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Theories on Sovereignty

- **ABSTRACT:** *The notion of sovereignty has been invented in the 16th century. This concept is traditionally linked to Jean Bodin, who first used the term to describe modern statehood in his work ‘Six Books of the Commonwealth,’ written in 1576. The concept itself was originally conceived to define the characteristics of the absolute monarchy, but was later used to describe the rule of other sovereigns as well; thus, it was created as one of the most prolific concepts in political theory. Although sovereignty was an object of intense interest to political philosophers mainly until the middle of the 20th century, it is still not an out-of-date concept. While it is true that modern international law, recent political practice, and the chiselled concepts of law and state have diminished the importance of this notion until now, it has not disappeared. In fact, even the recent international policy and the modern constitutional practice are not able to do without the paradigm of state sovereignty. Like all concepts, it has been inflated, yet, its core political theoretical content remained almost the same. In the present paper I am going to attempt to introduce the types of sovereignty, mainly on the basis of who the sovereign can be.*

- **KEYWORDS:** sovereignty, political philosophy, ideological history, parliamentarism, government, social contract, *volonté générale*

1. The concept of sovereignty

Today, sovereignty has become a partially burdened concept – just like democracy,¹ rule of law,² or even utopia³—and arises sometimes in dissimilar contexts and

1 Cf. e.g., Tóth, 2019a, pp. 302–317.

2 Tóth, 2019b, pp. 197–212.

3 Tóth, 2019c, pp. 67–83.

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with several differing contents. The term is even used in common parlance. For example, sovereign decisions are mentioned to indicate one's own, independent decisions, or decisions free from undue influence; we talk about sovereign rights instead of individual rights; and the possession of the right to give instructions is described as one's sovereign position, etc. However, even though the concept of sovereignty has been overused, its use in state theory remains acceptable and even justified. There is no better or more adequate term to describe the modern state⁴, although the practical realization of the opportunities deriving from sovereignty is determined by the power relations between states.

Sovereignty, in essence, is the supreme authority over a specific territory and a permanent population. The subject of sovereignty is the sovereign, who, in principle, holds unlimited power over the population of a given territory, where individuals are bound to obey the sovereign but the sovereign is not bound to obey anyone.

Thus, the concept of sovereignty has three components. Supreme power indicates that the holder of power exercises it exclusively, and that they do not have to share it with anyone else. The sovereign is an individual, a body, or a group of individuals that holds all state powers and to whom everyone subject to their power is obliged to obey – this definition is sometimes supplemented by the fact that not only is it the case that everybody is obliged to obey but that, in most cases, people do actually obey. It is plain to see that territory is a *sine qua non* of the concept; the effect of the commands must always be realized in a physical space, without which no state or state sovereignty exists. Thus, for example, subjects of international law, where there is no territory involved but where everyone is obliged to obey orders, have no sovereignty—even if they may have other rights, such as the right to enter into an international treaty as in the case of the Order of Malta. Finally, the population is also an indispensable element of the concept of sovereignty: if there is no psychophysical entity with a will to whom the regulations of the supreme power apply, then there can neither be supreme power nor power in general.

The existence of supreme power results in territorial sovereignty over the territory covered by its authority and personal sovereignty over individuals subject to its power. On that basis, the sovereign is entitled on the one hand, to the normative and individual assessment—e.g. sanctioning or prohibiting—of all actions, events, and facts that have occurred in the given territory apart from

4 The concept of sovereignty is inseparable from the modern state; its development is related to the first historical form of the modern state, the absolute monarchy. For the concept of the term state as the indication of the modern state cf. e.g., Paczolay, 1998, pp. 113–146; Paczolay, 1996, pp. 447–463; and Takács, 2012, pp. 108–113. As opposed to the foregoing, the concept of state used by us encompasses, *inter alia*, the ancient despotic states of Asia, the Greek polis, Rome, or even the feudal monarchies – as regards that concept of state, cf. e.g., Szilágyi, 2011, pp. 73–142. When speaking of the modern state, we do not use that term as a synonym of the state in general, but only as one of the modern types of the state.

the exemptions of international law recognized by the sovereign itself—e.g. for individuals with immunity, the sovereign without the permission or request of the other state concerned may not investigate or assess crimes or other incidents committed by diplomats, or in the embassy buildings of other states. On the other hand, the sovereign is entitled to assess the acts of individuals under its personal sovereignty—its own citizens—even if those acts were not carried out in the sovereign's territory if a criminal offense, or any other act that is unlawful under the law of the state, is committed by a citizen of a given state, the police or other authorized body of that state may conduct an investigation, the prosecution may file charges, the court may render a decision, and the enforcement authorities may then enforce the court's decisions.

The exercise of sovereignty presupposes the existence of a government. The government exercises supreme power and other prerogatives deriving from it. However, this does not mean that the government is a conceptual element of sovereignty, merely that the exercise of supreme power is pursued through this organization.

Sovereignty has two aspects or two sides: an internal and an external side. The classic perception of sovereignty belongs to its internal side, according to which the subject of sovereignty—the sovereign—has exclusive and supreme power over a given territory and the population living there, which is not limited by any other power. The independence and immunity of the subject of sovereignty,⁵ resulting from inner sovereignty as a condition, belongs to the external side of sovereignty, along with the option to be on equal footing with other sovereigns holding supreme power over other territories and populations; that is, to participate in international relations as an equal party with equal rights to declare war, make peace, enter into international treaties, accede to international organizations, etc.

Understandably, such equality is relative depending on the actual political, economic, and military power—the rights, which are equal in principle, are in fact combined with very different opportunities for international action. This is why many believe today that sovereignty is an obsolete concept, since no state, not even the largest has complete and perfect sovereignty; even the most powerful states must consider other states without the freedom to do whatever they please, even on their own territory or *vis-à-vis* their own population.

Besides external and internal sovereignty, another major theoretical issue related to the phenomenon of sovereignty is the conceptual nature of sovereignty. Based on the different perceptions of that nature, we can speak of legal and political sovereignty.

