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Floating Sovereignty: A Pathology or a Necessary Means of State Evolution?

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Abstract—The framing of the debate concerning sovereignty in terms of the dualism of retention or rejection conceals the floating character of sovereignty and constrains the capacity of the state to mutate, adapt and respond adequately to the diverse and complex processes which range in, through and above it. The paper develops the idea of floating sovereignty by putting forward four main propositions: (i) sovereignty's historical entanglement with statehood makes it unsuitable for non-state political organisations; (ii) although the state has been the necessary condition for sovereignty, the latter is no longer necessary for the evolution of the state; (iii) the traditional ideological function performed by sovereignty, namely the legitimation of state power, could be performed by other organizing principles which prioritize governmental efficiency over territorial extent and democratic criteria over nationalist ones; (iv) this means that the state will no longer be in a position to command the loyalty of its citizens but it would have to purchase it through its capacity to meet social needs, to fulfil its basic functions and through the normative qualities of its institutions and policies. Three institutional designs in core areas of 'high politics', that is, the fields of determination of nationality, immigration policy and foreign and security policy show how floating sovereignty could be implemented.

1. The Issue

Once upon a time there was a mighty state. As a sovereign unit, it exercised supreme law-making and law-enforcing authority within a delineated territory and constituted the supreme object of political allegiance. In the external domain, too, it was recognized as an inviolable and authoritative body by other discrete, equal in status and independent states. True, prior to the eighteenth century, states did not do much; their main tasks included diplomacy, conducting small-scale wars and the internal administration of order. Since then, states have matured, monopolized military force, consolidated and unified civil societies by making them sites of political democracy, by extending macroeconomic planning and by providing communication infrastructures. Although the post-war era led to a decrease in the military strength of European states, they have, nevertheless,

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managed to strengthen their hold on populations by providing security, economic advancement and social welfare.

Sovereignty has thus been a central principle of domestic and international political practice: a state must possess sovereignty if the domestic community is to exist at all, or at least if it is to be able to function effectively internally as well as a member of the international community. Until very recently, any suggestion that sovereignty could be either limited or shared was dismissed as a contradiction in terms.[1] And yet, on deeper reflection, political actors and academics alike had to face some 'awkward facts'[2] and to concede that sovereignty implies neither freedom from legal constraints, be they domestic or international law rules, nor independence from external economic exigencies and transnational relations. Indeed, sovereignty as a conception and as political practice has always existed in a constrained manner.[3] Since Hugo Grotius' writings, for example, international law, be it in the form of customary rules or legal codifications of *ius cogens* principles, has been premised on the principle that governments cannot act with absolute impunity. Additionally, the British conception of sovereignty as Parliamentary omnicompetence does not imply that law has conferred upon Parliament the right to act as if law did not exist. For most of the past one hundred years, the British Parliament has accepted that informal checks and voluntary balances limit its power. Moreover, the assumption that greater 'interdependence' leads to greater 'dependence' is not quite right.

And yet, it is only in the last two decades that the ambiguities and contradictions of the traditional sovereignty narrative have become manifest. Globalizing processes and the pace of technological change, the perforation of sovereign borders by persons, products, pollutants and power[4] and institutional arrangements above or beyond the state legal order have multiplied and intensified constraints on the 'sovereign state'. The emergence of new collective actors working within, across and above state lines has exposed the legal fiction of a political universe consisting of states only. This process has also shown that claims made by governments should not always be conflated with the needs or demands of communities, and that citizens' allegiances are no longer confined within national borders.

All this has opened up a debate about the nature and future of sovereignty. Whereas some insist that we should retain sovereignty as a concept and a working

[1] H. J. Morgenthau, *Politics Amongst Nations* (5th edn, 1973).

[2] H. Bull, *Anarchical Society* (1977) at 218, 238.

[3] F.H. Hinsley, *Sovereignty* (2nd edn, 1986) at 117–57. See also A. James, *Sovereign Statehood* (1986) at 6–8 and M. Mann 'Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying' 122 *Daedalus* 115 (1993) at 118.

[4] The so-called four P flows; I. D. Duchacek, D. Latouche, and G. Stevenson (eds), *Perforated Sovereignties and International Relations: Trans-Sovereign Contacts of Subnational Governments* (1988). see also A. Khan 'The Extinction of Nation-States' 7 *American Journal of International Law and Policy* 197 (1992); K. Nordenstreng and H. Schiller (eds), *Beyond National Sovereignty: International Communication in the 1990s* (1992).

hypothesis of political life, others argue that sovereignty has become obsolete.[5] The latter view has important implications for the state. Should we view both sovereignty and the state as dispensable in light of transnational processes of all kinds and the European supranational adventure?[6] Do states decline and take the form of either federations, confederations or condominions?[7] Or would it be wrong to assume that states are dying?[8] Furthermore, could a possible demise of the state be accompanied by the endurance of sovereignty in some other form, such as deterritorialized, multilayered or plural sovereignty? Or would the superannuation of sovereignty leave the viability of territorial states unscathed? Alternatively, one may wish to distinguish between an external retreat of the state and internal processes of reinforcement of state authority.[9] Another possible way of approaching this issue would be to divert our attention away from speculations about the withering away of the state and sovereignty to the shifting functions of the state, their mutating nature, their diversified operations and the reshaping of sovereignty in increasingly complex and dense environments. After all, the states' alleged 'loss' of sovereignty to regional and global institutions and the markets has been accompanied by their occupation of new fields and extension of their powers of control. Additionally, the process of globalization may be neither solid nor irreversible.

One observes in this discussion that the end/endurance of sovereignty and decline/endurance of the nation-state dualisms feature centrally. Poststructuralist perspectives, which regard the state as a historically contingent authoritative solution to the problem of order and contingency in world politics,[10] have suggested that such dualisms may be unhelpful.[11] But even suggested alternatives do not escape those dualisms. Convinced that the problems surrounding sovereignty stem from its traditional association with the state, for example, Hoffman has sought to sever the link between the two by developing a post-statist

[5] Bull, above n 2 at 266. See also N. Greewood Onuf 'Sovereignty: Outline of a Conceptual History' 16 *Alternatives* 425 (1991); S. Krasner 'Sovereignty: An Institutional Perspective' 21 *Comparative Political Studies* 66 (1988); P. Allot, *Eunomia: New Order for a New World* (1990). Compare H. J. Laski, *Studies in the Problem of Sovereignty* (1917); *A Grammar of Politics* (1941).

[6] D. Easton, *The Political System* (1953) at 108.

[7] P.C. Schmitter 'If the Nation-State Were to Wither Away in Europe, What Might Replace it?' ARENA Working Paper, No. 11(1995); 'Imagining the Future of the Euro-polity with the help of New Concepts' in G. Marks, F. Scharpf, P. Schmitter and W. Streeck (eds), *Governance in the European Union* (1996).

[8] Strange has noted that the authority of all governments has been eroded while the significance of transnational corporations has increased; S. Strange, *The Retreat of the State* (1996).

[9] Muller and Wright have argued that whereas internationalization, Europeanization, multinationalization and technological change have led to external state retreat, on a domestic level we discern retreat, stability and growth with respect to the role of the state; W. C. Muller and V. Wright ' Reshaping the state in Western Europe: the limits to retreat' 17 *West European Politics* 1 (1994) at 8–9.

[10] R. Ashley 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique' 17 (2) *Millennium* (1988) at 229.

