

**SOME MAIN ASPECTS OF STATE
SOVEREIGNTY,
WITH SPECIAL REFERENCE TO
THE DISTINCTION BETWEEN
EXTERNAL AND INTERNAL SOVEREIGNTY**

ANDREA DOLCETTI

ST HILDA'S COLLEGE

UNIVERSITY OF OXFORD

SUPERVISOR: PROF JOHN M. FINNIS

DPHIL

Michaelmas Term 2016

ABSTRACT

The problem at the heart of the Thesis can be formulated, in its simplest form, as follows: What is (the nature of) state sovereignty? I approach this problem with a view to deploying one of the methodologies developed by analytical jurisprudence in tackling the *quaestio vexata*: What is (the nature of) law? In particular, I seek to deploy a method of the sort employed by John Finnis in offering an explanatory definition of law. Accordingly, I focus attention on the characteristic features of the paradigm case of state sovereignty. The trajectory drawn by the six Chapters of the Thesis is impelled by the following research question: what are the standing human needs that make sovereignty (despite the risks associated with its exercise) necessary and desirable for a state, both internally and externally? In order to answer this question, I first consider how external and internal (state) sovereignty have been conceptualised in the context of analytical jurisprudence. This allows me to establish that (state) law and (state) sovereignty are co-related, and directs me toward a study of legal discourse. On the basis of this correlation, I show that the concepts of external and internal sovereignty are associated with a (meta-)claim to state legal independence and a (meta-)claim to state legal supremacy. By analysing those claims, in the context of public international law and constitutional law discourse, I demonstrate that two needs in combination, the need for self-determination and the need for autonomy, underpin those claims. I conclude by arguing that state sovereignty, both externally and internally, is made necessary and desirable (despite the risks associated with its exercise) by the state political community's standing needs for self-determination and autonomy, which are rooted in the necessity and desirability of protecting a human person's freedom in practical reasonableness.

ACKNOWLEDGMENTS

This thesis would not have been possible without the supervision of John Finnis. I am sincerely grateful to him for being extremely generous with his time, for his attentive comments on countless drafts, and for challenging my thinking in productive and provocative ways.

I am also very grateful to my examiners, Timothy Endicott and John Tasioulas, for making the viva a thought-provoking and enjoyable experience. Their comments will serve as an invaluable resource for the future development of this work.

Over the years, I have been fortunate to receive feedback on my work from a number of jurisprudence students and scholars. For their kindness and collegiality I am forever grateful. Special thanks to Leslie Green and Nicholas Barber for their helpful observations during the Confirmation of Status process. As a doctoral student, I have benefited from the support of the Law Faculty and of St. Hilda's College. I would like to thank Katja Ziegler and Sarah Green for being excellent College Advisers.

I owe a particular debt of gratitude to all my family. Without their help, studying at Oxford would have not been possible. I would like to thank, in particular, my parents and my brother for their constant support and encouragement.

Last, but not least, I would like to thank Daniela, with whom I have shared every moment of this journey. I am already looking forward to our next journey!

TABLE OF CONTENTS

Introduction – State sovereignty in an age of globalisation	i
Outline of the Thesis	v
Chapter 1 – Questioning state sovereignty	1
1. The uses of the word ‘sovereignty’: a short linguistic survey	5
1.1 The problems of the location and of the content of state sovereignty	9
2. What is (the nature of) state sovereignty?	11
2.1 State sovereignty as a bridge between facts and norms	12
2.2 State sovereignty as an essentially contested concept	14
2.3 State sovereignty as a multi-layered system	16
2.4 State sovereignty as responsibility to protect	19
2.5 What is the <i>point</i> of state sovereignty?	21
3. Jacques Maritain’s three-fold criticism of state sovereignty	24
3.1 Maritain’s historical argument against state sovereignty	24
3.2 Maritain’s metaphysical argument against state sovereignty	30
3.3 Maritain’s conceptual argument against state sovereignty	32
4. Why (do we need) state sovereignty?	34

