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Preliminary communication
UDK 341.211:316.42
DOI: https://doi.org/10.25234/pv/15594
Paper received on 13 March 2021
Paper accepted on 17 July 2021

SOFT LAW AND SOVEREIGNTY – FROM A POLITICAL TO A LEGAL LIMITATION**

Summary: *Firstly, the author analyses the theory of sovereignty from the point of its birth and then he considers more recent theoretical challenges facing the notion of sovereignty in a globalised world. Particular attention is paid to soft law – that new, formally non-binding source of international law in the light of its factual influence on the desovereignisation of states. The author holds the position that the relativisation of the notion of sovereignty has been a process that began already in the 18th century and that has only additionally accelerated with new challenges posed by globalisation. The author argues for the only possible and proper use of the notion of sovereignty in its original meaning as an absolute, completely unlimited, and indivisible power. On the other hand, he takes a critical approach not only to the theory of constitutional pluralism but also to the ideas of the state's legal sovereignty. He pleads for rejection of separating different aspects of sovereignty, artificially distinguishing between the factual and legal sovereignty, as well as the external and internal sovereignty. While theoretically possible, it is of no practical use because the notion of sovereignty can only be correctly understood as a political and legal illimitability. For all other various modalities and attempts at relativising and grading sovereignty, from the 18th century to this day, different terms should be coined. Being mindful of the situation in most of the present-day states, the author advocates the introduction of the term "pseudo-sovereignty".*

Keywords: *constitutional pluralism, legal sovereignty, behavioural sovereignty, relativisation of sovereignty, pseudo-sovereignty*

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** This paper is a result of the scientific research project which is financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia (No. 179045).

1. A HISTORICAL OVERVIEW OF THE ORIGIN OF THE THEORY OF SOVEREIGNY

In contrast to the past times when population (Ancient History) and territory (Middle Ages) constituted dominant defining features of the notion of state, in the modern period, as well as today, it turned out to be state power. The long-standing and exhausting medieval struggle for supremacy between the state and the church led to the state power becoming, in the modern period, a predominant element of the state, from which the control over the territory and the population derives. With the state's "victory" over the church and the prevalence of state power as a state element, there arises the theory of state sovereignty or the sovereignty of the state power. Jean Bodin, in his work *The Six Books of the Commonwealth,* emerging in 1576, gives, for the first time in history, the theoretical definition of the notion of sovereignty as "the absolute and perpetual power of a state". Even Bodin himself considered defining the notion necessary because, in concerning oneself with the state, it is this notion that needs to be understood most. Bodin's definition of sovereignty assumed that it concerns the highest, independent, legally non-bound, and indivisible power. Bearing in mind that Bodin perceived the monarchical form of government as the perfect manifestation of sovereignty, it is entirely clear that the historical conditions in France dictated that Bodin's notion of sovereignty become a theoretical framework tailored for the absolute monarchies of that time.

Some while later, in the 17th century, we find a similar definition of the theory of state sovereignty on the English soil, with Thomas Hobbes. He also sought to offer but even more solid theoretical foundations for the absolutist rule of the Stuart Dynasty. Unlike his French predecessor, Hobbes had an ambition to develop a comprehensive philosophical system intended to strengthen the state tarnished by increasingly intense conflicts between the king and the Parliament. In Hobbes' state, Leviathan, the "mortal God", the essence of the state, resides in one person – a sovereign, in whom the sovereign power is vested (while all others are his subjects). The essence of the state is sovereign: "one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence".[1] The sovereign power of the state with Hobbes, as well as Bodin, is *legibus solute,* absolute, indivisible, and non-transferable. However, they base the idea of sovereignty on two different philosophical models. Hobbes' state – Leviathan, rests on the rational constructivism of men, while Bodin's state celebrates in the human world the great divine and natural law.[2] Nevertheless, the meaning of sovereignty on a theoretical level remains intact, original, classical only if understood in this way, as it does not lack the essential coherence. As Hinsley nicely defined by analysing the history of the concept of sovereignty, at the beginning of "the idea of sovereignty was the idea that there is a final and absolute political authority in the political community; and everything that needs to be added to complete the definition is