5 It is therefore inherent in the external aspect of sovereignty that the sovereign exercising state power is not subjected to other sovereigns, it is not obliged to obey the norms or orders of other sovereigns, and the state—against its own will and without its prior consent—cannot be held liable by other states.

The approach of legal sovereignty is based on the idea that sovereignty is a legal concept: the scope of the exercise of supreme power is thus limited by the framework of law. Based on this approach, it is not true that the sovereign may do whatever they wish, as they are bound, at least, by the laws created by themselves. Therefore, legal sovereignty determines the requirement of a state bound by law—the formal rule of law, which is to be described in detail below—, perceiving the concept of sovereignty as a normative, prescriptive one.

Political sovereignty, on the other hand, considers sovereignty a factual issue: according to this approach, the concept of sovereignty—as a descriptive concept—indicates the existence of power and the sovereign exercising such power, regardless of whether the exercise of power is sound legally or otherwise whether it is ethical, fair, complies with certain legal principles, etc.

2. Types of sovereignty – with respect to the subjects of sovereignty

The types of sovereignty can be distinguished based on who the sovereign is.⁶ Accordingly, the following types of sovereignty exist: 1) sovereignty of monarchs (rulers); 2) parliamentary sovereignty; 3) popular sovereignty; 4) state sovereignty; 5) national sovereignty.⁷

6 In addition to these types which are distinguished based on the subjects of sovereignty, Carl Schmitt's concept is also worth mentioning. Although this concept, on the one hand, does not define the specific subject of sovereignty more precisely, it indicates several such subjects – parallel to one another – having regard to the legal system of the German Reich of its age, but it does not link sovereignty in general to any state, sociological, or political entity. On the other hand, it lacked the significance related to the history of ideas that the abovesaid types had, but it is worth being briefly discussed since it is a rather interesting concept. In his 1922 work titled 'Political Theology', Schmitt defined the sovereign as an entity who decides on the state of exception. It cannot be generally defined who decides in particular on the state of exception in a political and legal system, but whoever has the power to make this decision qualifies as the sovereign. Accordingly, the sovereign is inside and outside the law – foreruns the law – at the same time, as it can determine both the law itself and its boundaries the cases when it can be suspended and the provisions to comply with in such cases, namely not on a normative but on an individual basis. András Karácsony points out that, accordingly, '[t]he power of the sovereign derives from itself, which means that it is not derivative or deduced from any norm. [...] The position of the sovereign is paradoxical. On the one hand, it is outside the legal order, but, on the other hand, it belongs to the legal order, since it has a decision-making competence with respect to the suspension of the law and the constitution, as well as to the foundation of a new kind of legal order.' (Karácsony, 2019, p. 70.) The state of exception is identical neither to the state of emergency nor to the state of war, as those are also regulated by norms; the state of exception refers to a situation where life is not governed by norms but decisions – that is, the decisions of the sovereign. In that sense, the action of the sovereign is of a political nature (not bound by law) – that is what makes it sovereign action. 'The state of exception is a phenomenon in which life and law become tense, and the decision-making sphere of law and of politics get separated.' (Karácsony, 2019, p. 73.)

7 The so-called legal sovereignty is not discussed in the present framework but in relation (or rather, as opposed) to the concept of political sovereignty.

■ 2.1. *Sovereignty of monarchs (rulers)*

The sovereignty of monarchs is historically—with respect to both the history of ideas and political history—the first type of sovereignty. The sovereignty of monarchs is a product of the practice of absolute monarchy, which served as a (ex-post) theoretical justification for the absolute power that was used to characterize the modern state. In other words—as opposed to, for example, the idea of popular sovereignty emerging later –, the practice was developed first and was followed by the theory.

2.1.1. *Antecedents of the modern absolute monarchy*

Understanding state theory and the practical/theoretical aspects of the modern age requires an understanding of medieval conditions since the practical framework of absolute monarchy as a theoretical framework of sovereignty was developed to overcome those conditions.

In the Middle Ages, the significance of state theory diminished even compared to that in the Roman era, and theoretical debates were determined primarily by pragmatic considerations, namely the need to resolve any current power conflicts or to justify the position of one side. Among such conflicts, a prominent place was occupied by the ideological and power struggle of the papacy and the empire, as well as the political and legal struggle of the emperor and the local monarchs emerging from the organization of tribes and clans, and such conflicts were not separate from one another. This struggle, as well as the political thought as a whole and the everyday life of European societies, was permeated by the Christian faith and worldview, which was the be-all and end-all of every political philosophical thought and state theory. All ideas and opinions were expressed in relation to this worldview and were to be interpreted only within this paradigm.

The root of the struggle between the empire and the papacy (*imperium et sacerdotium*) was twofold: while, on the one hand, regarding the ideological question of finding the truth (that is, first, in terms of the ontological question of whether the truth originates from the human mind or divine will, and, second, the epistemological question of how the truth can be recognized; that is, for example, whether there are any authentic sources of truth apart from Biblical revelations—such as Council resolutions or any secular (particularly ancient) sources), an actual consensus had developed that the Bible and its explanations were binding and authentic sources of knowledge and that the human mind can at most recognize such knowledge, but it cannot change or override it; on the other hand, no consensus had been reached regarding the issue of who may lawfully exercise power. The supporters of the pope, who were also supporters of the pope's secular – and not merely spiritual – power, believed that the pope was entitled to exercise not only religious but also secular power, while the supporters of the emperor believed that secular power in its entirety belonged to the emperor – whom they considered the heir and head of the Roman Empire (*imperator*), and

the pope had competence in matters of faith at most. Since religious power meant a very significant secular influence – e.g., anyone had the right to capture or kill a person excommunicated by the pope –, and by refusing certain religious services: marriage, baptism, and administering the last rites, the bishops could cause serious harm even to those who held secular powers, a struggle developed in relation to the right of holding the positions of bishops, which was originally an internal affair of the Church. The so-called Investiture Controversy continued with varying intensity under the reign of several emperors and popes, and its results were no less varying; however, the emperor's attempts to intervene in the nomination or appointment of certain bishops were many times successful as the emperor successfully intervened in ecclesiastical matters, while the papacy was able to build secular power beyond its religious influence culminating in and symbolized by an independent papal state extending around the city of Rome from the eighth century. The power of the pope was also enhanced by the exclusive papal duty and privilege according to which the kings and the emperor himself could only be crowned by the pope.