[11] As Walker has argued, 'Nor can it be said that sovereignty is simply passe as if it were here today and gone tomorrow. It is true that to work with the principle of state sovereignty is to engage with deeply entrenched discourses about political life in which the analysis of contemporary structural change is often formulated as if sovereignty must be either permanent or defunct'; R. B. J. Walker 'State Sovereignty and the Articulation of Political Space/Time' 20 *Millennium* 445 (1991) at 448. See also R. B. J. Walker, *Inside/Outside: International Relations as Political Theory* (1993); C. Weber, *Simulating Sovereignty*: *Intervention, the State and Symbolic Exchange* (1995).

conception of sovereignty.[12] By transcending 'the troubled institutional reality of the state',[13] Hoffman's dynamic conception of sovereignty welcomes difference and accommodates plural identities in a stateless world where conflicts of interests can be resolved peacefully.[14] This position resembles Laski's preference for a pluralistic society without a state. MacCormick, on the other hand, favours a polycentric conception of sovereignty that decentres, but does not efface, state authority. MacCormick argues that the monistic approach to sovereignty has been premised on the incorrect assumption that law is both given and singular.[15] Consequently, it underscores legal pluralism, that is, the existence of a plurality of overlapping normative orders each of which presupposes the validity of the other. The European unification is a good example of this for there is a distribution of sovereign rights at various levels, which 'of course leaves a compendious "external sovereignty" of all the member states intact and even in a sense strengthened'.[16]

Hoffman's and MacCormick's proposed alternatives are noteworthy and insightful. However, both schemas are premised on the belief that either the state (Hoffman) or sovereignty (MacCormick) is a finished project and an achieved condition. Both theorists' embracing of post-sovereign politics thus presupposes the closure of the game (the transcendence of either the state or sovereignty). But such an approach underscores the 'floating nature' of sovereignty[17] and 'the problem of the state'.

In this paper I argue that states are neither closed nor open systems; they are, instead, complex systems in motion. Because their identity is neither fixed nor determined in advance, but always in a process of formation and transition, their pathways to evolution and adaptation depend on ongoing processes of legitimation which revolve around organizing principles other than sovereignty. This does not imply the obliteration of sovereignty.[18] Sovereignty remains floating, hollow and fluctuating, almost in a state of suspended animation. But floating sovereignty should no longer be seen as 'pathology'. It is, instead, a 'cure'. In what follows, I develop the idea of floating sovereignty by questioning the dichotomic thinking centred on the retention/obliteration of sovereignty. In particular, I argue that sovereignty's historical entanglement with discursive configurations of statehood makes it unsuitable for non-state political organizations. Indeed, although the state was historically a precondition for the

[12] J. Hoffman, *Sovereignty* (1998).
[13] Hoffman, above n 12 at 19.
[14] J. Hoffman 'Blind Alleys: Can we define Sovereignty?' 17 *Politics* 53 (1997) at 57; *Beyond the State* (1995).
[15] N. MacCormick, *Questioning Sovereignty* (1999); 'Beyond the Sovereign State' 56 *Modern Law Review* 1(1993); 'Sovereignty, Democracy and Subsidiarity' in R. Bellamy and D. Castiglione (eds) *Democracy and Constitutional Culture in the Union of Europe* (1995).
[16] N. MacCormick 'Liberalism, Nationalism and the Post-Sovereign State' 44 *Political Studies* 553 (1996) at 561–562. Compare here James' preference to analyse state sovereignty through its international attributes; James, above n 3 at 7. The problem here is that such statements reassert the domestic/international dualism which is one of the many absolutist dualisms that the state proliferates. On this see J. Bartelson, *A Genealogy of Sovereignty* (1995).
[17] Walker (1993) refers to the free play of sovereignty; see above n 11.
[18] Evolution refers to changes induced by developments in the external environment whereas adaptation refers to internal changes.

emergence of sovereignty, the latter is no longer necessary for the functioning and evolution of the state. Otherwise out, sovereignty does not remain a precondition for the state's existence. The traditional ideological function performed by sovereignty, that is, the legitimation of state power could be performed by other organising principles that prioritize democratic and output-oriented criteria over nationalist ones. What this means in reality is that the state will no longer be in a position to command the loyalty of its citizens, but it would have to purchase it through its capacity to meet societal needs, to fulfil its basic functions and through the normative qualities of its policies and institutions.

The discussion is structured as follows. Section 1 unravels the 'weight' of past conceptions of sovereignty while section 2 shows their unsuitability for non-sovereign political orders, such as devolved government in the UK and the European Union. Section 3 discusses the idea of floating sovereignty. Three institutional designs in the fields of determination of nationality, immigration policy and foreign and security policy will show that removal of these core areas of 'high politics' from the states' exclusive domain of jurisdiction would not make states 'less sovereign'. Rather, it could increase their authority by increasing their capacity to perform certain key tasks and by prioritizing functional and democratic criteria of legitimacy over nationalist ones.

2. The Weight of the Past

As a foundational principle of domestic and international politics, sovereignty has been informed by Bodin's, Hobbes' and Austin's monistic conceptions of sovereign power. But these conceptions represent only certain, historically conditioned, readings of sovereignty. The theory of sovereignty is not a single and unified tradition. Rather, it constitutes a rich body of thought comprising the textual grafting of discourses involving not only complex processes of interweaving and superimposition, but also considerable divergence. In this section, I shall examine the 'multiple readings' of sovereignty in an attempt to show that certain understandings of sovereignty, which have acquired the patina of orthodoxy, have been privileged to the exclusion or marginalization of others that are more apposite to contemporary reality. The privileging of these narratives owes much to the fact that they successfully legitimized a hierarchical political order, which prioritized regulation, control and obedience, and reduced the question of society to the problem of social order.

In medieval Europe there was no alternative political theory to the theocratic position of the Pope and Holy Roman Emperor.[19] Monarchs used universalist theocratic theories in order to strengthen their authority. By adopting the title Rex Dei Gratia they sanctified their office and, as God's representatives, they

[19] D. Held, *Political Theory and the Modern State* (1989); *Democracy and the Global Order* (1995). See also J. Strayer, *On the Medieval Origins of the Modern State* (1970); J. G. Ruggie 'Territoriality and Beyond: Problematising Modernity in International Relations' 47 *International Organisation*, 139 (1993); E. H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957).

became the guardians of their communities. Lacking any *sui generis* entitlement to rule, Europe's kings thus 'asserted their authority, not by inventing new symbols of power, but by appropriating medieval ones'.[20] By trumpeting their claims to absolute authority they strengthened their hold on the state and countered both the nobility's feudal claims and the Papacy's religious claims. However, this did not mean that kings could rule as they wished; their powers were limited by natural law, the canon law of Christendom and the consent of the community as expressed in both customary and positive law.

These constraints were recognized by Bodin, who articulated a coherent theory of sovereignty in the second half of the 16th century—even though the term had gained currency by the beginning of that century.[21] In the face of the confusion of the Huguenot wars, Bodin saw the salvation of France in the rule of an absolute, central sovereign power (*majestas*), which would only be accountable to Immortal God. Although Bodin did not found the state on grounds external to itself, such as the divinely ordained harmony of the universe, his Sovereign shared many of the properties of his divine counterpart. The Sovereign had to possess unlimited, perpetual and undivided power to make laws and impose them on the people regardless of their consent. Abuse of power gave rise to no right of resistance. But the dictates of divine and natural law, the customary laws of the community and the property rights of the citizens limited the proper exercise of sovereign power.