Chapter 2 – External and internal sovereignty in legal theory	39
1. John Austin: the idea of an independent political society	42
1.1 Dewey’s criticism of Austin’s theory of law and sovereignty	45
2. Hans Kelsen: the monistic conception of state sovereignty	49
2.1 Kelsen’s doctrine of the unity of law	52
2.1.1 The completion relationship and the relationship of validating purport	55
2.2 The sovereignty of a state legal order	56
3. Alf Ross: state sovereignty as an empty concept?	60
3.1 Ross’ functional conception of state sovereignty	62
3.2 Ross’ critique of the substantive conception of state sovereignty	68
3.2.1 The legal and the political dimension of the substantive conception	71
3.3 Questioning Ross’ conception of state sovereignty	73
3.3.1 Ross’ theory of definitions and legal concepts	76
3.4 The power of a self-governing community	80
4. H.L.A. Hart: a rule-based conception of state sovereignty	85
4.1 Legal and factual independence	88
4.2 Law and sovereignty	90
5. Niel MacCormick: sovereignty and post-sovereignty	92
6. Law, state, and sovereignty	97

Chapter 3 – External and internal sovereignty in legal discourse: the British Dominions as a case study	99
1. The British Dominions as a case study	101
2. The development of a “model Dominion”	108
2.1 British acquisition of the territory	109
2.2 The achievement of Responsible Government	112
2.3 The First World War	113
2.4 The Statute of Westminster 1931	115
3. State legal independence and state legal supremacy	119
Chapter 4 – State independence and the right to self-determination	123
1. State independence, personality and sovereignty	126
1.1 State independence and the “normal condition” of states	127
1.2 External sovereignty and the authority of international law	130
2. The principle of sovereign equality	133
3. The principle of non-intervention	136
4. State independence and the right to self-determination	139

Chapter 5 – State supremacy and the need for self-governance and autonomy	144
1. The identification of the constitutional holder of “state” supremacy	147
1.1 State supremacy and the ‘Crown versus Parliament’ thesis	151
2. The debate about the supremacy of the Crown-in-Parliament	154
2.1 The exercise of the (legislative) supremacy of the Crown-in-Parliament	156
2.2 The origin of the (legislative) supremacy of the Crown-in-Parliament	161
3. State supremacy and <i>pouvoir constituant</i>	167
4. The legality and the legitimacy of state supremacy	172
Chapter 6 – An explanatory definition of state sovereignty	175
1. State political communities as complete human communities?	180
1.1 State political communities and the importance of practical reasoning	181
1.2 State political communities as a type of human community	183
1.2.1 The common good of a complete community	187
2. Do we need state political communities?	191
2.1 Are political communities complete communities?	193
2.2 Are state political communities complete communities?	197
3. The sovereignty of a state political community	200

INTRODUCTION

State sovereignty in an age of globalisation

It is common opinion that we live in an age of globalisation¹. ‘Globalisation: Threat or Opportunity?’ is the title of an “issues brief” published by the International Monetary Fund (IMF) on 12 April 2000². In that document, the term ‘globalisation’ is taken to refer to ‘the increasing integration of economies around the world, particularly through trade and financial flows.’³ Despite acknowledging the existence of cultural, political and environmental dimensions of globalisation, this brief explicitly focuses on economic globalisation, understood as a historical process sustained by technological progress. It is nonetheless interesting to notice that, even within the context of economic globalisation, the IMF found it impossible to avoid the problem of the potential tension between globalisation and state sovereignty. This is demonstrated by the decision to devote a section to the following question: ‘does globalization reduce national sovereignty in economic policy-making?’⁴

