VARIOUS HISTORICAL CONNOTATIONS OF THE CONCEPT OF SOVEREIGNTY

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Abstract

Sovereignty as a feature of state power, shall be expressed in terms of organizing and exercising, determining and resolving internal and external problems, freely and according to its will, without any interference, respecting the sovereignty of other states, as well as European and international law norms. The sovereignty of the people may remain a mere fiction, in the conditions in which the people, as a whole, does not become or is not aware of its complete and complex role as the sole sovereign owner of state power. The people assuming and exercising this role implies not only that it has the right to participate in government, which is in fact an essential aspect of democracy, but also the fundamental duty to achieve social, economic prosperity accompanied by cultural development to ensure the freedom it needs in order to fulfil its civic obligations and duties. From this point of view, the state has the aim of realizing the social expectations of the people, the requirements laid down by various groups or social categories in decisions for the exercise of state power. Rather controversial, the concept of sovereignty, from the perspective of its historical imposition and configuration, involves at least two connotations likely to cause an active and permanent controversy in specialized literature - a simple statement and a political and legal concept.

Keywords: *sovereignty; rule of law; power of state; concept of law.*

1. Introductory elements regarding the concept of sovereignty

The very controversial concept[1] of *sovereignty* involves, from the perspective of its historical imposition and configuration, at least two positions likely to cause and active and permanent controversy in literature.

So, from a first perspective, the concept of *sovereignty*, coinciding with the *State* itself, as a concept, exists as such, in itself, sovereignty being understood as an attribute of the State for the first time, establishing this positive predicate, according to the precept by which words would exist before things, existential states.

2. General considerations regarding the historical evolution of the concept of sovereignty

In such an opinion[2], being a majority one, there are, on the one hand, a logical-semantic reduction of *sovereignty*, as a concept, to the *state*, but, at the same time, on the other hand, *sovereignty* is only the result of a statement on a note, on a predicate that can be said about the *state* as meaning, at the same time, *its external independence* in relation to other entities of political organization[3] in statal form of communities of the same rank, as well as *an internal supremacy*. Therefore, any member must be characterized, at least historically, as both *independent* as an actor on the international scene, and as holding *an internal supremacy* by exercising certain royal rights[4].

From the second political-theoretical perspective, *sovereignty* is a concept existing, pragmatically, before Bodin. [5] Building - from a certain ideological motivation, wanting, in fact, to impose a theory of the Christian republic - the principle of sovereignty and the theory of a sovereign republic, but the result being the elimination of the Christian fundamentals of authority, Bodin argues that sovereignty, in itself, in its very concept, is nothing more than the power to make laws, or, in other words, the *will of the sovereign*, an ordering power, from a normative point of view, of the Republic. In this sense, sovereignty is therefore "the principle of the profane foundation of power". As a matter of fact, the concept of *sovereignty*, associated with that of the *state*, emerges from the legal doctrine of Bodin, therefore, starting with the 16th century, taking into account that the concept of *state* is a modern epistemological creation, with anthropologists noting that certain societies, which did not know the functional differentiation of power in accordance with the classic *check and balance* formula, highlighted by

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[1] Hans Kelsen, Les rapports de système entre le droit interne et le droit international public, (Paris, Hachette, 1927), 35-41.

[2] Jean Bodin, *Les Six Livres de la République* (éd. Gérard Mairet), (col. "Le Livre de Poche. Classiques de la philosophie", nr.4619), (Paris, Gallimard 1993).

[3] Constantin Dissescu, *Constitutional Law*, ("Soce & Co" Publishing House, Bucharest, 1915), 315.

[4] Alexandru Bolintineanu, Mircea Malita, *Carta ONU*, (Politica Publishing House, Bucharest, 1970), 13-15.

[5] Olivier Beaud, *La puissance de l'État*, (Presses Universitaires de France, Pars, 1994), 35-36.

Montesquieu[6] and John Locke, did not know the *state*, being, in a modern formula, non-statal societies[7].

Even if, as regards the concept of *sovereignty*, it has been the object of debate ever since the Middle Ages, without, however, the use of the concept of sovereignty[8], during this period, having the same political and legal significance of what the medieval people understood by the statal sense of the concept.

Carré de Malberg[9] noted, moreover, that in the medieval period, the term of *sovereignty* rather designated, used comparatively, a certain level of *Power.*

In the 13th century, the term of *sovereignty* acquires and is enriched with a legal-technical meaning, expressing not only a relationship of power, but a certain supreme attribution, a single *authority*, namely to settle, as a last resort, a legal conflict. A second and richer meaning in relation with the somewhat constrained sense of the 12th century, so that another customary law, the *Usages d'Orlenois* from the middle of the 13th century, governing the distribution of jurisdictional attributes between the monarch and his barons, states that the royal justice remains as a last judgment (in the sense of a decision which can no longer be attacked in front of another power, either vertically and, as such, understanding it as superior, or by conceiving it horizontally, the concept of *sovereign* reflecting, therefore, the recognized faculty of the monarch[10] to resolve a judicial conflict by a non-appealable decision, since " *le roi est souverains, si doit être ça cora souverain*[11]".