Bodin's conception of sovereignty floated in the intellectual landscape for several decades before achieving recognition towards the end of the seventeenth century. It co-existed with other notions, such as: (i) Althusius' conception of popular sovereignty which vested supreme, inalienable and indivisible power in the People[22]; (ii) existing theories of limited sovereignty; (iii) notions of double sovereignty depicting a plurality of sovereigns each having full sovereign power in their domains[23]; (iv) theories of mixed sovereignty stressing the joint exercise of power by the King, Lords and the peoples' representatives. Notably, Suarez had defended a theory of limited and partial sovereignty, which subordinated the power of the secular state to the Church.[24] Building on the thinking of the Jesuit thinkers of the Counter-Reformation who had abandoned the papal claim to sovereignty over all princes in the European commonwealth and had confined it to the headship of the Church, Suarez argued that the ruler possessed only limited sovereignty since the people had reserved certain of their rights at the time of the transfer of power to him.

The failure of the mentioned theories to avert the Civil War in England prompted Hobbes to construct 'that Great Leviathan', that is, the 'mortal God

[20] Lerner, 1991 at 409; see also C. Schmitt, *Political Theology: Four Chapters on the concept of Sovereignty* (G. Schwab trans) (1985).

[21] Hinsley, above n 3 at 100–125.

[22] Although Althusius shifted the locus of supreme power from the ruler to the ruled, it left the conceptual parameters of Bodin's conception of sovereignty intact.

[23] See Hinsley, above n 3 at 138.

[24] Suarez, *De Legibus ac Deo Legislatore* (1619) cited in J. Bowle, *Western Political Thought* (1947).

to which we owe, under the Immortal God, our peace and defence'.[25] The Sovereign acquired power by a contract of subjects between one another, and as there never was any contract between the People and the Sovereign, the latter could not be accused of breach of covenant. More importantly, the multitude became a people through their submission to the Sovereign: 'it is the unity of the Representer, not the unity of the Represented that maketh the Person One'.[26] Sovereign power had to be concentrated in a single centre, and the sovereignty of the state absorbed and ultimately extinguished the sovereignty of the people. Law 'was not Counsel, but Command'; the command of a Sovereign armed with power, known as the command theory of law.[27]

Hobbes' conception of sovereignty as unrestricted ruling power inhering in a unitary state personality runs through many successive variations, such as Bentham's, Austin's and others'. True, it stood in conflict with the Whig tradition's emphasis on the responsibility of government to the governed and Locke's notion of government by consent, that is, the idea that government derives its authority from the consent of the governed who retain their inviolable rights and must be governed through clearly defined laws and impartial judges.[28] Rousseau sought to merge both traditions of absolute sovereignty and constitutionalism. He rehabilitated Hobbes' idea of exclusive, single and unrestricted sovereignty by shifting its locus from the ruler to the community or the people founded on the basis of a social contract. At the same time, however, he developed further Locke's idea of government by consent by requiring that the citizens in a sovereign assembly must continually reaffirm their consent. Sovereignty was retained by the people, the collective agency which embodied the general will, while government—the everyday running of the state—was in the hands of the few. It thus follows that the government's will could only be a particular will in relation to the truly general will of the society, since the depositories of the executive power were not the masters of the people but its officers.[29] It is true to say that although Rousseau did not expressly locate the general will within the institutional setting of the state, his schema, nevertheless, strengthened national sovereignty. Popular sovereignty provided a link between the concepts of state and nation and made the nation-state the natural locus of legitimate constitutional authority.

But it was not so much Rousseau's synthetic approach to sovereignty but Hobbes' idea of exclusive and absolute sovereignty which exerted much influence upon 19th century British thought and dominated the 20th century. For both Bentham and Austin, positive law has the character of (express or tacit) command of a sovereign who is not habitually obedient to any other body. Whereas Austin emphasized the unlimited nature and the single locus of sovereign power, Bentham did contemplate the possibility that sovereignty could be both limited and divided. By examining passages and footnotes in Bentham's *A Fragment of*

[25] T. Hobbes, *Leviathan* (R. Tuck ed.) (1991[1651]), Ch.17.
[26] Ibid., Ch. 17 at 120, and Ch. 18.
[27] Ibid., Ch. 26 at 183.
[28] J. Locke, *The Second Treatise of Government*, [1690] (J. W. Gough ed and rev) (1946).
[29] J. J. Rousseau, *The Social Contract* [1762] (M. Cranston trans) (1968).

Government and an *Introduction to the Principles of Morals and Legislation*, Hart has argued that Bentham called into question the idea that in all forms of government there must be an authority, which is absolute. He entertained the idea that the supreme governor's authority could be limited by 'an express convention', even though he did not elaborate on its juridical status.[30] According to Bentham, an express convention could set the foundations of a federal commonwealth with limited authority over the constituent states or could take the form of voluntary submission of a state to the government of another. In addition, two footnotes in Chapter two of *Of Laws in General* suggest that Bentham contemplated institutional arrangements whereby a body may be sovereign with respect to certain acts and non-sovereign with regard to other (limited sovereignty) or where sovereignty could be divided between the legislature and the courts (divided sovereignty).[31] Notwithstanding these insights, however, it is certainly the case that both Bentham and Austin made habitual obedience (limited or divided) the basis of (limited or divided) sovereignty and this appealed considerably to Victorian conservative jurists.[32]

Notions such as command, order, habits of obedience and absolute authority were unappealing to pluralist theorists, such as Laski. Laski argued that Austin's theory of sovereignty would 'breed simple servility if it were capable of practical application. There can be no servility in a state that divides its effective governance'.[33] Laski believed that governments do not derive their authority from the authoritative issue of commands to political inferiors disposed to habitually obey them, but, instead, from the consent of the governed. In his opinion, the articulation of the state-centred conception of sovereignty owes much to the need to strike a balance between 'two poles of contradiction'; that is, between a diverse civil society consisting of various entities having heterogeneous interests and the unity of the state. State-oriented sovereignty strikes the balance by forcing the identification between the two: the state is mistaken for political community and multivocality is substituted by a single voice. Sovereignty therefore conveyed the false impression of 'a sort of mystic monism', thereby legitimising state action, which favoured certain class interests.[34] Laski also criticized the idea that 'there must be in every social order some single centre of ultimate reference, some power that will be able to resolve disputes by saying a last word that will be obeyed',[35] and, in his later essays, considered it problematic

[30] H. L. A. Hart 'Bentham on Sovereignty' 2 (2) *The Irish Jurist* (1967), reprinted in B. Parekh (ed.) *Jeremy Bentham—Ten Critical Essays* (1974) Ch. 7, 145–153.

[31] Ibid. at 151.

[32] See M. Loughlin*, Sword and Scales: An examination of the Relationship between Law and Politics* (2000) at 136–9.

[33] H. J. Laski, *Studies in the Problem of Sovereignty* (1917) at 273–4.

[34] Laski, above n 32 at 4–5.

[35] Compare Schmitt's conception of sovereign as the body which decides the state of emergency; above n 20. Although Schmitt refers to the potentiality (and not actuality) of power being exercised in order to respond to a situation of economic and political crisis by suspending regular law and rules, he fails to discuss the possibility that sovereign may be the body that creates the crisis which the suspension of regular law is supposed to resolve.

to define sovereignty as unlimited law-making power vested in the Queen-in-Parliament without regard to the content of laws.[36] Moreover, he called into question the assumption that the state is entitled to primacy over any other association.[37] His views are echoed in contemporary accounts of multilayered sovereignty, whereby

> persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of the state . . . People should be politically at home in all of them, without converging upon any one of them as the lodestar of their political identity.[38]

Laski's solution to the problem of sovereignty was the creation of a pluralist society without a sovereign state, and it is this idea I explore below by addressing the issue of non-sovereign political orders.