1 Thomas Hobbes, *Leviathan* (Oxford University Press, 1998) 114.

2 Simon Gojar-Fabr, 'Pojam suverenosti od Bodena do Hobsa' in Petar Bojanić and Ivan Milenković (eds), *Suveren i suverenost – između pojma, fikcije i političke emocije* (Službeni glasnik 2008) 112.

added if this statement is continued in the following words: `*and no final and absolute authority exists elsewhere*`".[3]

This theoretical and conceptual definition of sovereignty was applicable and appropriate merely to those historical circumstances, at the stage of formation of modern states, embodied in absolute monarchies. With each small step further in history, it is evident that already at that time this conception of sovereignty is becoming unsustainable in its original form. In the period after the Great Revolutions, the triumph of the theory of popular sovereignty, the sovereignty concept established by Bodin and Hobbes loses its original sense, necessarily even then becoming the subject of *relativisation*. This development was already visible with the father of liberalism, John Locke, and his *Two Treatises of Government* of 1689, in which, through his at the time "heretical" theory of social contract, he undoubtedly influenced a shift in the conceptions of sovereignty and a sovereign. Limitations that Locke back then placed upon the sovereign (such as the necessary division of power, subsequently also elaborated by Montesquieu, apparently solving the problem of sovereignty with the idea of dividing functions rather than sovereignty itself) were a sign that perhaps already then it was time to re-examine the very notion, because the concept had undergone significant transformation and lost its basic meaning. Locke's work strongly impacted not only the English theory but also the American, and particularly the French theory, and especially Rousseau.

Theoretical articulation of the idea of popular sovereignty in the 18th century, whose origins can be traced even much further back in history, is primarily credited to Jean-Jacques Rousseau. Rousseau's underlying idea of popular sovereignty premises that sovereignty is not only indivisible but also inalienable, that is, non-transferable. A sovereign, who is, to Rousseau, a collective being, cannot be represented but by himself, as "power can be delegated, but the will cannot".[4] Therefore, as Rousseau holds the position that sovereignty cannot have representatives, to him, people constitute both the holder and the executor of the sovereign power of a state, although he was aware of the limitations of direct democracy due to state size already at that time. As can be seen, Rousseau managed at least on a philosophical level to overcome the eternal problem of the nominal and real holder of sovereignty by advocating direct democracy. On the other hand, the notion of sovereignty already with Rousseau is no longer absolute; it endures certain limitations, ones by the general will. And sovereignty in the original, full sense of the term does not tolerate any limitations and relativisation. Rousseau notices that problem and tries to transcend it when he states: "the sovereign power, absolute as it is, sacred and inviolable as it is, does not and cannot go beyond the limits of general agreements, and that any man can make full use of that share of his goods and liberty that is left him by these agreements".[5]

On a practical level, a factor that significantly contributed to the relativisation of the notion of sovereignty was the rise of the first constitutions. The first constitutions signified the end of an epoch in the life of the state and the willingness of the state government to subject itself to limitations, even those self-imposed. In the first written constitutions, that willingness of the government was more enforced than voluntary; however, with time, it became

3 F H Hinsley, *Sovereignty* (Cambridge University Press 1986) 26.

4 J J Rousseau, *The Social Contract* (Oxford University Press 1999) 63.

5 Ibid 70.

a customary practice for it to be voluntary, at the same time continuously lurking the moment when it could, once again, break free from those constitutional fetters and become unrestrained again. It is the inherent nature of sovereign state power not to tolerate limitations, and even if there are any, it continuously tries to dispose of them.

Agreeableness, at least apparent voluntariness, in accepting limitations (human rights, the rule of law) is what accompanies and characterises the notion of sovereignty from the 18th century to the present day. Can sovereignty as an absolute illimitability be a matter of compromise and undergo any limitations? Does that conception constitute *contradictio in adiecto*? Is it not high time that we revisit the use of this term for denoting something that has lost its original sense? When we speak of the notion of sovereignty, we can rightly ask ourselves what is this in fact about? Already this historical relativisation of the notion has in many ways made pointless the existence of one such concept whose original sense entailed absoluteness and unrestrainedness of the state power. What a theory today, in a globalisation era, calls the "curtailing", "erosion" of sovereignty are processes that have long begun and followed this notion since the 18th century.