Since there could be many kings but only one emperor who was the heir of the Roman Empire, the overlord of all monarchs, the “king of kings,” the respective emperor – who had been elected king of Germany first and then formally king of Italy – was above every king. The kings, of course, had no intention to allow a real say to the emperor in the affairs of the territory they ruled, so conflicts of power occurred regularly between the kingdom and the empire (*regnum et imperium*). For this reason, the popes often supported the kings' actual aspiration for power, and the kings, to be able to assert their best self-interest, supported the pope.

From the middle of the Middle Ages onwards, various autonomies: guilds, universities, and cities were established; these autonomous communities won themselves the right to be exempt from the power of the king or the prince, and received several privileges and immunities, partly from the monarchs and partly from the pope. Thus, for example, guilds were entitled to adopt binding rules for their members and to decide who could work in a certain profession; universities originated in twelfth-century Italy and spread across Europe, defined as the community of teachers and students (*universitas magistrorum et scholarium*), in addition to determining the means of education and scientific research, which were then closely interlinked, exercised criminal jurisdiction over university citizens; in other words, they set their own criminal norms and enforced those norms themselves. Cities had the right to adjudication over their residents, based on their own rules.

This was a multifaceted and ever-changing constellation of power where the ideas on the nature, rights, and obligations of the state – the political community – were formulated and debated. Such debates concerned the following main issues.

1) Who or what is the actual, ultimate source of power? The majority answer – in that age, of course – was that God is the direct or indirect source of all power. Even then, however, the idea arose, represented with the greatest influence and consistency by Marsilius of Padua, that power derives from the people or the political community as a whole.

2) Which is the best way to exercise power? In this respect, different answers were given based on the Platonic and Aristotelian divisions; thus, for example, the aforementioned Marsilius, as an exception, considered the exercise of communal power to be ideal. Nonetheless, the typical answer was the proclamation of the monopoly of power, that is, the primacy of the kingdom.

3–4) Is lawful acquisition and/or lawful exercise of power a condition for the legitimate exercise of power? Theologians, in particular, tended to legitimize undue power that oppressed people – tyrannical power – or power that was actually possessed but unlawfully acquired, on the grounds that it is a consequence of the deterioration of the community; that is, that the subjects deserve to be oppressed as a result of their sins, which means that tyranny is a form of God's punishment against people. Secular representatives of political thought, however, typically opposed tyranny, which they did not consider a legitimate form of rule.

5) A controversy follows from this, namely that there is a right of resistance (*ius resistendi*) against the one exercising autocracy – provided that tyranny is considered illegitimate. Some who did not consider tyranny legitimate nevertheless argued that despite the lack of legitimacy, tyranny cannot be defied – either because tyranny is God's punishment or because resistance is not appropriate for practical reasons, as everyone draws the line elsewhere in terms of autocracy, so it cannot be expected from people to recognize whether a ruler is a tyrant or not –; and some of them argued that there actually is a right of resistance that can be exercised in practice by the people against a manifestly unjust ruler e.g., one who openly opposes divine ordinances. As a combination of these two approaches, Thomas Aquinas considered that there is a right of resistance but that no individual is in the position to exercise it themselves, for no one could think that God specifically sent them to bring down the tyrant and no one can logically think that, Aquinas considered that the theoretical possibility of tyrannicide was emptied.

6) There were also lively debates over the issue of superiority; that is, whether the emperor or the pope was superior or whether the pope had secular power. The question was theoretically addressed by Pope Saint Gelasius's fifth-century doctrine of two swords governing the world, according to which secular power belongs to the emperor and the kings in their own territory, while spiritual power belongs to the pope, and the world is ruled by these two authorities (*auctoritas sacra pontificum et regalis potestas*: the sacred authority of the pope and the royal power). However, according to Pope Gelasius, while the clergy is subject

to secular regulation, the pope's guidance in religious matters is exclusive and covers not only clergymen but also the emperor himself what amounts to a matter of religion is, of course, determined by the pope who is infallible in religious and moral affairs and speaks *ex cathedra*.

7–8) Finally, differing answers were also given to the question of whether the symbolic superiority of the emperor represented a direct practical supremacy over individual kings; in fact, even the actual power of the pope remained did not remain undisputed, as there were power struggles between the Council and the pope over the right to decide matters of faith. Regarding the former issue, a solution was finally proposed by the theory of Bartolus who, based on the laws of Justinian, held that the emperor – the Roman princeps, who was the Holy Roman Emperor in the medieval interpretation – was the ruler (*dominus mundi*) of the entire Christian world (*res publica christiana*). Nonetheless, Bartolus also distinguished between areas that were *de facto* under the emperor's authority, and areas that were ruled by him *de jure* only but not in practice, as each king is 'emperor in his own territory' (*rex est imperator in regno suo*) – this doctrine successfully resolved the contradiction between the emperor's power and the factual independence of kingdoms.