3. The Challenge of Non-Sovereign Orders

The preceding discussion showed that the monistic conception of sovereignty, that is, the idea that there must be a single, indivisible and unlimited political authority eventually gained hegemony. As the construct became ossified, the original political motivations, which produced its articulation, were no longer evident. These motivations were primarily concerned with furnishing the legitimating procedures and conditions of political power which would justify obedience to the Ruler and, by so doing, would ensure the preservation of (a certain type of) order and stability. The political effects of the sovereignty discourse that is the actual enhancement and consolidation of executive power remained disguised. A chain of equivalence was created between the governmental will, state sovereignty and popular or national sovereignty, whereby limitations on the exercise of executive power became tantamount to limiting state sovereignty, since the executive is the representative of the state, and, consequently, to limiting to the people's or the nation's sovereignty, since the state is the authentic representative of the people or the nation. In this way, the congruence between the rulers and the ruled was achieved.

But is the entanglement of sovereignty with the 'writing' of statecraft (or the questioning of statecraft in the postcolonial landscape) necessary or contingent? To what extent is sovereignty a central pillar of non-statist political configurations? Hoffman would answer this question positively, for his reformulated version of sovereignty is designed to capture the plurality and diversity of a stateless world.[39] Although the possibility of conducting 'sovereignty language games' in other

[36] H. J. Laski 'Law and the State' IX *Economica* 267 (1929) at 267–269.

[37] Laski, *A Grammar of Politics*, at 44–5. See also P. Lamb 'Laski on Sovereignty: Removing the mask from class dominance' XVIII *History of Political Thought* 326 (1997).

[38] T. W. Pogge 'Cosmopolitanism and Sovereignty' 103 *Ethics* 48 (1992) at 58. Compare Elshstain's preference for a shift of the focus of political identity from sacrifice to responsibility; J. B. Elshstain 'Sovereignty, Identity, Sacrifice' 20 *Millennium* 395 at 402–04.

[39] Hoffman, above n 12.

domains cannot be dismissed *a priori*, I believe that the inherited meanings of sovereignty make it an unsuitable organizing principle of non-state political organizations, unless, of course, they aspire to future statehood. Otherwise put, not all associations need to be or can become sovereign. In what follows, I examine two juridicopolitical orders that seem to work successfully without asserting some form of sovereign power; namely, devolution in the United Kingdom and the European Union.

Devolution is a process whereby powers are transferred from a unitary centre to decentralized institutions of government within in a limited framework set out in legislation.[40] As a project, devolution was underpinned by the twofold objective of modernizing the United Kingdom constitution and of creating a system of governance, which is responsive to local needs and open to local initiatives.[41] Although devolution called into question the British unitary constitutional order, it did not bring about either a federal or a confederal state.[42] Rather, it created a complex system of asymmetrical and differentiated governance, whereby all devolved administrations have to observe a common set of principles, such as inclusiveness, diversity, sustainability, equal opportunity, flexibility, openness and modern working practices, but have differing competences. Unlike the Northern Ireland Assembly and the Scottish Parliament, for example, the Welsh Assembly does not have competence to enact primary legislation; it merely has the right to be consulted on Welsh primary legislation. Similarly, the powers transferred to the Northern Ireland Assembly are not the same as those devolved to the Scottish Parliament, for their devolution settlements differ in relation to both procedural safeguards and the accountability of the executives. In keeping within our discussion, however, although both bodies are empowered to adopt primary legislation within the bounds of their competence, they can hardly be described as sovereign.[43] Their actions are not beyond the ambit of the review of the courts.[44] Nor do they possess unlimited normative power of law-making: enumerated exceptions and restrictions limit the Scottish Parliament's and the Northern Ireland Assembly's exercise of legislative power. More importantly, on the occasion of conflicting provisions on issues of shared competence, an Act of the United Kingdom Parliament can trump any Act of the devolved legislature even though mechanisms for pre and post-legislative scrutiny have been established in order to avoid such conflict. After all, section 28(7) of Scotland Act 1998 provides that Parliament's power to legislate for

[40] See N. Burrows, *Devolution* (2000) at 1; R. Brazier 'The Constitution of the United Kingdom' 58 *Cambridge Law Journal* 96 (1999); V. Bogdanor, *Devolution in the United Kingdom* (1999); N. Walker 'Beyond the Unitary Conception of the United Kingdom Constitution?', *PL* 384 (2000) at 394–8.

[41] White Paper, Modernising Government, Cm 4310 (1999). It materialized with the enactment of the Scotland Act 1998, the Government of Wales Act 1998 (National Assembly for Wales (Transfer of Functions) Order SI 1999 No 672) and the Northern Ireland Act 1998 (Appointed Day) Order SI 1999 No 3208; see also Northern Ireland Act 2000 (Restoration of Devolved Government) Order (SI 2000 No 1445).

[42] MacCormick, *Questioning Sovereignty* (1999) at 194.

[43] For the opposite view, see A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (12th ed, 1997).

[44] Burrows, above n 40 at 79. See also *Anderson, Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland*, 16 June 2000.

Scotland is unimpaired by the Act. A similar provision is entailed by section 5(6) of the Northern Ireland Act 1998.

The overall institutional configuration is one of dispersion of power and of creating partnership arrangements since it 'acknowledges a plurality of interlocking sets of standards of right and wrong, operated by different authorities in different spheres of responsibility'.[45] The normative existence of the devolved administrations is anchored on the objectives of ensuring good, democratic and efficient government and the devolved structures do not have to be the single and supreme repository of political authority in order to meet these objectives.[46] Certainly, if Scotland decided to pursue the path of full independence and to embrace statehood, then sovereignty and, consequently, attempts to de-reserve all the reserved powers and to highlight the political aspirations of the Scottish nation conceived of as a 'shared community of fate', would feature centrally in its claims to statehood.

Similarly, it is doubtful whether European governance can be explained on the basis of concepts derived from national statehood. Projections of the paradigm of sovereign statehood to the EU lead to the erroneous assumption that the EU is an aspiring superstate competing with the member states. But such projections fail to convince as to why the process of European integration should lead to a more centralized form of governance. European integration is not a quest for ultimate statehood.[47] Neither the Treaty on European Union nor the subsequent amendments negotiated at Amsterdam and Nice have produced a European executive branch of government analogous to those in the member states. In addition, neither the incremental expansion of the competence of the Community nor the incremental extension of qualified majority voting into new areas can be said to have seriously undermined statehood.[48] The EC/EU's legislative input crucially depends on the member states, which are also responsible for the administration and implementation of its rules. Interestingly, the EC's lack of the paraphernalia of the state, that is centralized administrative structures and coercive state apparatuses, such as an army or police force, does not compromise its authority to declare the law of the Community and assert its primacy over national law. Otherwise put, the EC does not have to assert a form of Euro-sovereignty in order to work.

European integration may have not eroded statehood, but neither has it left it unchanged. Domestic legal systems and administrative practices have become 'Europeanized' and national laws have ceased to be purely domestic. European

[45] See MacCormick, above n 42 at 74.

[46] Towards Scotland's Parliament: A Report to the Scottish People by the Scottish Constitutional Convention (Edinburgh: Scottish Constitutional Convention) (1990).

[47] But compare F. Mancini 'Europe: The Case for Statehood' 4 *European Law Journal* 29 (1998).