The starting point for the contemporary understanding of sovereignty as a fundamental concept is not its original meaning but a relativised version of this concept appropriate to modern democracies. The fact that the notion of sovereignty escapes, intentionally or unintentionally, a precise theoretical definition shows that, from its emergence onwards, this concept has, as necessary, been subject to various ideological uses and misuses. The lack of agreement on the essential attributes, the properties of the very notion, speaks to the point that even the concept itself should be seriously revisited to arrive at its genuine rather than the acceptable meaning. It is best to tell a thing like it is. For this reason, it seems it would be better to leave the notion of sovereignty in its original, Bodinian meaning (to which Bentham and Austin were the closest) for denoting the supreme, inviolable, unlimited, absolute power, regardless of whether it exists today. For all other variants and attempts at relativising the meaning of this notion and at its grading (from the 18th century up to the present-day), it seems it would be appropriate to look for a more proper term or even terms.

Adjustments of the term sovereignty to various needs for denoting a variety of different things have completely depleted and made meaningless the very term and concept itself.[6] Kelsen observes well that it is the diversity of meanings of the term sovereignty that creates unclarity in theory. Starting from the etymological origin, the Latin word *superanus*, Kelsen concludes that this term most frequently means "a special quality of the state, the quality of being a supreme power or supreme order of human behaviour".[7] However, it seems that neither Kelsen's final solution is acceptable – one that he sees in the denial of the sovereignty problem itself and the idea of radical suppression of the concept of sovereignty.[8] Similar perspectives were also present in the French theory, with Leon Duguit, but particularly in the German theory of Hugo Preuss and Hugo Krabbe. Krabbe points out that the notion of

6 Lukić attempts to dissolve terminological confusion and claims that, instead of ambiguous term *sovereignty*, it would be much simpler to use precise terms to nominate the exact subject in question like illimitability, absolute power, legal illimitability, etc, Radomir Lukić, 'Povodom pojma izvora prava' (1974) 22(5–6) Anali Pravnog fakulteta u Beogradu 709.

7 Hans Kelsen, 'Sovereignty and International Law' (1960) 48(4) Georgetown Law Journal 627.

8 Hans Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre* (J.C.B. Mohr, 1920) 320.

sovereignty must be abandoned the moment the absolute state and its authoritarian power is abandoned because the state sovereignty is incompatible with the idea of a modern state, to which the perspective that links sovereignty to the law is more appropriate.[9]

2. MORE RECENT THEORETICAL ATTEMPTS AT RELATIVISING AND SPLITTING THE NOTION OF SOVEREIGNTY

One seemingly possible theoretical way out of this vicious circle became the sharp distinction between external and internal sovereignty, followed by the separation of the factual (real) and legal aspects of sovereignty, that is, the factual and legal illimitability of state authority. Krasner distinguishes as many as four meanings of the notion of sovereignty that are in use today: "domestic sovereignty, referring to the organisation of public authority within a state and to the level of effective control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control transborder movements; international legal sovereignty, referring to the mutual recognition of states or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations".[10] This author is aware that these four meanings of sovereignty are neither logically coupled nor necessarily correlated in practice. However, he believes that "the absence or loss of one kind of sovereignty does not logically imply an erosion of others, even though they may be empirically associated with each other".[11] Therefore, in Krasner's view, there are instances where states can retain internal sovereignty while factually being under the control of an external authority. It is against this background that theory tried to find the solution in the separation of the notions of statehood and sovereignty in a way that an entity can have statehood if it has elements of the internal but not also the external sovereignty. Krasner illustrates this point with the example of Serbia, among others, in the time of Miloš and Mihajlo Obrenović, which had elements of internal sovereignty while existing within the realm of the Ottoman Empire.[12]

The path towards a complete division, relativisation, and even negation of the notion of sovereignty in the era of globalisation and strengthening of different supranational organisations further led to the question of gradation, particularly of the factual aspect of state government sovereignty, which today in most of the states undergoes significant political limitations. No one can claim for any state that it has full sovereignty if, owing to joining an international military alliance, it must allow a stay of many foreign soldiers on its territory. Domination of the European Convention on Human Rights and the European Court of Human Rights over the constitutional orders of the European countries is evident. Through the influence on human rights, control is established over governments of the nation-states.

