

INTRODUCTION

Sovereignty Yesterday, Today, and Tomorrow?

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Most of the articles in this special issue are the outcome of a lecture series entitled 'Sovereignty Yesterday, Today, And Tomorrow?' that we organized at the University of Leuven, Belgium, in the spring of 2015. The title of this lecture series secretly referenced a 1963 movie by Vittorio De Sica ('Ieri, oggi, domani'). This brilliant comedy, starring Sophia Loren and Marcello Mastroianni, does not have an actual plot but is in fact composed of three short stories that show three different couples in radically different settings. The only thing that weaves the stories together is that these couples are always played by Loren and Mastroianni.

Something similar happens in the case of sovereignty. This same word returns in radically different debates and contexts but what weaves them together is that somehow the concept of sovereignty is always at stake. This is clearly visible in a number of academic debates. In public law, political science, international relations, and legal and political philosophy, discussions on a wide diversity of problems always turn out to somehow involve the concept of sovereignty. The same phenomenon can be witnessed in political and legal reality. Whether the topic is populism, refugees, the jurisdiction of the ECJ, Brexit or the resistance against CETA, sovereignty is always involved. Although sovereignty has often been declared dead, the many debates in which sovereignty continues to play a role make it abundantly clear that sovereignty is still alive and remains an essential part of our legal and political reality and imaginary. This is also the red thread that runs through all the contributions of this special issue. All reflections start from the premise that sovereignty was highly relevant in the past, is a crucial category to understand the present, and probably will continue to inform our legal and political world even in the future.

The apparent ease with which one can connect such a broad range of issues to the notion of 'sovereignty' suggests that a variety of interpretations and conceptions of sovereignty is doing the rounds. This is the topic of the first article by Raf Geenens. It sets the conceptual stage for this special issue. The lack of a clear, let alone comprehensive or generally accepted definition of sovereignty is addressed here in a very straightforward manner, namely by distinguishing five different meanings of the term sovereignty: political sovereignty, legislative sovereignty, original constitutive power, constituted constitutive power, and external sovereignty. These different meanings are of course related (and in the classical Westphalian state order they were also practically entangled) but they are distinct and cannot be fully reduced to one another. The confusion between these different meanings is not innocent as it often renders ongoing debates vague or inaccurate.

Moreover, it is grist to the mill of those who want to relegate sovereignty to the category of souvenirs.

Pavlos Eleftheriadis, in his contribution, operates with a slightly different categorization. He makes a distinction between a political understanding of sovereignty, which he associates with the relational concept of sovereignty developed by Martin Loughlin and a legalistic interpretation such as the one offered by Neil MacCormick. The former marks power as the necessary condition for law, the latter claims that law is necessary to generate power. While Eleftheriadis admits that these views appear fundamentally different, he insists that they are concerned with the same thing: 'sovereignty'. He continues by setting up a fruitful dialogue between these two understandings, arguing that the way power and principle interplay in the making of a constitution can be clarified by understanding law as self-reflective reason. The result is a constructivist interpretation of sovereignty as a necessary but not a determining element in the process of legal deliberation.

The article by Martin Loughlin elaborates a full-fledged defense of the political understanding of sovereignty that figures in Eleftheriadis's text, taking into account recent changes in the nature of government, such as those within the EU. The central argument of the article concerns the reciprocal relation between the concept of sovereignty and the juristic understanding of the state. Since the concept of sovereignty expresses the autonomy of the political domain, it has a foundational function that is necessary for the existence of any coherent system of public law. Likewise, the state functions as an institution of legal authority that allows us to see, understand and act from a political perspective. Loughlin accurately puts the finger on the failure of both political scientists and legal scholars to catch this crucial reciprocity. At the same time, he patently recognizes that the sovereignty/state paradigm is under pressure due to very real legal, political and economic changes, and he specifies his claim that sovereignty is being eroded within the EU especially, with plenty of examples from EU case law and regulation.

Even more embedded within legal practice – and EU legal practice more specifically – is the text by Elke Cloots. She criticizes the tendency of both the European Court of Justice and some of the domestic constitutional courts to confuse 'national identity' and 'constitutional identity', a criticism that she extensively substantiates with case law. Cloots argues that the claim to safeguard constitutional identity that is made by certain constitutional courts is informed by a particular conception of state sovereignty, one that implies a protectionist gesture of closure on behalf of the member states. Article 4(2) TEU, on the other hand, compels the EU as a multinational polity to respect the different national identities of the Member States. This obligation can be understood to embody a liberal concern for individual autonomy, thus demanding inclusion and openness. The latter consideration leads her to the conclusion that the focus of the EU Treaty on 'national identity' should be embraced. Accordingly, the distinction between 'national identity' and 'constitutional identity' adds a very interesting perspective to contemporary interpretations of sovereignty.

It fits the purpose of this special issue to conclude not with a categorical statement about the nature of sovereignty, but rather with a very tangible example of the meaning and implementation of sovereignty in legal and political practice. Stephen Tierney presents the Scottish referendum in 2014 as a significant case study of how a sub-state community can adequately claim and exercise sovereignty.¹ The well-rehearsed critique of referendums as manipulative instruments in the hands of political elites has resulted in the undervaluing of their potential as constitution-making (or constitution-changing) devices. Tierney argues that these criticisms can in fact be handled within democratic theory by means of a thoughtful deliberative democratic design. He thus makes the feasibility of referendums conditional upon the degree of participation of citizens in the decision-making process, thereby explicating and substantiating the link between sovereignty and democracy.

The purpose of the lecture series on sovereignty, organized at Leuven's Institute of Philosophy and Faculty of Law, was to bring together an interdisciplinary set of thinkers who would be able to join critical reflections on the concept of sovereignty with important practical concerns. We believe that the texts brought together in this special issue live up to this ambition. They never take any given meaning of sovereignty for granted. Instead, they explicitly set themselves the task of engaging with the problematic character of sovereignty (and related concepts), investigate it from different perspectives, and keenly explore its importance for legal and political real-world issues.

1 The text by Stephen Tierney was written and completed before the Brexit referendum. It therefore does not take into account the ramifications of Brexit on the various arguments that are presented.