[48] See A. Dashwood 'States in the European Union' 23 *European Law Review* 201 (1998). The term federalism has been used incorrectly in debates about Europe; 'first by linking it with the idea of the withering away of the state, and secondly, by implying that federalism somehow makes a stand for accumulation of power at the union level'; T. Koopmans 'Federalism: The Wrong Debate' Guest Editorial, 29 *Common Market Law Review* 1047 at 1052. Taylor has also observed that fears about the federalist future of the EU arise from a misunderstanding of the nature of the legal and constitutional arrangements of the European Community; P. Taylor 'The European Community and the State: Assumptions, Theories and Propositions' *Review of International Studies* (1991).

integration redefines existing political arrangements, alters traditional policy networks and triggers institutional change. The doctrine of supremacy of European Community Law, for example, has called into question the monistic conception of sovereignty in several jurisdictions and public lawyers have been busy reconciling constitutional theory with political realities.[49] This 'quiet revolution in the legal orders of the Member States' has not been without controversy. Starting with *Macarthys* v *Smith*[50] where Lord Denning stated that an inconsistent national provision must be construed in conformity with Community Law and continuing with the controversy concerning the primacy of non-directly effective Community provisions, which surrounded the doctrine of indirect effect,[51] the British judiciary finally accepted the supremacy of EC Law in *Factortame.*[52] The Factortame saga showed that 'legal theory must march alongside political reality',[53] notwithstanding attempts to limit the impact of *Factortame II* by arguing that Parliament voluntarily authorized the upward migration of sovereignty via the Accession Act 1972 which could be legitimately repealed.[54] The constitutional implications of the supremacy of Community law, that is, the empowerment of the judiciary by granting it powers of legislative review were clearly highlighted in *R* v *Secretary of State for Employment ex parte Equal Opportunities Commission and Another.*[55] True, the argument that sovereignty remains vested in the member states and is pooled or collectively exercised by the Community from which the state has the right to secede continues to have an appeal even though it misreads the Community legal order and underestimates the scope and the nature of the powers vested in the Community. Its main weakness is that it posits a clear demarcating line between the Community and national legal orders thereby concealing the osmotic relationship of states with the EU. As Schuppert has argued

> if reciprocal influence is the key to understanding the process of European development, it cannot be a case of either waiting for the EC to take the step of becoming a federal state or, alternatively, of anxiously observing the process of the erosion of the nation-state in order not to miss the moment which finally marks the loss of sovereignty.[56]

[49] J. Weiler 'The Community System: the Dual Character of Supranationalism' 1 *Yearbook of European Law* 267 (1981).

[50] Case 129/79 *Macarthys Ltd* v *Smith* [1980] ECR 1275; [1980] 2 CMLR 205.

[51] *Duke* v *GEC Reliance* [1988] AC 618

[52] *R* v *Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85; *R* v *Secretary of State for Transport, ex parte Factortame* [1991] 1 AC 603; *R* v *Secretary of State for Transport, ex parte Factortame* [1996] ECR I-1029; *R* v *Secretary for Transport, ex parte Factortame* [1998] 1 CMLR 1353; [1997] 1 CMLR 971.

[53] Loughlin, above n 32 at 154.

[54] P.P. Craig 'United Kingdom Sovereignty After Factortame' 11 *YEL* 221 (1991). Compare W. Wallace 'The Sharing of Sovereignty: the European Paradox' 47 *Political Studies* 503 (1999).

[55] [1995] AC 1; [1995] 1 CMLR 391. In this case, the House of Lords dismissed the Secretary of State's argument that only directly effective provisions could be enforced before national courts and thus that the Equal Opportunities Commission lacked the capacity and the sufficient interest to achieve that provisions of the Employment Protection (Consolidation) Act 1978 contravened Article 141 (formerly 119) EC and Directive 76/207/EEC.

[56] G. Schuppert, 'On the Evolution of the European State: Reflections on the Conditions of and the Prospects for a European Constitution' in J. J. Hesse and N. Johnson (eds), *Constitutional Policy and Change in Europe* (1995).

The above statement is essentially a call to rethink our conceptual vocabulary and to devise concepts that can reflect both the distinctiveness of the evolving, non-sovereign form of governance beyond the nation-state and the transformation of the state without overlooking the creative tensions, dialectic struggles and conflicts entailed by such processes. 'Europe' constitutes a unique design, which could politically develop along the lines of co-operative federalism without a state. In such a non-statal form of governance, a gain in functions at one level does not necessarily imply a loss at another[57]; the traditional realist view of power as an indivisible quality, which a unit either enjoys or does not has to be questioned. On the contrary, it highlights the emergence of a form of multilayered governance that allows for many centres of collective decision-making and the exercise of joint responsibility over certain functions. Similarly, the process of devolution in the United Kingdom shows that political units do not need to be defined by sovereignty in order to function (or to function well) and that we need to rethink the role of 'sovereign' states in a post-sovereign system.

Against such a background it is not surprising that scholars have recently embarked upon a search for a political and constitutional theory 'beyond the nation-state'; a theory which by transcending the departure of the nation-state/ return to the nation state dualism featuring in federalist and intergovernmentalist perspectives promises to capture the novelty, complexity of overlapping, mutually interacting and co-ordinate levels of government[58]; a theory which prioritizes interweaving reciprocity and systems change, instead of the familiar doctrine of sovereignty, and inclusive democratic governance, instead of territorial exclusivity and bounded allegiances.

4. Floating Sovereignty: an Argument

Sovereignty has legitimized state power by linking authority, territory and population and creating congruence between the rulers and the ruled. It has successfully done so by being groundless and hollow. The foregoing discussion revealed the historicity and indeterminacy of sovereignty, and reflective approaches in international relations have suggested that sovereignty has functioned as a ground for statehood due to the indeterminacy of its meaning.[59] By transcending and negating the particular context of hierarchical power relations, sovereignty has

[57] See O. Waever 'Integration and Security: Solving the Sovereignty Puzzle in EU Studies' 49 *Journal of International Affairs* 389 (1995).

[58] C. Harding 'The Identity of European Law: Mapping Out the European Legal Space' 6 *European Law Journal* 126 (2000); I. Harden 'The Constitution of the European Union' *Public Law* 609 (1994); J. L. Seurin 'Towards a European Constitution? Problem of Political Integration' *Public Law* 625 (1994); N. Walker, 'Flexibility within a Metaconstitutional Frame: reflections on the future of legal authority in Europe' in G. de Burca and J. Scott (eds) *Constitutional Change in the EU; From Uniformity to Flexibility* (2000); H. Abromeit, Democracy in Europe: Legitimising Politics in a Non-state (1998); R. Bellamy and D. Castiglione (eds), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (1996); J. Shaw 'The emergence of postnational constitutionalism in the European Union' 6 *Journal of European Public policy* 579 (1999).

[59] Poststructuralist perspectives have shown how the meaning of sovereignty became stabilized by political practices of 'writing', in the sense of constructing, the state; See Weber, above n 11; Walker, above n 11; R. B. J. Walker and S. H. Mendlovitz (eds), *Contending Sovereignties: Redefining Political Community* (1990).

been a signifier of order, and consequently of the possibility of society.[60] Even though its function has been to authenticate the modern political order, sovereignty has been seen as a precondition for politics. But political orders do not remain static. States are in a state of transition: they evolve, adapt, develop, and diversify in line with changing exigencies and environments. True, the process of adaptation is asymmetrical; in some areas, their powers weaken and increase in others.[61] But this does not mean that powers have to be fused into a single centre.