9 Vilhelm Henis, 'Rastakanje pojma suvereniteta' in Petar Bojanić and Ivan Milenković (eds), *Suveren i suverenost – između pojma, fikcije i političke emocije* (Službeni glasnik 2008) 146.

10 Stephen Krasner, *Sovereignty – Organised Hypocrisy* (Princeton University Press, 1999) 9.

11 Ibid 24.

12 Ibid 172.

A more recent view in legal theory that has attracted particular attention from the scientific community and that seeks to solve the problem of sovereignty in today's complex interconnected world is the theory of constitutional pluralism. One of the founders of this movement, Neil MacCormick, argues for a dilution of the notion of sovereignty, pointing that sovereignty should not necessarily be understood through hierarchical relationships and subordination. MacCormick, particularly mindful of today's Europe, considers that legal order should be examined "in the complex interaction of overlapping legalities".[13] This author further holds that despite the existence of mutual overlap, the political and legal aspects of sovereignty have always been and remained different.[14] Therefore, MacCormick seeks to separate the factual from the legal dimension of sovereignty, as well as external from internal sovereignty. MacCormick's assertion that there are no sovereign states in the traditional sense in the EU does not mean that the EU is now a sovereign instead of Member States but that there is some form of divided sovereignty and cooperation among the States. He conceives of the post-sovereign world as one where "our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap".[15] MacCormick sees sovereignty not as one's property that the moment it is lost is gained by someone else, but more as virginity that, once lost, is never gained by someone else.[16]

Similar reasoning is used by MacCormick's student and successor at the Faculty of Law of the University of Edinburgh, Neil Walker. Walker, one of the leading representatives of the constitutional pluralism theory, continues in the footsteps of his master. He holds that the idea of state-centred constitutionalism, as well as the structure of states of the Westphalian age (with homogenous territory, community, and politics), is coming to an end.[17] He sees the post-Westphalian world as multidimensional, founded on inclusive normative coherence that grows beyond nation-states but wherein nation-states survive, although modified and with reduced influence. The relationship between the orders would no longer be vertical but horizontal, heterarchical rather than hierarchical.[18] The concept of sovereignty, as Walker views, is not disappearing but is more a non-exclusive concept, for which reason he considers it more appropriate today to use the term "late sovereignty" than "post-sovereignty". He illustrates this point with the example of the European Union, in which the set borders among the states are no longer (or not just) territorial but are also functional.[19] In contrast to a one-dimensional Westphalian look of the state, in a pluralist, post-Westphalian view, founded on metaconstitutional authority, the "units", nation-states, are no longer isolated, constitutionally self-sufficient.[20] Jurisdictional overlap, as well as governance on different levels (na-

13 Neil MacCormick, 'Beyond the Sovereign State' (1993) 56(1) Modern Law Review 10.

14 Ibid 11.

15 Ibid 17.

16 Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999) 126.

17 Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) Modern Law Review 320.

18 Ibid 337.

19 Ibid 346.

20 Ibid 355.

tional and supranational), Walker sees as the rule rather than the exception.[21] This Walker's view leads further to the conclusion on not only the overlapping but also on the division of sovereignty among different actors.[22] The theory of constitutional pluralism has paved the way for many other attempts to find a compromise in the multilayeredness of the notion of sovereignty in a globalised world.[23] Hand in hand with the theory of constitutional pluralism go the ideas of polycentric, multi-dimensional, multi-layered governance of the world in the era of globalisation.[24]

On the line of thought of constitutional pluralism theories on the existence of diverse, new levels of interstate and international decision-making remains I. Pejić. She speaks of functional and substantive erosion of constituent power. The traditional function of constitutions is retained merely in the procedural sense, as "today's constitutions emerge by "borrowing" legal solutions that are considered proven and acceptable in the so-called traditional constitutional democracies".[25]

The criticism against constitutional pluralism theories and advocacy for the idea of sovereignty of state power within nation-states comes, to be put forward by V. Petrov. Petrov sees the theory of constitutional pluralism as seductive but incorrect because the constituent power is original and unique. "Therefore, it is not possible to speak of constituent powers on the regional, European, and global level but of specific, in all respects significant, influence of these systems on national constitution framers. The influence, however, is not a legal but a factual category."[26] Nevertheless, even this diametrically different viewpoint rests on the idea of the existence of clear-cut delineation of factual (political) and legal aspects of sovereignty.