Thus, for the political-legal mentality and the appropriate language, *sovereignty* alludes to the *sovereign* who can, either as baron or king, within his sphere of given and recognized dominance, decide independently of another person. A mentality on *sovereignty* somewhat opposed to the modern meaning we give to the concept, beginning especially with Rousseau, the opposition being between the *judicial* conception of sovereignty and the modern, *legislative*, one, the idea of a unique and effective public power with exclusive competence - namely, legislative power - being foreign to the medieval conception, which will later make Kelsen[12] state that the constitutional order of the Middle Ages and in general was established as a decentralized legal order but without a precisely located center, i.e. the unifying power which sovereignty is for the modern state.

For the Middle Ages, in European political practice, *sovereignty* shows only the concepts of double *power* and *judicial power relationships*, and which generates, in the era, the content of the expression of *rights of sovereignty* as an unlimited and general attribute of the monarch, not infrequently a result of limitation by military force of the sovereignty of its barons. In this way, by the Treaty of Brétigny (1360), Charlemagne assumes in the content of his sovereignty a series of royal prerogatives which are considered today, in the doctrine of public law, as pertaining to the essence of sovereignty: *ius belli*, *ius iudicii* et al., however, all of these rather representing attempts of introducing the decisive concepts of Imperial Roman law, but without their full reception.

Therefore, the thesis according to which the concept of *sovereignty* was present before Bodin of course, the French legalists of the first half of the 16th century, such as Grassaille, Seyssel, or Chasseneuz, have certain merits in substantiating modern public law on the principle of sovereignty, but that which was the object of their theses was the justification of the supremacy of the monarch within the state, based on the theory of divine law as basis of his prerogatives. Thus, the great jurist Charles Dumoulin[13] admitted the absolute character of sovereignty, substantiating royal power on divine investiture, thus identifying, the same as his predecessors, *sovereignty* with *royalist absolutism*, identification which has, as such, consecrated the medieval adage, as quoted in the work of the medieval public law works, that persons governed by public law, that *Rex Franciae est in regno suo tanquam quidam corporalis Deo* - "the King of France, in his kingdom, is God embodied". It's true, a logical identification, that does not exclude, however, the at least formal recognition of a certain constitutional legal limit of such an absolutism of power, the limits being the *oaths* and the *principle of consent of statuses*.

Bodin managed to achieve the great leap toward the modern concept of *sovereignty* by understanding, however, that sovereignty is not the principle of the authority within the state, but the principle of the State from which all powers[14] originate, for Bodin the sovereign and the sovereignty which he exercises, either directly or indirectly - only operates in order to found and preserve a Republic - the state, because sovereignty is the principle of the state itself. For Bodin, sovereignty is based on law[15], which implicitly

[6] Montesquieu Charles., *Despre spiritul legilor*, vol. 1. ("Stiintifica" Publishing House, Bucharest, 1964), 11.
[7] Charles Loyseau, *Le prince*, (Gallimard, Paris, 1952), 290.
[8] Paul Negulescu, *Curs de drept constituțional român*, (Alex Th. Doicescu Publishing House, Bucharest, 1927), 94-95.
[9] Carré de Malberg, *Contribution à la théorie générale de l'État*, tome I, (Sirey 1, Paris, 1920), 74.
[10] Genoveva Vrabie, Organizarea politico-etatica a Romaniei. Drept Constitutional si institutii politice. Vol. 2. (Cugetarea Publishing House, Iasi, 1999), 74.
[11] Paul Viollet (éd.), Les Établissements de saint Louis accompagnés des textes primitifs et de textes dérivés, avec une introduction et des notes, 4 tomes, (Société de l'histoire de France, librairie Renouard, Paris, 188), 515-517.
[12] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Vökerrechts* (2.Ausg.), (Aalen, Scientia Verlag, 1981), 55.
[13] Jean-Louis Thireau, Charles Dumolin, 1500-1566. (Droz, Geneva, 1980), 28.
[14] Gérard Mairet, Le principe de souveraineté. Histoire et fondements du pouvoir moderne, (Gallimard, Paris, 1997), 34.
[15] Jean Bodin, Les Six Livres de la République, 58.

makes *the sovereign state* a *state governed by the rule of law* - in Bodin's terminology, "an *État de justice"*.

Jean Bodin marks, in the history of the concept of *sovereignty*, *the* principle of individualizing historical peoples, of building the poitical territoriality of the states, of political modernity in general, a process which continues with Thommas Hobbes, with his *Philosophical Rudiments of Government and Politics*, repeating the exposure of the conceptual system of sovereignty through *Principes fondamentaux de la philosophie de l'État* and *Du citoyen, a* work through which Hobbes inaugurates, for the modern era, the philosophy of the state.

For Hobbes[16], by following Bodin, *positive law*, the law in force, is an expression of the will of the sovereign who uses his power in this way. As an immanent form of civil human existence (i.e., within the Roman sense of *civis*), with its determining factor and political significance, the law is a condition of civilization, the law "playing", in order to achieve such a purpose, a double function: moral and pragmatic, is in the service of (social) justice and peace. Therefore, law summarizes and expresses the essence of the state, namely the *union* of individuals within the same political body and their *subordination* to the same rules.