Although the state has been the necessary institutional setting for sovereignty, the latter is no longer a necessary prerequisite for the effective functioning of states. Sovereignty has established an entitlement to rule, but states do not need to appeal to sovereignty in order to be imbued with legitimacy. True, states are so deeply immersed within complex and multifaceted webs of interactions at transnational, supranational, subnational levels that any attempt to depict them as distinct from and antagonistic to the above contexts would be misleading. As argued above, the European enterprise relies crucially on the member states for the formulation, implementation and the enforcement of rules. But even beyond Europe itself, the emergence of new sites of normativity beyond the nation-state such as the international human rights regime, the global political economy and so on has not led to the withering away of states. Rather, states continue to play a key role in negotiating the outer limits and substantive content of the global normative order.

The evolution of states, however, necessitates the acceptance of the floating character of sovereignty and the thin correlation between sovereignty and the state on the part of their organs. The former implies that sovereignty is neither a thing to be possessed nor an addition of competences whose successive removal, like the leaves of an artichoke, could be constitutionally tolerated until it reached its heart, that is, a hard core of sovereign powers in areas of 'high politics' (e.g. immigration policy, fiscal policy, foreign policy and defence matters).[62] Political actors must recognize the peculiar and exceptional nature of the 'artichoke', that is, its propensity to mutate, to regenerate new leaves and the fact that that it lacks a heart. Sovereignty is hollow. This does not mean that sovereignty does not exist. Sovereignty exists, but its existence is located within the radically open domain of discourse. The lack of sovereignty's firm ontological mooring can be seen if we attempt to sketch the relation between 'levels of sovereignty' and state powers on a graph. It seems to me that states will not cease to be states with greater outlay. Nor will they surpass levels of sovereignty already available to those exercising a more limited array of competences. Sovereignty 'is already

[60] On signifiers, see T. Hawkes, *Structuralism and Semiotics* (1977); E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy* (1985).

[61] See J. Mayall 'Sovereignty, Nationalism and Self-determination' 47 *Political Studies* 474 (1996).

[62] The artichoke simile was evoked in French debates concerning the compatibility of the Maastricht and Amsterdam Treaties with French constitutional law; Maastricht I, Decision 92–308 DC, 9 April 1992; Maastricht II, Decision 92–312 DC, 3 September 1992; Maastricht III, Decision 92–313 DC, 23 September 1992; Amsterdam, Decision 97–394 DC, 31 December 1997. As such, it bears many similarities with S. Hoffmann's distinction between 'high politics' and 'low politics': 'Thoughts on the French Nation Today' 122 *Daedalus* 63 at 72.

present' in small functions and will not rise with the largest. The thin relation between sovereignty and the state, on the other hand, implies that sovereignty is neither necessary for the evolution of the state nor constitutive of its existence. As such, it should not obstruct policy makers from negotiating policy choices with other actors and, generally speaking, from responding to contemporary challenges.

Critics may object here that although my argument may reflect accurately the nature of sovereignty it, nevertheless, fails to appreciate the significance of its function. After all, sovereignty has persisted as an ideology and organizing principle of the international system because it has helped to define and enforce collectively binding decisions on the members of the society in the name of the general will or public interest. If sovereignty is no longer necessary for the evolution of the state, how could state power be legitimized?

Undoubtedly, legitimacy is another 'essentially contested' concept and opinions differ significantly over its meaning and its scope. In addition, legitimation devices mutate over time in line with the state imperative of maintaining internal order. Beetham's theory of legitimacy can offer valuable insights into the issue at hand, for Beetham emphasizes the 'normative justifiability' of liberal democratic states.[63] Normative justifiability entails three things: an agreed definition of the people or the 'political nation' as defining the rightful bounds of the polity; the appointment of public officials according to accepted criteria of popular authorization, representiveness and accountability; and the maintenance by government of defensible standards of right protection, or its routine removal in the even of failure. So assuming that the political order has been lawfully constituted and power is exercised according to a pre-established set of rules (legality or formal legitimacy), a particular configuration of power relations becomes justified on the basis of national/mythical, procedural democratic and task-oriented criteria (my own terminology). The national/mythical criterion has played a key role in rendering the state a legitimate unit of political organization. States are depicted to be concrete embodiments of peoples, conceived of as ethnic or political nations. Indeed, the success of popular or national sovereignty as an organizing principle of modern states owes much to presumptions about their organic unity: they have been portrayed as unitary, undifferentiated and integrated bodies lending an identity to their citizens and compelling their unqualified allegiance. In addition to the national/mythical dimension, however, the legitimacy of the modern statist order depends on its ability to meet its purposes, to perform the acknowledged tasks of government, whatever these might be (e.g. security (Hobbes), rights protection (Locke), democracy, welfare (Dworkin; Habermas; Offe), justice (Rawls; Ackerman), to encourage good and discourage evil (Raz), or to promote liberal virtues (Galston)). In the process of establishing the governments' 'right to rule', the national-mythical and the task

[63] D. Beetham, *The Legitimation of Power* (1991); D. Beetham and C. Lord, 'Legitimacy and the EU' in A. Weale and M. Nentwich (eds) *Political Theory and the European Union* (1998) at 14–19. But compare I. Scharpf, *Governing in Europe: Effective or Democratic?* (1999).

or performance-oriented dimensions have been closely associated. But their relation has been a relation of dependence in so far as the former has subordinated the latter or has functioned as its premise. However, this does not mean that they cannot be separated. In such a case, legitimacy would have to rest on democratic and functional criteria, such as electoral authorization, democratic participation, accountability, the efficient performance of key tasks, the delivery of welfare and, generally, the outcome of governmental policies.

Two implications follow from this. First, state authority would no longer have an ultimate fixed and firm mooring since it would no longer be seen to represent a foundational essence embodied in the nation. Instead, its authority would depend on the quality of political projects, the effective performance of key functions and on the actions of welfare providing administration. This represents a shift from the traditional content-independent-authority to rule (Bodin, Hobbes, Austin, Hart) underpinning the traditional conception of sovereignty. Second, the state will no longer be able to command the loyalty of its citizens, but would have to purchase it through its capacity to meet societal needs, to fulfil the basic functions widely believed to be fundamental to its purpose, and the normative qualities of its policies and institutions (purchasing loyalty thesis). But how could floating sovereignty be empirically implemented? In what follows, I will disturb the 'hard core' of sovereignty by considering three institutional designs which call into question the states' power to define their nationals, to decide who will be admitted and who will be excluded from the national territory and to provide security and defence.

A. Scenario 1: Defining Nationality

Determination of nationality falls within the exclusive jurisdiction of sovereign nation-states. The International Court of Justice has expressly linked state sovereignty with the power to determine the conditions concerning loss and acquisition of nationality.[64] Notwithstanding the problems that this creates in the application of Community law, such as lack of uniformity and consistency owing to unacceptable variations in the personal scope of the right to free movement, and the consequential problem of the exclusion of third country nationals residing in the territories of the Union, the European Community has not encroached on the member states' sovereign prerogative of determination of nationality. The member states have declared that 'the question whether an individual possesses the nationality of a member state shall be settled solely by reference to the national law of the member state concerned'[65] and the Amsterdam Treaty inserted in Article 17(1) EC the statement that 'Union citizenship shall complement national citizenships'. True, nationality for Community Law purposes does not have to coincide with nationality for other purposes and both

[64] *Nottebohm Case (Liechtenstein* v *Guatemala)*, 1955 ICJ 4 (Judgement of April 6, 1955).