Another interesting theoretical way out of this problem, which is grounded on the argument of voluntary acceptance of limitations, is offered by De Vergottini, who wants in every way to position the state power as sovereign, "supreme, original, and unconditioned", one capable of justifying itself. "Limitations" of sovereignty sustained by states when taking part in international organisations De Vergottini sees as "partial revocation of the exercise of sovereignty", which can be lifted at any time and which constitutes an auxiliary means in the pursuit of state interests. Because, otherwise, if those "limitations" had a character of complete and definite renunciation of sovereignty, it would be irreconcilable with the very essence of the state.[27] A similar view is taken by Michel Troper, who holds that the essence of state sovereignty can never be lost because power, in itself, is not transferable and can always

21 Ibid 356.

22 See more: Ivana Tucak, 'Globalizacija i državni suverenitet' (2007) 7(1) Hrvatska i komparativna javna uprava *passim*. Likewise, Held sees the future in the cosmopolitan model of democracy which is "the legal basis of a global and divided authority system – a system of diverse and overlapping power centres…", David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995) 234.

23 Jean L Cohen, *Globalization and Sovereignty – Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) *passim*.

24 See more: Jan Art Šolte, *Globalizacija – kritički uvod* (CID 2009) 185–223; Mihael Cirn, *Upravljanje sa one strane nacionalne države* (Filip Višnjić 2003) 253–281.

25 Irena Pejić, 'Ustavotvorna vlast u vremenu globalizacije' in Aleksandar Kostić (ed), *Državni poredak – suverenitet u vremenu globalizacije* (SANU 2019) 218.

26 Vladan Petrov, 'Ustav danas – šta je ostalo od suverenosti ustavotvorca?' in Aleksandar Kostić (ed), *Državni poredak – suverenitet u vremenu globalizacije* (SANU 2019) 240.

27 Djuzepe De Vergotini, *Uporedno ustavno pravo* (Službeni glasnik 2015) 152.

be reinstated through renewed negotiations, cancellation of a contract, or a new constitutional amendment.[28] Troper points out that while international contracts limit the exercise of power by states, it is only so because the states signed and ratified them on the basis on their being sovereign, which is not a loss but precisely a manifestation of sovereignty. Limitations only last insofar as the consent of the state, which can always terminate the contract.[29] However, unlike Troper, De Vergottini explicitly acknowledges that in the era of globalisation, which erases the boundaries of interests of a community, particularly due to deterioration of economic activities, there are instances "where the state itself accepts the loss of endurance regarding the self-sufficiency of its order. It is often itself a protagonist in the process of internationalisation through liberalisation, deregulation, privatisation, all of which facilitates its weakening and ends with legitimising rules deriving from the activities of formally incompetent subjects".[30] Likewise, T. Šurlan points out that, purely normatively perceived, internationalisation of law is controlled and voluntary, a renunciation of a part of sovereignty that is, however, also a product of that same sovereignty. On the other hand, globalisation, which is not a legal phenomenon, involves a transfer of global values, but with no obligation upon a state to accept those values; it remains a matter of free choice.[31] Rightly, I. Jovanov wonders "whether a political sovereign, amid the rapidly advancing globalist trends, is freed from the usual obedience to someone from the outside".[32]

The main culprit for the problem of sovereignty, according to Kelsen, is the ambiguity of the term itself, the meaning of which is determined by political rather than scientific reasons. "One who appreciates the idea of the sovereignty of his own state, because he identifies himself with his state in his enhanced self-consciousness, will prefer the primacy of national law. On the other hand, one who cherishes the idea of a legal world organisation will prefer the primacy of international law".[33]

Although it appears as the easier way to solve the sovereignty problem, separating and delimiting the factual and legal aspects of sovereignty with surgical precision is in no way possible. This is particularly so because one of the main instruments of desovereignisation of states in a globalised world has today undoubtedly become one new, well-conceived, factual source of law in the international arena – soft law.