¹ On globalisation, as a social, economical and political phenomenon, see, most recently: F.J. Lechner & J. Boli, *The Globalization Reader*, Chichester, Wiley-Blackwell, 2015; S. Tierney (ed.), *Nationalism and Globalisation*, Oxford, Hart Publishing, 2015; B. Holzer, F. Kastner, T. Werron (eds.), *From Globalization to World Society: Neo-Institutional and Systems-Theoretical Perspectives*, New York, Routledge, 2015; S.T. Otsubo, *Globalization and Development (Volume I) – Leading issues in development with globalization*, London, Routledge, 2015; G. Ritzer & P. Dean, *Globalization: A Basic Text*, Chichester, Wiley-Blackwell, 2015; F. Bourguignon, *The Globalization of Inequality*, Princeton, Princeton University Press, 2015; R.C. Feenstra & A. Taylor (eds.), *Globalization in an Age of Crisis: multilateral economic cooperation in the twenty-first century*, Chicago, The University of Chicago Press, 2014; N. Thrift, A. Tickell, S. Woolgar, W.H. Rupp (eds.), *Globalization in Practice*, Oxford, Oxford University Press, 2014; W.E. Murray & J. Overton, *Geographies of Globalization*, London, Routledge, 2014; J. Baylis, S. Smith, P. Owens, *The Globalization of World Politics: An Introduction to International Relations*, Oxford, Oxford University Press, 2014. Personally, I think that the main feature of globalisation is the quasi-instantaneous (virtually worldwide) access to information (including disinformation and propaganda). On the relationship between globalisation and information, see: L. Floridi, *The Ethics of Information*, Oxford, Oxford University Press, 2015, Chapter 15 (‘Global information ethics’).

² The text of the document (published in 2000, and amended in 2002) is available here: <http://www.imf.org/external/np/exr/ib/2000/041200to.htm> (last accessed on 4 January 2016).

³ Ibid, p. 1.

⁴ This question is the title of Box 1 of the issues brief. In the first paragraph of the Box, this question is rephrased in the following terms: ‘does increased integration, particularly in the financial sphere make it

As one would expect, the IMF answered this question in the negative⁵ – an answer which may suggest that if the ‘integration of economies’ is increasing, it still falls far short of integration. From my point of view, however, the problem expressed by that question is more important than the different ways in which the question may be answered. For that question points towards a characteristic feature of the world we live in. Awareness of the problem of the potential tension between globalisation and state sovereignty has been recently revived by the European debt crisis: in particular, the negotiations between the Greek Government and the so-called Troika have led the public to wonder whether Greek sovereignty has been reduced⁶. Indeed, according to some analyses of the European debt crisis, the question asked by the IMF in the year 2000 should be given, fifteen years later, an affirmative answer: national sovereignty has indeed been decreased.

More generally, it has been suggested that globalisation is only the latest chapter – for some commentators, it may even turn out to be the last – in the history of the decline of the modern State⁷. Given that sovereignty is commonly associated with the development of the modern Nation-State, some commentators have in this context speculated that globalisation, in its different dimensions, may have caused – or, at least,

more difficult for governments to manage economic activity, for instance by limiting governments’ choices of tax rates and tax systems, or their freedom of action on monetary or exchange rate policies?’

⁵ The text of the issues brief explicitly says that ‘globalization does not reduce national sovereignty’. The IMF reaches this conclusion by suggesting that, since volatile short-term capital flows can threaten macroeconomic stability, and we live in a world of integrated financial markets, countries have an interest in following policies that promote financial stability: globalisation creates a strong incentive for governments to pursue such economic policies. According to the IMF, economic globalisation leads countries ‘to develop standards and codes that are based on internationally accepted principles that can be implemented in many different national settings’. So, one might argue that the development of those standards and codes follows from the ‘sovereign choice’ of the states that adopt them. Yet, the IMF also acknowledges that it is precisely the development of this ‘international financial architecture’ that may be in tension with the existence and exercise of ‘national sovereignty’. Unfortunately, this last point is just mentioned, but not properly discussed, in the document.