[65] Declaration on Nationality of a Member State annexed to the Final Act of the Treaty on European Union [1997] OJ C340 145–172; See also the Edinburgh and Birmingham Declarations [1992] OJ C 348 and Bull. EC 10–1992.

the United Kingdom and Germany have submitted declarations.[66] In *Micheletti*, the European Court of Justice confirmed that determination of nationality falls within the competence of the member states, but it went on to add that this competence must be exercised with due regard to the requirements of Community law.[67] This means that the member states must recognize state nationality and refrain from imposing supplementary conditions to the exercise of fundamental freedoms, such as a residence test. It also implies that the member states can neither withdraw nationality from individuals in violation of fundamental rights, which are protected as a general principle of EC law, nor introduce legislation in the field of nationality law, which may violate these rights thereby contravening Article 10 EC (the solidarity clause).[68] According to de Groot, Article 10 EC also prohibits a member state from including a significant population of an ex-colony or non-EU country into its definition of nationality for Community purposes without prior consultation with Brussels.[69] Arguably, although Community law set limits on the member states' autonomy in nationality matters, it does not call into question the states' power to define the rules on acquisition and loss of nationality.

Suppose, however, that the political will existed and the Community proceeded to harmonize national laws governing acquisition and loss of citizenship. Legislative harmonization could take the form of either minimum harmonization whereby a Community measure would lay down a minimum set of criteria and requirements for citizenship acquisition or of a directive or regulation forming the basis for a code of European nationality and of Euro-naturalization procedures.[70] Harmonization would put an end to the varying rules and conditions for acquisition of citizenship, thereby contributing to the formation of a common European migration policy. This, in turn, would facilitate the process of European integration and the attainment of the internal market. It would also improve the position of third country nationals in countries where citizenship and naturalization laws are quite restrictive, thereby ensuring that all the persons who are subject to laws and policies have a chance to participate in and influence the process of their formation. True, harmonization could also be criticized for replicating the nationality model of citizenship at the European level and ultimately projecting the European adventure as a quest for statehood. Such criticisms, however, could be ameliorated if European citizenship did not replicate

[66] The Federal Republic of Germany made a declaration on the definition of the expression of 'German National' which was annexed to the Treaty of Rome. The UK made two declarations: the first was attached to the Accession Act 1972 and the second was made on January 28, 1983; see Declaration [1983] OJ C23 1.

[67] Case C-369/90 *Micheleti et al. v Delegacion del Gobierno en Catanbria* [1992] ECR I-4329. This has been reaffirmed in Case C-122/96 *Stephen Austin Saldanha and MTS Securities Corporation and Hiross Holding AG* [1997] ECR I-5325.

[68] S. Hall 'Loss of Union Citizenship in Breach of Fundamental Rights' 21 *ELRev* 129 (1996).

[69] This could be done either via a declaration or by special act, akin to the British Parliament's authorisation of the extension of the British nationality to British Overseas Citizens living on the Falkland Islands; see G.-R. de Groot, 'The Relationship Between the Nationality Legislation of the Member States of the European Union and European Citizenship' in M. La Torre (ed.) *European Citizenship: An Institutional Challenge* (1998).

[70] On this, see EP Resolution of 18 September 1981 OJ C 260/100.

the nationality model of citizenship and became conditioned on domicile.[71] Traditionalists would undoubtedly object to the loss of state sovereignty in this area. Harmonization of citizenship and naturalization laws would be seen to weaken the affective dimension of citizenship, that is, membership in a community built around ties of belonging and a sense of identity to the nation. But harmonization could equally be defended on the grounds that it would lead to the modernization of the state. It would do so by reducing the scope of ideologically led action by dominant elites whose definitions of what belonging to the nation means have traditionally determined access to citizenship, and by bringing existing archaic and exclusionary notions of citizenship in line with human rights norms and normative accounts of democratic citizenship.[72]

B. Scenario 2: Protective States and the Challenge of Migration

Sovereignty has been regarded as the ultimate value in immigration matters, and the states' right to exclude almost unconditional (except on humanitarian grounds or to facilitate family reunion). Renouncing exclusive control over borders has thus been seen as tantamount to losing sovereignty. In the European Union, the process of the gradual abolition of border controls at internal frontiers highlighted the member states' anxiety to be granted sovereign power of control over the external frontiers of the Union, in exchange for their consent for the shrinking of internal borders. As states had to co-operate in this area, their co-operation took initially the form of informal and para-Communitarian co-operation (1985–1991). This was followed by diluted intergovernmental co-operation under the third pillar of the Treaty on European Union (1992–1998). The third pillar established institutional links with the Community institutions, but it accorded leading actor status to national governments. The weaknesses of the intergovernmental method led to proposals for the partial Communitarization of the third pillar,[73] which paved the way for the new Migration Title of the Amsterdam Treaty (1 May 1999). The Communitarization of migration-related matters means that the measures agreed at the Community level are legally binding, take precedence over conflicting national law provisions, and may be directly effective if they meet the conditions laid down by the European Court of Justice.[74] It also means that the Court's jurisdiction over enforcement actions, annulment, failure to act and non-contractual liability apply to this title.

Although most Member States did not regard the new framework as an affront to their sovereignty and, indeed, succeeded in retaining many of the

[71] T. Kostakopoulou 'Towards a Theory of Constructive Citizenship in Europe' 4 *Journal of Political Philosophy* 337 (1996); T. Kostakopoulou 'Nested "Old" and "New" Citizenships in the European Union: Bringing Out the Complexity' 5 *Columbia Journal of European Law* 389 (1999).

[72] For example, the reforms of the Italian Law on Citizenship n. 91 of 5th February 1992 which amended the unequal treatment of men and women sanctioned by Law n. 555 of 13th June 1912 were defended as necessary modernising reforms; on this, see B. Nascibene, *Nationality Laws in the European Union* (1996).

[73] European Commission, Report for the Reflection Group, Bull. EU 5/1995, 10/5/95.

[74] That is, if they are sufficiently clear and precise, unconditional, complete and legally perfect. See Case 26/62 *Van Gend en Loos* [1963] ECR 1; [1963] CMLR 105; Case 2/74 *Reyners* v *Belgium* [1974] ECR 631; [1974] 2 CMLR 305.

intergovernmental features of the old Justice and Home Affairs framework and circumscribing the ECJ's jurisdiction[75], Denmark, Ireland and Britain decided to opt out of the Title, and have negotiated special arrangements. Interestingly, whereas Britain and Ireland could decide to opt in during or after decision-making in the Council (Articles 3 and 4 of the Protocol on the position of the UK and Ireland), Denmark has dogmatically resisted such a possibility.[76] It is haunted by the spectre of losing sovereignty even though Communitarization has left the conceptual parameters of the security paradigm which characterized the third pillar intact: the Community has adopted the member states' discourse on the securitization of migration and asylum policy whereby migration and asylum flows are seen as a security problem which must be effectively controlled and reduced.[77] More importantly, whereas the participating member states regard Title IV as a framework which will enable them to achieve more credible and Pareto-efficient outcomes and even to impose their security agenda beyond the confines of the Union, the non-participating states remain caught in the efficiency/ideology or sovereignty dilemma. This perhaps explains why the British Home Secretary, Jack Straw, announced in the House of Commons two months before the entry of the Amsterdam Treaty into force that Britain is interested in developing co-operation with European Union partners on asylum and the civil co-operation measures of Title IV and 'shall look to participation in immigration policy where it does not conflict with our frontiers-based system of control'.[78]

But suppose migration and asylum policy were fully Communitarised; that is, co-decision and qualified majority voting applied to all areas and the European Court of Justice's jurisdiction were fully restored. Suppose further that Communitarization was followed by a substantive shift in the basic orientations of the common migration policy whereby the contemporary restrictive and law-enforcement approach was 'de-legitimized' and another more positive approach was adopted. This approach could be the subject matter of a European Charter on Migration and Asylum policy, which would furnish a legally binding, constitutional framework for immigration. Such a framework would free immigration from the whims and prejudices of governmental elites majorities and promote a fairer understanding of the migration movements—of their structural causes as well as of their global character. The Charter would bridge national and Community agendas in this area and yield a more positive approach to immigration measured in human rights fulfilment and more liberal admission policies. The institutional guarantees and checks provided for at the Community level could block exclusionary policies and decisions taken by national or subnational units. By undercutting the 'fortress logic' and the 'invasion syndrome' underlying the present regime and the potential for ideologically-led action in migration matters,

[75] See Articles 67 and 68 EC. For an analysis, see S. Peers, EU Justice and Home Affairs Law (2000); T. Kostakopoulou 'The "Protective Union": Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe' 38 *Jornal of Common Market Studies* 497 (2000).