3. SOFT LAW AND SOVEREIGNTY

Marti Koskenniemi observes that international lawyers have been critical of state sovereignty, regarding it as a confrontation of egoistic interests of limited communities against the

28 Michel Troper, 'Sovereignty' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 358.

29 Ibid 361.

30 De Vergotini (n 27) 159.

31 Tijana Šurlan, 'Internacionalizacija ustavnog prava naspram globalizacije ustavnog prava' in Aleksandar Kostić (ed), *Državni poredak – suverenitet u vremenu globalizacije* (SANU 2019) 251.

32 Ilija Jovanov, 'Povratak ka izvornom značenju pojma suvereniteta' (2015) 20(1) *NBP* – Žurnal *za kriminalistiku i pravo* 154.

33 Kelsen (n 7) 640.

world in general, aimed at securing unlimited opportunities for oppression within own borders.[34] Essentially, although already at first glance it may seem absurd, international lawyers use sovereignty to limit sovereignty. Commitment to international treaties is not perceived as a derogation of the state's sovereignty but a result of it. For this reason, as Koskenniemi further observes, sovereignty loses a great deal of its normative or descriptive meaning.[35] In the view of international lawyers, a global governance is taking place, which is essentially anti-formalist (wherein the issues of law and legality give place to the issues of values and legitimacy) and involves: "the rule by affinities and norms, regimes, and practices that have no localisable centre or ethos and that constantly penetrate and define what the "sovereignty" of our states may mean, what room for action there remains for the state power".[36]

One of the main, essentially political, tools of global governance by which various supranational actors also penetrate the legal sovereignty of the states is precisely that new, factual source of international law – soft law. Soft law involves a range of formally and legally non-binding rules created by different international organisations, such as recommendations, protocols, guidelines, comments, opinions, etc. While not legally binding, those rules exert strong factual influence on states and the general opinion, tending to grow into a classical, hard law. Setting the norms for individual sensitive areas that hard law would not be able to access instantly, for various reasons (political, moral, economic, psychological, social), is a domain reserved for soft law.[37] With soft law and soft orientation of legal and political routes, the first step is made towards hard law. Despite the insistence in the literature upon the non-bindingness of soft law, it is created with the expectation that factual obligation will evolve into legal. Thus Meyer as well seeks to provide a more precise definition of soft law: "soft legal obligations are those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law".[38] Therefore, soft law exercises the function of legitimising the penetration of diverse external ideological and other influences. It opens the way for various international political and economic pressures that directly intrude on the states' sovereignty. However, there are even views, amongst those international lawyers preferring soft law to hard law, that "soft-law instruments impose lower `sovereignty costs` on states in sensitive areas".[39] The idea of reducing "sovereignty costs" (protecting state's sovereignty) by insisting on non-binding and not fully precise rules of soft law and its preference over hard law, which incurs high costs for state sovereignty, has been present since earlier.[40]

Soft law at first glance indeed proves to be a practical instrument, whose flexibility enables prompt, efficient, *ad hoc* norm-setting, for which classical international sources of law are not

34 Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1(1) *Asian Journal of International Law* 61.

35 Ibid 62.

36 Ibid 63.

37 Dragutin Avramović, ``Omekšavanjem prava` ka međunarodnoj vladavini prava' (2011) 2 *Srpska politička misao* 273.

38 Timothy Meyer, 'Soft Law as Delegation' (2008) 32(3) *Fordham International Law Journal* 890.

39 Gregory C Shaffer and Mark A Pollack, 'Hard Vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94(3) Minnesota Law Review 719.

40 See: Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organisation*, *passim*.

appropriate. Also stressed as a relevant segment is its legal non-bindingness, owing to which it may not seem as creating much pressure on the sovereignty of the states, having been left freedom not to accept it. Soft law is presented as a matter of consensus. However, formal legal non-bindingness does not also imply factual, essential non-bindingness. Different types of political and economic pressures, conditionalities, warnings, expectations, and sometimes even threats essentially leave no room, in many states, for the freedom of decision. It is common knowledge that non-legal mechanisms of influence and sanctioning in international relations can be and have been far more efficient and stricter than the legal mechanisms themselves. This background thus justifies one author's negative assessment of soft law and his insisting on legal formalism: "By creating uncertainty at the edges of legal thinking, the concept of soft law contributes to the crumbling of the entire legal system (let us add sovereignty as well – *note by the author*). Once political or moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality, and therewith becomes nothing else but a fig leaf for power."[41]