⁶ The term ‘Troika’ has been used by media to refer to a tripartite committee of bailout creditors formed by: the European Commission, the European Central Bank, and the International Monetary Fund. See, e.g.: <http://www.bbc.co.uk/news/business-15149626> (last accessed on 4 January 2016).

⁷ See, e.g., W. Reinhard, *Geschichte des modernen Staates* (2007); Italian translation: W. Reinhard, *Storia dello stato moderno*, Bologna, Il Mulino, 2010, pp. 115-120.

accelerated – the decline of state sovereignty⁸. Now, the notion that state sovereignty is declining may be false (from a descriptive point of view), and/or undesirable (from a normative point of view). Similarly, the proposition that state sovereignty is declining because we are moving towards an increasingly globalised world generates a number of theoretical and practical questions. Nevertheless, the phenomena that we currently gather under the umbrella term ‘globalisation’ highlight the relevance of state sovereignty for the world we live in. For example, it is in light of those phenomena that public opinion in Western democracies increasingly ascribes worldwide significance to a number of “sovereignty disputes” which, a few decades ago, may have appeared to be simply regional territorial disputes⁹.

Whether the *reality* of state sovereignty is, in the context of globalisation, disappearing, or simply undergoing a transformation, is open to debate. The same consideration might apply to the (normative) question of whether state sovereignty should be preserved or abandoned. These are open debates, which demonstrate that the *concept* of state sovereignty is a key concept, not only for understanding what our world is, but also for arguing about what our world ought to be. This is why the relationship

⁸ See, e.g.: S. Sassen, *Losing Control? Sovereignty in the Age of Globalization*, New York, Columbia University Press, 1996; G. Smith & M. Naím, *Altered states: globalization, sovereignty, and governance*, Ottawa, International Development Research Centre, 2000; M. Wolf, ‘Will the Nation-State Survive Globalization?’, *Foreign Affairs*, January/February 2001 Issue; available at <https://www.foreignaffairs.com/articles/2001-01-01/will-nation-state-survive-globalization> (last accessed on 4 January 2016); E. Ip, ‘Globalization and the future of the law of the sovereign state’, *International Journal of Constitutional Law*, VIII, 2010, pp. 636-655; J. Ku & J. Yoo, ‘Globalization and Sovereignty’, *Berkeley Journal of International Law*, XXXI, 2013, pp. 210-234. A particularly topical example of the potential tension between globalisation and state sovereignty is provided by the recent refugee crisis in Europe. More generally, migration flows have posed a number of challenges for state sovereignty (especially, in the West) over the last few decades. On this aspect of the problem, see, e.g.: G.P. Freeman, ‘The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States’, in C. Joppke, *Challenge to the Nation-State: Immigration in Western Europe and the United States*, Oxford, Oxford University Press, 1998, Chapter 3. On the development of the modern Nation-State, see, among others: G. Poggi, *The State: its Nature, Development and Prospects*, Cambridge, Polity Press, 1990, Chapters 3 & 4.

⁹ One can think about the following cases: the South China Sea; Jammu and Kashmir; Palestine; and, most recently, Crimea. At the moment, there are more than one hundred territorial disputes in the world. Amongst these, it is worth remembering – especially because they present a strong connection between claims to territory and claims to sovereignty – the following cases: the Arctic Circle; Antarctica; the Falkland Islands; the Atacama corridor; Taiwan; Tibet; Somaliland; Western Sahara; Gibraltar; and South Ossetia.

between globalisation and state sovereignty has been considered, within the academic community, as an opportunity to re-define state sovereignty¹⁰. State sovereignty has, indeed, been defined and redefined in many different ways, outside and inside academia. By considering state sovereignty through the lens of their specific respective methodologies, different academic communities have offered different (descriptive and normative) conceptions of state sovereignty. Despite acknowledging the value of studying these different *conceptions* of state sovereignty, I am mostly interested in the *concept* of state sovereignty. For, in my opinion, only a proper understanding of this concept would enhance our understanding of the world we live in.

