the other facets of sovereignty; law over politics. They are mutually constitutive and as such are remorselessly dependent on each other for their existence. Thus, the practices of politics cannot exist without a (normative) frame provided by law. Law’s binary logic makes a decisionistic claim regarding the nature and locus of ultimate authority which opens up the frame for political contestation of this claim. In the simplest sense in the EU, the claim to the supremacy of EU law,

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<sup>107</sup> Who famously described sovereignty as being the ‘one who decides on the exception’. C. Schmitt, *Political Theology*, (Chicago: University of Chicago Press, 2005),p .5.

and the implications of ultimate authority which emanate from it open up a space for contestation as to the accuracy and appropriateness of such a claim between the euro-polity and its Member states. This contestation has played out for the most part between the ECJ and national supreme courts rather than the conventionally political branches of government.<sup>108</sup> However, notwithstanding the legal fora within which contestation has occurred, the nature of the contestation remains political sparked by, or framed within, a legal claim to ultimate authority. This dialogue has been characterized by the idea of constitutional pluralism.<sup>109</sup> Thus, the threshold concept of sovereignty lives on.

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<sup>108</sup> J. Weiler, A. Stone-Sweet and A. M. Slaughter (eds.), *European Court and National Courts: Doctrine and Jurisprudence*, (Oxford: Hart, 1998).

<sup>109</sup> See N. Walker, "The Idea of Constitutional Pluralism" (2002) 65:3 *Modern Law Review* 317; M. Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. Walker (ed.), *Sovereignty in Transition*.