The greatest soft law threat to the sovereignty of the states, besides the evident direct penetration into the states' sovereignty, lies, at the same time, in the dispersion of normative authority and, consequently, in the depersonalisation of the sovereign. The greater the depersonalisation of the true sovereign (soft-law maker), the greater the degree of voluntarism. Moreover, depersonalisation of the sovereign renders him, for the most part, devoid of responsibility for possible outcomes and makes it impossible to establish any legal mechanism of control. In soft law, responsibility rests with an imaginary international community.[42] In any event, soft law will not be equally factually binding for all states. While some (such as EU accession candidate states) will have to accept soft law and even speed up its conversion into hard law, others will, on the ground of their factual political strength or true sovereignty, be able to reject any soft law norm at any time.

From all the above stated, it is easy to conclude that soft law is not, as some authors claim, a means for protection and preservation of the sovereignty of the states, but quite the opposite - one perfidiously devised for stripping away sovereignty from the states and pursuing individual interests of a hidden, true sovereign. For this precise reason, Krasner sees international legal sovereignty as the best example of "organised hypocrisy".[43]

4. CONCLUDING REVIEW

Of sovereignty in the original sense of the term (as the only correct way to use it), almost nothing is left today, except one or possibly a few states in the world that can be said to be capable of effecting, like a Roman princeps, that all they do applies as a general law while being completely unbound by law. Just like when it first emerged, sovereignty continues to presume the existence of the highest possible power, beyond which there is no higher.

41 Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67(4) Nordic Journal of International Law 391.

42 Avramović, ''Omekšavanjem prava` ka međunarodnoj vladavini prava' 280.

43 Krasner (n 10) 42.

It sounds convincing the statement by Giuseppe De Vergottini that, in present-day constitutional states, sovereignty, "the same yesterday as today, never manifests itself as absolute, and its limitability can be recognised without its necessarily being contested for that".[44] This statement is essentially true; however, a question arises whether the term sovereignty can still be in use if not defined as an absolute concept? It seems to have been pointless, ever since Locke, to use the term sovereignty to refer to something that lacks the attributes of absoluteness, complete illimitability, and indivisibility. Illusory, although seductive, are the newer attempts to separate political from legal aspects of sovereignty, because these are intrinsically linked, and it is impossible to assess sovereignty based on one aspect alone. Hence, that which almost all world's states today can boast of is some sort of "semi-sovereignty". And since sovereignty tolerates no division, it is even better to say "pseudo-sovereignty", and most accurately, but heretically – non-sovereignty. It is imperative to use different terms to denote different things rather than resort to crippling and making meaningless the notion that merely at the point of its theoretical birth had a completely clear meaning. Present-day states, even if we take them as having full legal sovereignty (which is highly questionable), willingly accepting legal limitations (even those by international law), never have full but merely relative factual sovereignty (because *de facto* they cannot fully exercise their sovereign rights). While nominally having the right of choice, essentially, the economic and political sanctions and pressures in the era of globalisation and interstate relationships produce incomparably more severe effects on states (even on their very existence) than classical legal sanctions ever would. At first, it referred to smaller, and economically and politically less powerful states, but has been expanding increasingly also to those objectively quite strong and populous.

Often, to survive, states essentially have no right of choice but only one possible path, as, otherwise, they would commit "suicide". The so-called behavioural sovereignty, which varies and basically contrasts with legal sovereignty, is what most states can only dream of. While, from a strictly legal perspective, states have been left a right to withdraw from international arrangements or not to accept soft law if it jeopardises their sovereignty, for most of them, these alternatives are either too costly or unfeasible and come down to pure fiction of consent.[45] "States are said to 'consent' to all sorts of instruments that they are in fact coerced into signing: treaties of surrender, IMF conditionality agreements, and the terms of World Trade Organisation accession… In domestic law, a contract signed at gunpoint would be void for duress; in international law, a treaty like the Japanese Instrument of Surrender, signed under a threat of continued nuclear bombing at the conclusion of World War II, is said to embody valid consent."[46] From the perspective of behavioural sovereignty, fully sovereign states are merely those that can, without any limitations, put all their rights into practice. However, as mentioned earlier, the idea of gradation of sovereignty advocated by Steinberg (fully sovereign, moderately sovereign, and non-sovereign states) is unsustainable because it involves the division of sovereign power. This point is supported by the fact that some entities that do not even exist in the form of the state (for example, Mount Athos) essentially possess sovereignty,