The question that underpins the research presented in this Thesis is, in its simplest formulation, the following: What is (the nature of) state sovereignty? The purpose of this Thesis is to offer an *explanatory definition* of state sovereignty. As indicated in Chapter 1, the Thesis approaches this question with a view to deploying a methodology within the family of methodologies developed by analytical jurisprudence in tackling the *quaestio vexata*: What is (the nature of) law? In particular, my approach will seek to deploy a method of the sort outlined and deployed by John Finnis in offering an explanatory definition of law. Accordingly, I give prominence to the *point* of state sovereignty. And this, in turn, requires one to identify the paradigm case of state sovereignty: it is precisely an examination of such a paradigm case that will allow me to develop an explanatory definition of state sovereignty.

¹⁰ For a general discussion of this point, see: D. Grimm, *Sovereignty – The origin and future of a political and legal concept*, New York, Columbia University Press, 2015. A very interesting proposal for the redefinition of (state) sovereignty is offered in: J.L. Cohen, *Globalisation and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge, Cambridge University Press, 2012.

Outline of the Thesis

Chapter 1 - Questioning state sovereignty

In this Chapter, I provide a short linguistic survey of different uses of the term ‘sovereignty’, focusing on legal and political discourse, in order to better capture the connection between the terms ‘state’ and ‘sovereignty’. On the basis of this connection, I ask two inter-related questions: one about the *location* and the other about the *content* of state sovereignty. I suggest that these questions illuminate two elements of the basic question: what is (the nature of) state sovereignty? Consequently, I focus attention on the question: what is the *point* of state sovereignty? As the last question appears to acknowledge the possibility that the point of state sovereignty may be inherently evil (that is, a good that though intelligible is morally more or less defective), I consider the merits of three arguments developed by Jacques Maritain (1882 – 1973) against the concept, and the reality, of state sovereignty. Finally, I argue that the *what-question* about state sovereignty should be answered in light of the following *why-question*: why (do we need) state sovereignty? More precisely, I suggest that the point of state sovereignty should be identified in the morally reasonable promotion of certain basic goods, by means of a proper response to certain basic human needs. This suggestion allows me to formulate the research question of the Thesis, in terms of a search for the *standing human needs* that make state sovereignty (despite the risks associated with its exercise) necessary and desirable.

Chapter 2 - External and internal sovereignty in legal theory

In this Chapter I describe, and compare, the way in which (state) sovereignty has been conceptualised in the seminal work of the following legal theorists: John Austin (1790 – 1859); Hans Kelsen (1881 – 1973); Alf Ross (1899 – 1979); H.L.A. Hart (1907 – 1992);

and Neil MacCormick (1941 – 2009). On the basis of my comparison, I examine how different explanations of the relationship between law, state and sovereignty can generate different explanations of external and internal sovereignty, considered severally and together. In the first section, I describe Austin’s conception of sovereignty, with special reference to the idea of an independent political society. I then discuss Kelsen’s argument that sovereignty is the property of only one legal order – and that, as such, sovereignty can only be predicated of either a municipal legal order, or the international legal order. Subsequently, I engage with Ross’s thesis that state sovereignty is a bundle of “functional” concepts. The fourth section is devoted to Hart’s own view on state sovereignty – as exposed in Chapter X of *The Concept of Law*. Finally, I examine MacCormick’s idea of post-sovereignty; and his argument that, as demonstrated by a modern *Rechtsstaat*, external sovereignty may be present even though internal sovereignty may be absent. I conclude the Chapter by suggesting how the relationship between law, state and sovereignty should be examined, in order to discover what external and internal sovereignty amount to.