[76] See Arts 1–3 and 7, Protocol 5, Amsterdam Treaty.

[77] Kostakopoulou, above n 74 at 505–13.

[78] House of Commons Hansard Written Questions, 12 March 1999, Col. 381.

the 'constitutionalization' of migration along the lines suggested here would not only be consonant with principles underlying the European and national constitutional traditions, but it may be required by them too.[79]

C. Scenario 3: Consuming security

Defence policy has been another key function of modern Westphalian states. The capacity to conduct domestic affairs without unwanted interference and to ensure the security of the population has always been manifestations of sovereignty. States must 'decide for themselves how they will cope with their external and internal problems, including whether or not to seek assistance form others'.[80] This leads them to embark upon costly militarization programmes and to develop or acquire weapons that are more lethal than those of their neighbours.

Because security and defence policy have been jealously guarded by modern states, the Treaty on European Union excluded national defence industries from the operations of the single market, and the gradual forging of a genuinely Common Foreign and Security Policy (CFSP) has proved to be an arduous process. Building upon the foundations laid down in European Political Co-operation, the second pillar of the Treaty on European Union signalled the member states' commitment to develop a European defence dimension. However, the intergovernmental character of the co-operation meant that foreign policy outputs would emerge as the lowest common denominators among the national policies of the member states. Although the Amsterdam and Nice Treaties have introduced important reforms to the second pillar, the crux of the point is that the member states are not very eager to compromise their sovereign prerogatives in this area.[81]

But suppose that either in the European or the global context there existed an agency capable of mobilizing forces and reacting rapidly and effectively in cases of intervention at the request of the attacked party. Suppose further that this agency could not afford to show inertia because it would be bound by an insurance contract whereby states could purchase an insurance against risks, such as attacks from other states, invasions or other similar insurgencies. Their insurance would guarantee a specified kind of diplomatic action or military intervention, the deployment of specific military or civil/peacekeeping forces in exchange for a negotiated annual premium. Premiums could vary in accordance with differential risk assessments, levels of protection, specified forces to be

[79] In 'Is There an Alternative to Schengenland?' I have defended the argument that democracy in contemporary plural societies requires inclusiveness in terms of flexible membership and porous boundaries; 46 *Political Studies* 886 (1998).

[80] K. N. Waltz, *Theory of International Politics* (1979).

[81] The Nice European Council adopted the Presidency's report on the Common European Security and Defence Policy which confirms the EU's take over of the WEU, provides for the development of the Union's military capacity (establishment of a rapid reaction force is the first example) and the creation of permanent political and military structures; see Memorandum to the Members of the Commission, SEC (2001) 99, Brussels, January 18, 2001.

deployed and other political factors, and would be individually negotiated by the insured countries.

In an attempt to provide a solution to the problem of financing UN functions in the post-cold war era, Kay and Henderson have proposed the establishment of UNISA (United Nations Insurance Agency) operating under the ambit of United Nations.[82] UNISA would maintain the capability and display readiness to carry out military operations under the authority of the UN at the request of the insured parties (countries). UNISA's forces could be stand-by units provided for by individual states in exchange for reimbursement of their expenses. Alternatively, they could be recruited on an individual basis by UNISA itself: many individuals would welcome service, further training opportunities and a military career in a UN force.

Although traditionalist forces would regard the operation of an insurance agency as the ultimate surrender of sovereignty, governments would have no problems in convincing the electorate about its several benefits for the insured states (and their populations). First, it would result in higher and better levels of security at a reduced cost, since the chances of success of military operations undertaken by an agency that could deploy the best forces or have the more advanced technology at its disposal would be greater. Second, insured countries would be in a position to channel the net savings from the reduced military expenditure into civilian sectors and to enhancing welfare provision. For the population of small countries in the Second and Third worlds this would be a significant resource. Third, this arrangement would contribute towards enhancing global peace by reducing the probabilities of hostile operations since neighbouring countries would purchase the same or similar insurance from the same agency. Fourth, it would result in increased democratic accountability, and could trigger democratic reforms in the domestic context by extending democratic control over the military. It would certainly enhance transparent defence planning and resource allocation since the terms of the insurance contract would be available for public and parliamentary scrutiny and approval. The transformation of states into consumers of security, would not weaken state authority. Rather, it would increase it, by enabling individual governments to provide more security for less money and to elicit the participation and support of their populations (i.e. the purchasing loyalty thesis).

5. Conclusion

The preceding discussion suggested that, contrary to commonly held views, the removal of core areas of 'high politics' from the states' exclusive domain of jurisdiction would not make states less 'sovereign'. Rather, it could increase their authority by increasing their capacity to perform their primary functions as providers of protection and welfare maximizers and thus to elicit the support of

[82] A. F. Kay and H. Henderson 'Financing UN Functions in the Post-Cold-War Era' 27 *Futures* 3 (1995).

their citizens, and by enriching democratic life. I do not mean to suggest here that the institutional designs I have considered above are a readily achievable political task. But ideas, I believe, matter, not only because they represent visions of what is possible, but because they make the constraints of existing paradigms more visible. The world order is no longer intelligible on the basis of a Hobbesian realism and sovereignty can no longer exhaust the raison d' etre of the democratic state. The relativization of sovereignty involves the acceptance of its floating nature. In the schema of floating sovereignty suggested above, the question of legitimacy, and, ultimately, of sovereignty, ceases being an issue of shifting the sources of authority from the rulers to the ruled. Nor is it a matter of adjusting the borderline between state and society or between the state and the European Union. Rather, it becomes a matter of examining whether states can pursue in a democratic and efficient way the basic functions widely believed to be fundamental for their purpose and can enhance citizen participation and support.[83] Hence, sovereignty would be transformed from a central pillar of the modern statist order into an open-ended, fluctuating and adjustable ceiling over the free functioning of a dynamic and metastable society.

None of what I have said so far should be taken to eulogise the statist order or to apologise for its durability. I have not taken a stand on that larger issue. My claim has been more modest: that the framing of the debate concerning sovereignty in terms of the dualism of retention or rejection conceals the floating character of sovereignty and constrains the capacity of the state to mutate, adapt and respond adequately to the diverse, complex and often unlabelled structures and processes which range in, through and above it.

[83] This is to deny the possibility of language games invoking a thicker concept of sovereignty for strategic reasons in other parts of the world. For instance, the language of sovereignty might be useful resource for states of the Third World where 'sovereignty is not fully realised yet'; See N. Inayatullah and D. L. Blaney 'Realising Sovereignty' 21 *Review of International Studies* 3 (1995). On the concept of 'sovereignty games', see G. Sorensen 'Sovereignty: Change and Continuity in a Fundamental Institution' 47 *Political Studies* 590 (1999).

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