44 De Vergotini (n 27) 161.

45 Richard H Steinberg, 'Who is Sovereign? ' (2004) 40(2) Stanford International Law Journal 332, 333.

46 Ibid 333.

unlike many states - let us just take Greece as a territorially closest example.[47] A state is either sovereign or not sovereign. *Tertium non datur*. The statement by K. Čavoški that legal guarantees for sovereignty are invoked only by small and weak states that do not possess adequate power is entirely realistic.[48]

Another factor substantially contributing to the centuries-long process of relativisation of sovereignty and desovereignisation of states is that new, quasi-legal institution of international law, quasi-source of law, ingeniously designed modern invention of soft factual influence and deprivation of the state's sovereignty – *soft law*. Once this "soft" influence penetrates a state, from a political, it tends to gradually evolve, turn, at the same time, into a legal limitation of the sovereign state power, which it begins to eat away like a fast-growing tumour. Thus, states, under the hard influence of soft law, nominally by own will, but in fact involuntarily, eventually obtain legal limitations as well. We are approaching Schmitt's decisionism wherein the political substrate of sovereignty prevails over the legal, converting legal sovereignty, too, into a legitimising tool of the political interests of a true sovereign. Force prevails over the law, which in case of this determination of sovereignty (as often in other cases, as well) puts itself at the service of the political power. In Schmitt's words, the essence of the state's sovereignty should not juristically be defined as the monopoly of coercion or rule but as the monopoly of decision: "The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law."[49] All of these arguments attest to the thesis that political and legal aspects of sovereignty are virtually inseparable (the state is either sovereign or not sovereign). Terminological and conceptual dissection on a theoretical level is indeed feasible but did not prove to be of much use, as it only brings confusion about the sole possible meaning of the very term. Hence, it might be more correct and fairer to speak in more and more cases of pseudo-sovereignty rather than sovereignty.

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47 See more: Dragutin Avramović, 'Sveta Gora – između autonomnosti i državnosti' (2013) 47(2) Zbornik radova Pravnog fakulteta u Novom Sadu 431–449.

48 Kosta Čavoški, 'Poredak i suverenost' in Aleksandar Kostić (ed), *Državni poredak – suverenitet u vremenu globalizacije* (SANU 2019) 23.

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MEKO PRAVO I SUVERENITET – OD POLITIČKOG DO PRAVNOG OGRANIČENJA

Sažetak

Autor u radu polazi od analize teorije suvereniteta od trenutka njezina rađanja, ali pristupa razmatranju i novijih teorijskih izazova s kojima se susreće pojam suvereniteta u globaliziranom svijetu. Posebna je pozornost posvećena mekom pravu, tom novom, formalno neobavezujućem izvoru međunarodnog prava u svjetlu njegova faktičkog uticaja na desuverenizaciju država. Autor smatra da je relativizacija pojma suvereniteta proces koji je započet još u 18. stoljeću, a koji je samo dodatno ubrzan novim izazovima koje nosi globalizacija. U radu se autor zalaže za jedinu moguću i ispravnu uporabu pojma suvereniteta u njegovu izvornom značenju kao apsolutne, potpuno neograničene i nedjeljive vlasti. S druge strane, kritički pristupa teoriji ustavnog pluralizma, ali i idejama državnog pravnog suvereniteta. Zagovara odbacivanje razdvajanja različitih aspekata suvereniteta, umjetnog razlikovanja između faktičkog i pravnog suvereniteta, kao i vanjskog i unutarnjeg suvereniteta. To je teoretski moguće, ali praktično nekorisno jer se pojam suvereniteta može ispravno razumjeti samo kao politička i pravna neograničenost. Za sve druge različite modalitete i pokušaje relativizacije i gradacije suverenosti, od 18. stoljeća do danas, trebalo bi predvidjeti drugačije pojmove. Imajući u vidu stanje najvećeg broja današnjih država, autor zagovara uvođenje pojma "pseudosuverenitet".

Ključne riječi: *ustavni pluralizam, pravni suverenitet, bihejvioralni suverenitet, relativizacija suvereniteta, pseudosuverenitet*

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