Chapter 3 - External and internal sovereignty in legal discourse: the British Dominions as a case study

In this chapter I show how the concepts of internal and external sovereignty have been used to describe, regulate and assess the legal status of the British Dominions (as listed in the *Statute of Westminster 1931*) at the various stages of their evolution towards independence. I construct a “model Dominion”, and I analyse the typical constitutional development of this model, from its formation as a colony to its recognition as an independent state. This allows me to observe in slow-motion how important elements of (state) sovereignty aggregate. Four diachronic stages of the constitutional history of such a “model Dominion” are considered: (i) British acquisition of the territory and

installation of its administration as a colony; (ii) the achievement of responsible government; (iii) the acquisition of defence and treaty-making power (as a result of the First World War); (iv) the restriction of the legislative authority and ministerial responsibility of the UK (as a result of the adoption of the *Statute of Westminster, 1931*).

Chapter 4 - State independence and the need for self-determination

I begin the Chapter by discussing how the concepts of state independence, sovereignty, and personality (as subjection to international law) may be distinguished – without being separated – from the point of view of international law. I then discuss two legal doctrines which are considered to be entailed by the standard view on state independence: the principle of sovereign equality; and the principle of non-intervention. In light of these two principles, I argue that state independence encompasses not only a dimension of *legality*, but also a dimension of *legitimacy*. Its legality can be best explained – using Hohfeld’s terminology – as the *immunity* of a state vis-à-vis other (external) authorities. Its legitimacy can be best explained on the basis of the *claim*, made by a state political community, to self-determination. I conclude the Chapter by expanding on the relationship between this claim and the need for self-determination.

Chapter 5 - State supremacy and the need for autonomy

I begin the Chapter by considering the role played by the idea of state supremacy in the context of constitutional law discourse. This allows me to identify a number of possible holders of “state” supremacy, such as the Government as a whole; one of the organs of Government (in particular, the Crown or the Parliament); or the people. I then focus attention on the debate about the doctrine of parliamentary sovereignty, in order to explain the nature and the origin of the powers associated with the principle of

legislative supremacy. My analysis of this principle leads me to the idea of constituent power, which is commonly understood not as a legal, but rather as a *de facto* power. I will suggest that state supremacy should be understood not only in connection with the idea of constituent power, but also in connection with the idea of constituent authority. In light of the idea of constituent authority, I argue that state supremacy encompasses not only a dimension of legality, but also a dimension of legitimacy. Furthermore, I argue that if the legality of state supremacy can be best explained – using Hohfeld’s terminology – as a power vis-à-vis other (internal) legal authorities, its legitimacy can be best explained on the basis of the *claim*, made by a state political community, to self-governance. I conclude the Chapter by expanding on the relationship between this claim and the need for autonomy.

Chapter 6 - An explanatory definition of state sovereignty

I will begin the Chapter by tackling the problem of how state political communities can be identified in the context of our complex social reality. In doing so, I suggest that this identification problem can only be solved by introducing the ideas of a complete community and of its (with its members’) common good. In the second section of the Chapter, I study the implications of a state political community’s claim to be a complete community. In particular, I consider how this claim is linked to a proper understanding of the political community’s common good (and, therefore, to the solution to the identification problem that I discuss in the first section of the Chapter). I also consider how the idea of the common good and of a complete community can be explained as a response to the *standing human needs* of the members of a political community. I then explain how a state political community’s claim to be a complete community would require that community’s (state) legal system to have two characteristics – it must be limited to the public good, and it must be able to provide adequate protection of the

human rights of the members of that political community. In the final section of the Chapter, I focus attention on the *prima facie* difference between a state political community and a *sovereign* state political community. I argue that a state political community's claim to be a complete community is successful only when the state legal system (characterised by the features identified in the second section of the Chapter) is both supreme and independent. For only under these conditions, I submit, can the life plans of the members of the political community, qua complete community, be appropriately protected. This argument also allows me to explain the distinction between external and internal sovereignty in light of the relationship between the common goods of different states. I conclude the Chapter by showing that state sovereignty, both externally and internally, is made necessary and desirable (despite the risks inherently associated with the exercise of sovereignty) by the state political community's needs for self-determination and autonomy, which are rooted in the necessity and desirability of protecting the exercise of a person's freedom in practical reasonableness.