What is interesting in Hobbes is the fact that law as an expression of sovereign power is only meant to repress, to penalize guilt, without, however, aiming to carry out justice. The law does not express fairness. *Fairness*, as a value, constitutes only a procedure of sovereignty, in the sense that law constitutes what the sovereign wishes and what the sovereign wants constitutes law. Hobbes, by supporting the thesis that the State is a profane state, gives up, as a landmark, any divine norm, and, as such, the divine norms and values are no longer the landmarks of fairness, but the will of the sovereign is, the law having a deeply profane nature. The sovereign must be the only one able to determine what is and what is not fair: the law being a lexicon, a code, the sovereign is the one who lays down such a code, imposing the current and official definition of language terms.

As a matter of fact, for a long time, the concept of *sovereignty* was treated as a function of the *state*, as an essential and specific element of the state, the view of an anthropomorphic theory of legal scholastic which built law through a scientific technique of legal fictions being later abandoned.

From such a perspective, the concept of *sovereignty*, referring to the alliance between *property* and will, had been based on the political and legal trinity of:

a) personality;
b) the hierarchy of wills;
c) patrimony.

Although, in the modern classic conception, the holder of the right to property is the king and then the nation, the French Revolution of 1789, following in the footsteps of Locke's theory, transfers the subjective right to property from the king to the nation, not noticing, however, that the holder of the right to property of the national heritage was not the king, but that the property belonged to the institution of the Crown. The revolutionary theory which laid the foundation for 1789, and in particular the legal ideology of Rousseau, conceived sovereignty as an expression of three basic elements[17]:

a) indivisibility;
b) imprescriptibility;
c) inalienability.

However, these three determinants of the sovereignty of the nation are nothing more than the consequences of the *theory of the sovereignty of the crown*.

For the classic doctrine, distinctions must be made between the German School - Gerber, Jhering, Laband and Jellinek - and the French School - Rousseau and A. Esmein, the latter also being the author of the theory of the assignment of national sovereignty, therefore, between the *German positivist theory* and the *French positivist theory*, both approaches having features in common, namely legal positivism and judicial voluntarism - both opposing almost equally the English School of public law, by rejecting the theory of national sovereignty, the English substituting the analysis of the concept of *sovereignty* with the *theory of the sovereignty of Parliament*. Coming back to the distinctions between the German and French schools in the discussion on sovereignty, it should be noted that, for the German thinkers, the *State* is a legal person, his being an *a priori* assumption. As such, law arises out of the will of the State, sovereignty belonging to the state as a person[18]. Whereas for the French, the *State*, as the nation's legal expression, is *a posteriori* assumption, the Nation existing before the State, the State and Law arising out of the Nation; therefore, sovereignty belongs to the Nation - according to the theory of nation-people. Such a theory of the State generates two principles, namely:

1. the principle of national sovereignty;
2. the principle of the assignment of sovereignty.

However, Kelsen and Krabbe cause a change of paradigm. It is true, Krabbe[19] stops at an opposition between the *sovereignty of law* and *state sovereignty*. However, by analyzing the concept of *sovereignty* as a notion *of itself* and *in itself*, Kelsen triggers a breakthrough in deepening the theory and the notion of *sovereignty*, by studying the legal logic of the concept, by issuing a new hypothesis on sovereignty, by releasing the own function of the concept of

[16] Thomas Hobbes, *Du citoyen (De cive), Principes fondamentaux de la philosophie de l'État* (éd. Gérard Mairet), (col. ,,Le Livre de Poche. Classiques de la philosophie"), (Paris, Gallimard 1996), 270.
[17] Tudor Draganu, *Drept constitutional si institutii politice. Tratat elementar*, vol.1, (Lumina Lex Publishing House, Cluj-Napoca, 2000), 208-212.
[18] Bertrand de Jouvenel, *Du pouvoir, Histoire naturelle de la croissance*, (Hachette, Paris, 1972), 23.
[19] Francis Jaeger, Le problème de la souveraineté dans la doctrine de Kelsen (Exposé et critique), (E. de Boccard édit., Paris, 1932), 2-4

sovereignty in the theory of law. For Kelsen, sovereignty is no longer and can no longer be seen as an exclusive attribute of the state, but sovereignty is and becomes an attribute of international law - *droit des gens*, by exceeding the limits classically imposed by positive law and statal law. Already, with Kelsen, the problem of sovereignty becomes and is established as the issue of the unity of legal order, of the scientific systematization of law.

Conclusions

Sovereignty, is an *element of logic*, which gives a part of positive law priority over the other subsystems of positive law. As such, it is logical that sovereignty must be assigned, as a predicate, to internal public law - internal public order - rather than to the State, in order to arrive at a single source of the norms of jurisdiction, sovereignty being, in conclusion, a *criterium*, a synthetic principle in establishing the hierarchy of the different systems/orders of positive law, for the introduction of the logical-theoretical unity of law, through a common value.

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