2.1.2. *Development and characteristics of the modern absolute monarchy*

The absolute monarchy and thus, the modern state was developed by the end of the fifteenth or the beginning of the sixteenth century, while its heyday was in the sixteenth-eighteenth centuries; its classic pattern is considered by most to be the French absolutism although absolutism prevailed across Europe in the sixteenth-eighteenth centuries. A specific feature of the absolute monarchy that distinguished it from earlier types of political community is that a given area is under centralized and hierarchical control; ultimately, all relevant issues are decided by a single, undivided, and legally unrestricted central power. In absolute monarchies, this undivided and unrestricted central power is vested in the king as a sovereign that is, a monarch. This meant, on the one hand, that the (Holy Roman) emperor ceased to be a nominal and fictitious ruler of Europe and became no more than the ruler of the territories under his effective and personal control, and, on the other hand, that local and corporate autonomies ceased to exist in the estate monarchy, or that their decision-making power vanished. Neither the estates, nor the cities, the local landlords, and the various corporations – e.g., guilds, universities – were entitled to adopt rules that did not comply with the central power although particularism of customary law – not positive law – remained, on the ideological basis that as long as the application of these customary laws were not prohibited by the ruler, he tacitly approved their existence and functioning. However, it also follows that a new rule can be adopted instead of customary norms at any time, depending solely on the ruler's will.

Centralization entails the organization of state governance, that is, the establishment of modern administration and apparatus – offices consisting of persons who attend to such affairs professionally. Both the provision of central tax revenues necessary for the operation of the enlarged state (levying, inspecting, and collecting taxes), and the performance of other state functions require an extensive stratum of civil servants who are paid for their activities which are regulated in detail and who, in turn, can be held accountable for their work. This centrally organized state of an administrative nature, which placed the exercise of all public authority under its own jurisdiction, was called the police state (*Polizeistaat*) – which might sound somewhat deceptive today. In addition to bureaucracy, the main support of the power of this centralized state was an army of soldiers performing their work on a professional basis in return for their salary – this could have been an army consisting of soldiers recruited from among the subjects of the given country, or foreign soldiers (mercenaries).

As a result of the mercantilism which developed in France by the seventeenth century, economic policy was already centrally organized and managed by the state: trade balance played a key role in this, according to which revenues generated by foreign trade from products sold abroad by domestic traders should exceed such expenditures amounts payable for products imported from abroad as much as possible. The goal was to achieve as much export and as little import as possible, with domestic production of goods for domestic consumption or at least the procurement of such products from their own colonies. All this must be achieved by the state; to do this, it must take various measures – e.g., imposing safeguard duties on imports from abroad on products that are also produced domestically, subsidizing domestic companies with public loans, exceptionally setting central pricing for key commodities by determining minimum prices, price caps or mandatory official prices, etc.

This kind of centralized state only works if the scope of its power can be clearly established, both in territorial and personal terms; that is, if it is known exactly which territory and persons are covered by the right of command, control, and punishment/sanctioning by the central will. Thus, for unlimited and undivided power, it is necessary to define the subject to that power and the territory on which its commands are enforceable; that is, the concept of the modern state necessarily includes the territory in which the holder of state power can exercise its exclusive power, as well as persons – the subjects in the absolute monarchy, and later the citizens – over whom that power can be exercised from whom unlimited obedience may be demanded.

This is the way the concept of sovereignty emerged, encompassing both the fact of the supreme power of the modern state – limitless power that cannot be restricted – and the subjects over which/whom power is exercised the subjected territory and population. Two important correlations follow from all this: first, states are the entities that have sovereignty – all entities referred to as states have

sovereignty, as that is a *sine qua non* of being a state –, and second, only the states can have sovereignty.⁸

2.1.3. *The theory of the sovereignty of monarchs*

The groundwork for the doctrine of the sovereignty of monarchs was laid down by Jean Bodin (1530–1596). The state-theory and political philosophical approach of sovereignty appeared for the first time in his 1576 work titled ‘Six books of the Commonwealth.’ According to Bodin, ‘sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth,’⁹ characterized by the legislative power, the right of declaration of war and peace, the appointment of senior officials, the supreme judicial forum, the power to give pardon, receive homage, issue money, determine weights and measures, and levy taxes.

Bodin considered sovereignty to be vested in the absolute monarch, who gained their power directly from God to be his vicar and representative of his will.¹⁰ Therefore, no man can stand above them, and the enforcement of their will cannot depend on other(s), otherwise, they would not be sovereign. If the enforcement of the ruler’s will depends on the consent of someone “greater than them”, then such a ruler is nothing more than a subject – e.g., a governor or regent; if it depends on the consent of someone equal, then such a ruler is not more than a partner; and if it depends on the consent of something lesser – e.g., the senate or

8 However, this statement is by no means unanimously accepted: Péter Takács considers that the interconnection between the concepts of state and sovereignty follows from the concept of state sovereignty; however, according to him and other proponents of this view the specific feature of the state should rather be expressed with the term state power. As Takács puts it: ‘According to many, creating a connection between sovereignty and state was a mistake, resulting from the doctrine of state sovereignty. This doctrine suggested that the state is necessarily sovereign which means that if an entity is not sovereign, then it is not a state, and, indirectly, also that only a state can be sovereign which means that if an entity is not a state, then it is not sovereign. Again, the doctrine of state sovereignty was the reason why it was forgotten that the debates were originally about a sovereign body within the state. This doctrine, as was pointed out by C. F. Gerber and G. Jellinek, identified state power with sovereignty, while forgetting that sovereignty is not state power itself but, in their words, only one of the features of the whole (*vollkommen*) state power. [...] The point is that the state has no significant feature that cannot be described by the term independent and lawful state power. Although not relevant at this point, it is typical that supporters of this view (those who believe that the concepts of the state and state power are not necessarily connected – Z.J.T.) also say, or at least find acceptable, that there may be and there are both sovereign and non-sovereign states. If we intend to distinguish them, then the basis of such distinction must be the fact of whether or not they can organize themselves. This means that the state power’s ability for self-organization is the feature based on which those two big categories of states can be distinguished. This, nonetheless, is merely a consequence of the main issue: the relevant feature of the state is not sovereignty but state power. (Takács, 2011, p. 158.)

9 Bodin, 1955, p. 24.

10 These views are based on the Calvinian doctrine; all this is not surprising since Bodin himself sympathized with the Reformation for this reason, the Holy Inquisition added several works to the Index of Forbidden Books.

the people, then the ruler is not sovereign thus, if we consider the actual Bodinian content of the concept of sovereignty, then the first two cases cannot be deemed sovereign. Consequently, a sovereign is someone who is only answerable to God, above whose authority there is only God's power.