Chapter 1

Questioning state sovereignty

In June 1945, with WWII still ongoing in the Pacific region, fifty Countries, including the United Kingdom, signed the Charter of the United Nations¹. Article 2 of the Charter affirms that: ‘The Organization is based on the principle of the *sovereign* equality of all its Members.’² According to the membership criteria defined in Articles 3 and 4 of the Charter, the members of the UN are states³. It follows that the Charter recognises the principle of *sovereign* equality of *states* as one of the basic principles of the UN⁴. Especially in the context of international law and relations, the adjective ‘sovereign’ is often – indeed, most often – associated with those political communities that we call ‘states’⁵. Article 1 of the 1971 Singapore Declaration of Commonwealth Principles, for

¹ The Charter of the United Nations, which came into force on 24 October 1945, was signed on 26 June 1945 in San Francisco, at the conclusion of the United Nations Conference on International Organization. The 1945 San Francisco Conference was the result of a number of previous meetings and of documents produced in those meetings: The Declaration of St. James’s Palace (1941); The Atlantic Charter (1941); The Declaration of the United Nations (1942); the Moscow and Tehran Conferences (1943); the Dumbarton Oaks Conference (1944) and the Yalta Conference (1945). On the history of the United Nations, see, for instance: A. Ross, *The United Nations: peace and progress*, Totowa (N.J.), Bedminster Press, 1966, Chapter 1.

² Article 2 includes a list of seven principles that the Organization and its Members should follow in pursuit of the purposes (stated in Article 1) of the UN. See: <http://www.un.org/en/documents/charter/chapter1.shtml> (last accessed on 4 January 2016).

³ On UN membership, see: <http://www.un.org/en/members/about.shtml> (last accessed on 4 January 2016). It should be noted that the UN also includes a few categories of ‘permanent observers’: non-member States (such as the Holy See); intergovernmental organizations (such as the African Union and the European Union); and other entities, such as the International Committee of the Red Cross and the Sovereign Military Order of Malta. On the rules that regulate membership to the United Nations, see, for instance: H. Kelsen, *The Law of the United Nations: a critical analysis of its fundamental problems*, New York, Praeger, 1964, Chapter 4.

⁴ H. Kelsen, ‘The principle of sovereign equality of states as a basis for international organization’, *Yale Law Journal*, LIII, 1944, pp. 207-220. For an analysis of this principle, see *infra* Chapter 4.

⁵ Of course, the word ‘sovereign’ is also used as a noun. This is especially true in the context of constitutional legal discourse. For instance, the first paragraph of the *Royal Titles Act 1953* states that ‘the style and titles at present appertaining to the Crown should be altered so as to reflect more clearly the existing constitutional relations of the members of the Commonwealth to one another and their recognition of the Crown as the symbol of their free association and of the *Sovereign* as the Head of the Commonwealth.’ Emphasis added.

example, reads as follows: ‘The Commonwealth of Nations is a voluntary association of independent *sovereign states* [...]’.⁶

The fact that the adjective ‘sovereign’ is very often associated with the noun ‘state’, however, should not be taken as a demonstration of the existence of a necessary connection between the concept of sovereignty and the concept of state⁷. Yet, it is true that the terms ‘state’, ‘sovereign’ and ‘sovereignty’ occur, separately and combined, in almost every explanation of the structure of our political communities and legal institutions – whether these communities are considered in isolation, or in their mutual relations, qua members of the international society⁸. And it is also true that the idea of (state) sovereignty is commonly considered to be one of the basic building blocks of that structure⁹.

Now, in my view, a proper understanding of state sovereignty cannot be reached only on the basis of ordinary language philosophy¹⁰. Nonetheless, I acknowledge that

⁶ See *The Commonwealth* website, at: <http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf> (last accessed on 4 January 2016). Emphasis added.