For the rulers to be able to fulfill their mission and perform the task entrusted to them by God – governing the people and protecting the community –, they must gain almost limitless power, the elements, and also manifestations of which correspond to the aforementioned characteristics of sovereignty. The most important of these are the rights of legislation and abolition of laws,¹¹ from which all other rights and powers derive. According to Bodin, the sovereign is not even bound by their own laws, and they are limited by only three things: natural and divine laws, and the international treaties entered into by the sovereign.¹²

Based on these ideas, Bodin himself considered the kingdom to be the best form of state; he considered aristocracy to be tolerable although fallible due to the necessary debates between leaders,¹³ and democracy to be disagreeable. Regarding the latter, he argued that artificial equalization does not work because people are inherently unequal: '[by nature] some are wiser and more inventive than others, some formed to govern and others to obey, some wise and discreet others foolish and obstinate';¹⁴ 'but democracy is hostile to men of reputation'.¹⁵

Thomas Hobbes (1588–1679) was also an ideologist of the absolute monarchy: with his contract theory (explained in his major work, 'Leviathan' which was published in 1651 he sought to legitimize the rulers' unlimited power that cannot be restricted.

According to Hobbes, in the natural state, all people are equal, as there is little difference between them in terms of physical strength ('for as to the strength of the body, the weakest has strength enough to kill the strongest'),¹⁶ and their mental abilities are even less different from one another. This implies that they share the same hope of achieving their goals because 'during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man against every man.'¹⁷ To keep everyone safe that situation must be prevented because it would be impossible to achieve social coexistence and any resulting benefits. It is, therefore, necessary to create a power that is capable of controlling human selfishness for the benefit of all, by adopting and upholding laws that are binding for and enforced upon everyone. There is no statute law in the natural state, which means that nothing

11 This includes the right to amend and promulgate laws.

12 Bodin, 1955, 32–33.

13 Ibid, p. 206.

14 Ibid, p. 199.

15 Ibid, p. 200.

16 Hobbes, 1997, p. 140.

17 Ibid, p. 143.

can be unjust. Although natural law exists, it is not a real law but merely means the freedom for each person to use their own strength in an unlimited way to protect their own life so they can do whatever they think is most appropriate to protect it. Natural law is nothing more than a general rule deriving from common sense, prohibiting us from doing anything that might sacrifice our lives or relinquishing the means by which we can protect our lives.

Due to the fear of violent death and loss of goods, people moved on from the natural state – a condition of war of every man against every man (*bellum omnium contra omnes*) –, which was incapable of warranting their safety, to the civil state to enjoy the safety and the consequent comfort guaranteed by the state. Thus, they created the state and the sovereign by waiving their rights—except the right to life and physical integrity—by transferring them to the sovereign. The right to life and physical integrity, however, are natural rights that cannot be transferred by contract to anyone; therefore, even though the ruler may have the right to order his subjects to fight the enemy and, if they refuse to do so, to even punish them by death, they cannot be compelled to obey that order or to face death sentence without resistance.

In the civil state, everyone must be satisfied with as much freedom as given to others; otherwise, based on natural reasons, no human being would consent to a unilateral restriction of their rights by which they would only submit themselves to the arbitrariness of others, without any safeguards for themselves. In turn, others can expect the same consideration based on reciprocity. Thus, the golden rule of Christ applies: *‘quod tibi fieri non vis, alteri ne feceris* (do not do unto others what you do not want done to yourself).¹⁸ This mutual transfer of rights is called a contract, which requires someone to enforce it. There is an obligation arising from the principle of human reason which means that it is neither legal nor moral, ‘by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind,¹⁹ and from that follows the law that everyone must fulfill the covenants they have made. The guarantor of the fulfillment of this obligation is the state – the sovereign –, since even though the observance of the golden rule of Christ is reasonable in itself, it is contrary to our instincts that urge us to violate this contract, such that it can only be enforced by an external coercive power above us all, and its effectuation depends on whether that power has actual authority to enforce it.

The parties to the contract, that is, the people who wish to move from the natural state to the civil state, entitle the public authority to everything necessary to protect their lives and provide safety from one another and any external enemy, while irrevocably waiving the right to resist that authority.²⁰ The sovereign is not

18 Ibid, p. 149.

19 Ibid, p. 161.

20 ‘This done, the multitude so united in one person is called a COMMONWEALTH, in Latin CIVITAS. This is the ... great LEVIATHAN, ... the immortal God, our peace and defence.’ (Hobbes, 1997, p. 191.)

a party to, but the result of the social contract, that is, the sovereign did not enter into the contract, and so by definition cannot violate it. In Hobbes's theory, sovereignty is absolute and unrestricted and there may only be a difference in those who exercise it however, he considers any of them legitimate if the contracting people endowed them with absolute power. Thus, sovereignty can be exercised by a single person (monarchy), by several persons (aristocracy), or by all citizens (democracy); in practice, however, the theory of absolute sovereignty legitimizes only absolute monarchy, and not aristocracy or democracy; that is, the justification that the power of a king that cannot be restricted. Nonetheless, that power covers only the public sphere; in private relationships – not regulated by the state – the freedom of actions, that is, the freedom of trade, acquisition of property, and decisions of private life – as long as they do not jeopardize social peace – also prevail in Hobbes's theory whether or not something has social relevance, will ultimately be decided by the state due to its absolute sovereignty. For this reason, Hobbes's interpretation is not uniform either: some consider Hobbes's contract theory to be one of the first liberal theories on the basis that he considers the rights to life, physical integrity, and personal safety – as the real essence of the social contract – to be unrestricted in principle; others highlight the authoritarian features of the theory of absolute sovereignty, and some – e.g., Carl Schmitt – see it as an early theoretical foreshadowing of the totalitarian state.

■ 2.2. *Parliamentary sovereignty*

The principle and practice of parliamentary sovereignty are products of the development of the English state and law. As in the case of the sovereignty of monarchs, the practice developed first, and the theoretical justification was established subsequently or, at most, in parallel.

In England, parliamentary sovereignty came into being as a result of the English Civil Wars of the seventeenth century and became firmly established in the eighteenth century. Today's so-called parliamentary monarchy was historically preceded by a transition period, the era of constitutional monarchy where the monarch exercised the same or nearly the same rights as the parliament – In a term derived from John Locke, the age of “King-in-Parliament,” or neutrally referred to as ‘Crown-in-Parliament’. In the nineteenth century, Albert Venn Dicey, a true master of the history of English constitutional law, wrote that the pillars of English constitutional law are the principle of parliamentary sovereignty and the rule of law.²¹ Although the original content of parliamentary sovereignty has changed or been somewhat refined since the eighteenth and the nineteenth centuries, it can still be considered a part of English political practice.

21 ‘The principle of Parliamentary sovereignty means [...] that Parliament [...] has [...] the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having the right to override or set aside a legislation of Parliament.’ (Dicey, 1885, p. 36.)

Parliamentary sovereignty – just like the sovereignty of monarchs – denies the division of power. According to this theory, state power is vested solely in the parliament and any state body can participate in the exercise of power only with the authorization of the parliament. One of the clearest theoretical formulations of this was provided by John Austin, who even perceived the existence of the judiciary and, thus, – due to the common law and equity case law – the actual legislative power of courts to function with the tacit approval of parliament according to this view, the parliament may also take that legislative power back from the courts at any time by changing the rules of common law and equity. This happened in part in the nineteenth, and mainly in the twentieth century, when the so-called statute law, that is, acts of parliament and the lower-level central regulatory legislation based on statutory authorization, gained ground. On a similar theoretical basis, Jeremy Bentham argued that the courts cannot even interpret the statutes, and if they consider the application of a certain statute dubious – If it can be interpreted in more than one way – then they cannot rectify it but must return it to the parliament for clarification.

In the era of pure parliamentary sovereignty, courts themselves were integrated into the parliament; in addition to the fact that any judge could be (legally) removed by the joint initiative of the lower and upper house, in England – and in the United Kingdom, except the Scottish criminal cases –, the supreme judicial forum was the upper house of the parliament, that is, the House of Lords acting as a judicial forum a court consisting of twelve persons functioning as a part of the House of Lords. This situation ceased to exist only in 2009 when the Constitutional Reform Act, adopted in 2005, came into effect, establishing the Supreme Court which is independent of the parliament.²² As a matter of fact, the government is still not independent from the parliament. Traditionally, and even today, members of the government can only come from among those members of the election-winning party – the party acquiring seats necessary for governance – who won entry into the lower house of the parliament, that is, those who were elected as members of the House of Commons noting that the right of appointment formally belongs to the king/queen. The secretaries of the state as well as the prime minister have a strong responsibility to the parliament, which can dismiss the government at any time and decide to form a new one by electing a new prime minister. Therefore, the English Parliament is no longer able to do anything even in the context of public law its opportunities, even if not restricted by positive law, have

22 The first 12 members of the Supreme Court were the 12 law lords who held the position of Lord Chief Justice in the House of Lords at the start of the Supreme Court. After the expiration of their office, they may return to the House of Lords but until then their membership in the House of Lords is suspended, and they may not participate in its work or deliberations, and they may not vote. The judges following them are no longer selected from the House of Lords, so the personal interlinks between the upper house of the Parliament have now been phased out.

always been limited by customs and traditions deriving from legal and political culture, that is, practically the principles of the rule of law itself. The judiciary, in particular, has been completely separated from the parliament but the right to exercise sovereignty is still vested mostly in the parliament. This consequence of the doctrine of parliamentary sovereignty, the priority of the effectuation of the parliamentary will, is called the supremacy of the parliament. As articulated, with some sarcasm, by the Swiss-British author and political essay writer Jean-Louis de Lolme in 1771 (which maxim is erroneously credited sometimes to Walter Bagehot, and sometimes to Albert Venn Dicey who actually made this *bon mot* famous in the heyday of parliamentary sovereignty): ‘Parliament can do everything but make a woman a man and a man a woman’.²³

Thus, according to the doctrine of parliamentary sovereignty, the operation of the institutions of power is focused on a single hand; although based on the supremacy of this single body – that is, the parliament –, this doctrine does not recognize the division of power, it considers parliamentarism – the parliamentary system – as a whole to be subjected to the principle of representation. This means that the parliament is not for itself but for those who elected its members; as voters cannot decide all matters themselves, they delegate representatives in their stead, who – for them and on their behalf – make the important decisions. It also follows that the quality of parliamentarism depends on who can elect the representatives: if all citizens – every citizen except those not eligible to vote for obvious reasons (minority, being subject to a criminal conviction, etc.) – are entitled to do so, then parliamentary sovereignty is a type of popular sovereignty that implements indirect exercise of power – indirect democracy – in addition to popular sovereignty of Rousseauan origin that entails the direct participation of people. However, since the idea of parliamentarism has not meant the realization of universal suffrage for a long time, we should, in principle, separate parliamentary sovereignty from popular sovereignty, and consider it an independent type of sovereignty.

■ 2.3. Popular sovereignty

Popular sovereignty is the invention of the French Enlightenment and its theoretical foundation is traditionally linked to Rousseau. Although the idea of power constituted by the people and exercised directly by them had already emerged in the Middle Ages, the first modern appearance of this theory in the history of ideas can indeed be linked to Rousseau. As we saw at the end of the previous subsection, parliamentary sovereignty or the representation-based, indirect exercise of power by the people can be perceived as a part of popular sovereignty in a broader sense – at least in the case of general suffrage –, while popular sovereignty in

²³ ‘De Lolme has summed up the matter in a grotesque expression which has become almost proverbial. >>It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.<<’ Dicey, 1885, p. 39.

a narrower sense means that people exercise their power directly, without the interposition of representatives. The conceptual clarification is hampered by the fact that both concepts of popular sovereignty are used in today's scientific literature of political, legal and constitutional theory, and written constitutions often do not differentiate between these forms either. Even Rousseau, the father of the modern form of popular sovereignty acknowledged that indirect exercise of power is a possible way to implement popular sovereignty, not least due to the recognition that, for practical reasons, a larger state – such as Poland, where the drafting of the constitution was assisted by Rousseau – cannot be operated through direct decision-making.

Like many of the philosophers of his age, Jean-Jacques Rousseau (1712–1778) relied on the contract paradigm regarding the development of a form of government representing the people as a whole and regulated by law.²⁴ In order to unite their strength and overcome the disadvantages necessarily present in the natural state – particularly to protect their own lives –, people conceived of the social contract through which they established the state. According to Rousseau, the essence of the social contract is the following: 'Each of us puts in common his person and his whole power under the supreme direction of the general will; and in return, we receive every member as an indivisible part of the whole.'²⁵ This newly created moral and collective body is the republic, which is called state when it is passive, and sovereign when it is active. The persons who enter into the social contract are called citizens – who participate in the sovereign power –, and subjects – individuals subjected to the law of the state. Since the people have not waived their rights, only decisions in the interests of the people can be made. If that principle is violated, the people may resist; but as long as the people do not declare their will to the contrary, the laws are to be considered for the benefit of the people as a whole – even by those who do not agree with these laws.

There are only two requirements regarding the manner in which laws are established: that they should be made by the people and applied to them as a whole. That is, the disposing will and the subject of the disposition must be the same, and the will must be directed to itself. This, however, also means that everyone is involved in the life of the state in two positions: on the one hand, as a person in whom the general will is vested, that is, a part of the supreme power, and, on the other hand, as a person who is the subject of, and obliged by, the laws. It follows that everyone submits themselves to themselves as opposed to the will of others, since, on the one hand, as one of the people who exercise supreme power, they are subjected to laws while also being sources of the law, and, on the other

24 The thoughts described in this section can mostly be found in the 1762 work titled 'The Social Contract'. See Rousseau, 1998.

25 Rousseau, 1998, p. 37.

hand, everyone can be obliged by others by the way of laws as much as they can oblige others by the way of laws.

The fact that laws must be made by the people as a whole means that positive law must be the declaration of the general will (*volonté générale*), but it does not mean that unanimity is required for the validity of laws. Only two requirements are set: first, everyone who has entered the social contract and is considered to be part of the state should have the right – at least indirectly – to vote on the law and chooses to vote in favor of it.²⁶ According to Rousseau, the latter requirement is also met if the laws adopted by the body established for legislation are acknowledged by the majority of people and they do not rebel against them. The second requirement is that no person may be given rights or burdened by obligations, except in a normative way, by the stipulation of specific features of the subjects.

General will or public will is thus qualitatively different from the totality of individual wills; indeed, individuals are biased toward themselves so their private interest may outweigh the public interest. However, if everyone followed their specific private interests, the state – which was created in everyone's interest – would disintegrate, so the subjects must be obliged to follow the public interest. Every single member of the people is obliged to obey the people, which is essentially themselves, even if the direct individual interest of a citizen would otherwise be contrary to the interest of the community as a whole; if they fail to do so, the representative of the community who enforces the will of the supreme power (the court) can impose a penalty on the citizen who disobeys the law. Thus, the right of punishment is not arbitrary but is based on the will of the parties to the social contract because the actual intent of the contracting parties was to give effect to the real interests, which are those of the people as a whole instead of any *ad hoc*, particular interest.

So, Rousseau traces back the general will to the social contract conceived for the common good, based on their free will, which has to be accepted by every subject. However, only the state and the – conceptually integrated, indivisible, and inalienable – supreme power effectuated in the state derives from that; nonetheless, to exercise the supreme power, an entity separate from that power can – and should – be established, which is called government. Certain functions of the supreme power can be carried out by separate bodies, such as legislative and executive bodies. The forms of the latter differ based on how many people are involved in the execution: if the majority of the people are involved, then we talk about democracy, if a minority of the people – but more than one person – are involved, then we talk about aristocracy, and if only one person is involved, then it is a monarchy. Thus, Rousseau did not define democracy, aristocracy, and monarchy as forms of state but as forms of government, each of which may be established for the exercise of the supreme power created by the social contract.

²⁶ Rousseau called a republic any state governed by law, regardless of its form of government. Cf. Rousseau, 1998, p. 66.

■ 2.4. State sovereignty

The concept of state sovereignty is used in a number of ways. First, it refers to the fact that the subject of sovereignty is the state, as a separate entity in its entirety; second, this concept is also used for the state bound by law – the latter is a synonym for the concept of legal sovereignty. We use it in the former sense – distinguishing it from the sovereignty of monarchs, as well as from parliamentary, popular, and national sovereignty – as a type of sovereignty that serves to emphasize that the subject of sovereignty is not an organ or component of the state but that the state itself is an impersonal institutional system as a whole. In this way, the concept of state sovereignty can be distinguished from popular sovereignty – according to the latter concept, it is not the state but the entirety of citizens that is sovereign –, from the sovereignty of monarchs and parliamentary sovereignty – where, respectively, the absolute monarch or the elected parliament is the subject of sovereignty –, as well as from national sovereignty which will be presented in the next subsection. In this sense, state sovereignty is closely linked to the idea of the division of power; ultimately it expresses the principle that no organ, part, or component of the state can be exclusively sovereign in itself.

For example, Hans Kelsen wrote the following on state sovereignty in response to criticism of his own theory. He believed that parliamentary sovereignty is only a sub-type of the principle of popular sovereignty – which is preferred by many –; since the goal is not to trace back just one branch of state power to the will of the people but the functioning of the state order as a whole, popular sovereignty is not realized by parliamentary sovereignty, but, essentially, by state sovereignty; that is, by the functioning of the branches of state power as a whole, deriving from the will of the people,²⁷ where no single organ can have an exceptional position compared to the other state organs.²⁸

27 An important theoretical problem related to the concept and phenomenon of sovereignty is the nature of the concept itself. Based on the different assessments of this nature, we can talk about legal and political sovereignty. The concept of legal sovereignty as Kelsen himself conceived the concept of sovereignty, stems from the fact that sovereignty is a legal concept: the scope of the exercise of supreme power is therefore limited by legal frameworks. Based on this, the holder of the main power cannot actually do everything, as he is bound – at least – by the laws created by himself. The legal concept of sovereignty thus defines the requirement of a state bound by law – the formal rule of law, i.e., *Rechtsstaat* –, considering the concept of sovereignty as a normative – prescriptive – concept. On the other hand, political sovereignty considers it to be a matter of facts: according to this concept, sovereignty – as a descriptive term – denotes the existence of power – and its exerciser –, without affecting the legal or other correctness of the actual exercise of power – morality, justice, compliance with certain legal principles, etc.

28 Kelsen gave this explanation in defense of the constitutional court as an independent state organ that is entitled to annul the norms adopted by the legislature – parliament. According to him, the function of the constitutional court is to limit any possible violation of popular sovereignty by the parliament: just like the courts and the administration is subjected to the laws, the parliament is subjected to the constitution, and may only exercise its legislative function in their framework. Thus, based on popular sovereignty

■ 2.5. *National sovereignty*

The concept of national sovereignty is linked to the concept of the nation and since we can use the term nation in two senses, national sovereignty also has two possible definitions: we can distinguish the political nation on the one hand, and the cultural nation on the other. The concept of the political nation is the result of the monarchical form of state – which, almost without exception, prevailed at the time of the appearance of the modern concept of a nation –, since in these monarchies, a new community-forming force emerged and spread for the voluntary pursuit of the goals of the central power – so much so that many states, which had not existed before and had only just developed, also adopted this centralized, monarchical form of government.²⁹ On the other hand, the concept of the cultural nation developed in regions – and from there spread to other regions – where the so-called titular nation only had a narrow majority – or even only a minority – in its own state, or where certain nations could not have a country of their own or a significant part of their members remained outside their homeland. That occurred, for example, in Eastern and South-Eastern Europe. Also, the concept of the cultural nation was exploited in newly unified states whose people had belonged to separate states for a long time, but the memory of the common past was still preserved and gained new meaning – e.g., Italy, Germany.

A Political nation is nothing but the people itself, that is, the totality of people who are the citizens of and live in the same state – i.e., live in a specific territory, under the same sovereign (nation-state). Accordingly, to pursue political unity, everyone belongs to the nation on whose territory they live. Such a concept of nation has been developed and applies to this day in France and in the United States, where everyone is French or American, regardless of their origin, color, religion, mother tongue, etc.

In the case of a cultural nation, sharing the same ethnicity, culture, traditions, and language defines the identity of the people. This is the situation in most European countries. The identity of a cultural nation may develop spontaneously, in an organic manner (e.g., England), or in an artificial way, from top to bottom (e.g., Italy). Thus, the cultural nation does not include every citizen of a given country – only those who belong to the titular nation, with the same cultural identity –, but does include those who are not members of the titular nation but

and democracy – the essence of which is to make a compromise between the majority and the minorities, and, thus, to promote social peace –, the procedure of the legislative organ is bound by the constitution and the constitutional court ensuring the effectuation of the regulations enshrined in it, and whose function, in addition to give effect to the provisions of the constitution against statutes and decrees – to annul the norms violating the constitution –, is to resolve disputes over authority – also based on the constitution –, and to protect minorities, that is, to prevent the tyranny of the majority. Cf. Paczolay, 2003, pp. 9–31; Favoreu, 2003, pp. 52–113.

²⁹ Such as Belgium or Romania.

share the same language, culture, and tradition, due to which they bear a common identity.³⁰

Of course, these two concepts of the nation are not mutually exclusive but exist in parallel; however, one may be deemed dominant over the other in a given country. For example, in France, some support the concept of cultural nation and consider every non-French citizen French, who has French roots and identity, while they do not consider French those citizens whose traditions and customs are different from French traditions and customs. These two concepts of the nation compete with each other everywhere.

Therefore, due to the twofold nature of the concept of nation, national sovereignty has two meanings. In the eighteenth century when the concept of the political nation was developed, national sovereignty was basically used as a synonym for popular sovereignty. From the nineteenth century, when the concept of the cultural nation developed in addition to the concept of the political nation, national sovereignty was used more and more often to express this cultural identity. In the former sense, it expresses a fact, namely, that the actual subject of sovereignty is the totality of citizens – with any cultural identity – as a political community; in the latter sense, it formulated a political goal to be achieved – the goal that people with the same identity should, as far as possible, live in and be citizens of the same state, the so-called nation-state. In this latter sense, the national nature of sovereignty is an orthogonal dimension, which can connect to any other type of sovereignty. Thus, in this sense, we can talk about national parliamentary sovereignty and national state sovereignty. Today both meanings of national sovereignty are used, so it can be either a synonym for popular sovereignty or simply a desire for the political unification of members of a cultural nation.

3. Conclusion

It can be seen that the concept of sovereignty can be traced back to Bodin's approach to the concept of state, and it was originally embodied in the doctrine of the sovereignty of monarchs, but from the late Middle Ages, this doctrine was replaced by the different approaches of the subjects of sovereignty. The idea of popular sovereignty, from which the modern requirement of democratic legitimacy also emerged, proved to be the most defining and fruitful in terms of political practice and substantive constitutional regulations. Accordingly, all decisions of public authorities must be directly or indirectly traceable back to the will of the people. This is one of the most significant requirements resulting from today's modern rule of law, without which we cannot talk about either democracy or the effectuation of constitutionality in a material sense.

30 Furthermore, there are nations – in a cultural sense – that have no country of their own at all.

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