⁷ In fact, the argument unfolded in Chapter 6 will demonstrate that (state) sovereignty is necessary for a state political community, but only insofar as that political community successfully claims to be a complete community. More generally, the Thesis will demonstrate that a proper understanding of the relationship between sovereignty and state depends upon a proper understanding of the relationship between a state political community and its State (as the whole of its government apparatus). This last point is acknowledged, but not fully explored in F.H. Hinsley, *Sovereignty*, Cambridge, Cambridge University Press, 1986 (second edition), p. 22: ‘The concept of sovereignty will not be found in societies in which there is no state. Far from arising at once with the emergence in a community of the forms of the state, the concept will not have appeared until a subsequent process of integration or reconciliation has taken place between a state and its community.’

⁸ See, e.g., M. Loughlin, *Foundation of Public Law*, Oxford, Oxford University Press, 2012, pp. 183-208; see, also, the entry on ‘international society’ in M Griffiths, T. O’Callaghan, S.C. Roach, *International Relations: the key concepts*, Abingdon, Routledge, 2008 (second edition), pp. 173-175.

⁹ See: H. Laski, *A Grammar of Politics*, New Haven, Yale University Press, 1925, Chapters 1 and 2. See, also: R. Jackson, ‘Sovereignty in World Politics’, in R. Jackson (ed.), *Sovereignty at the Millennium*, Oxford, Blackwell Publishers, 1999, p. 9: ‘Sovereignty is like Lego: it is a relatively simple idea but you can built almost anything with it, large or small, as long as you follows the rules.’

¹⁰ Attention to language is certainly a characteristic feature of 20th century philosophy, and the clarificatory power of linguistic analysis should not be overlooked. On the importance of language for philosophy, see, by, amongst others: R. Rorty, *The Linguistic Turn*, Chicago, The University of Chicago Press, 1992. See, also: S. Soames, *Philosophical Essays – Volume 2: The philosophical significance of language*, Princeton (N.J.), Princeton University Press, 2009. Despite recognising its importance, however, I do not intend to limit my research to a linguistic analysis of the uses of ‘state sovereignty’. The methodology of my research – according to which there is room for linguistic analysis – is explained in the final section of the Chapter.

“linguistic phenomenology” can be useful, especially when it is employed simply to identify some preliminary questions about a given reality¹¹ – it is worth remembering that the object of my Thesis is not the expression ‘state sovereignty’, but rather the concept, and the reality, of state sovereignty. I would therefore submit that, for the purposes of my Thesis, a lexical exploration of ‘state’ and ‘sovereignty’ should be made, but only to introduce some basic issues, the discussion of which can direct one towards, and orient one in, a search for an “explanatory definition” of state sovereignty¹². Hence, in the first section of the Chapter, I will provide a short linguistic survey of different uses of ‘sovereignty’, focusing on legal and political discourse, in order to better capture the connection between ‘state’ and ‘sovereignty’. On the basis of this connection, two inter-related questions will be asked: one about the *location* and the other about the *content* of state sovereignty (§1).

I will begin the second section by noting that these two inter-related questions capture two main elements of the question: what is (the nature of) state sovereignty? Consequently, I will briefly describe four conceptions of state sovereignty that can be isolated within the contemporary scholarship on this topic. Although each of these conceptions may be interpreted as a way to illuminate the nature of state sovereignty, I will argue that none of them is able to provide a *satisfying* answer to the question: what is state sovereignty? In my view, this is due to the fact that none of these conceptions of state sovereignty is based upon a sound methodology. For despite (directly or indirectly)

¹¹ The expression ‘linguistic phenomenology’ is borrowed from J.L. Austin, ‘A Plea for Excuses: The Presidential Address’, *Proceedings of the Aristotelian Society*, LVII, 1956, p. 8: ‘In view of the prevalence of the slogan ‘ordinary language’, and of such names as ‘linguistic’ or ‘analytic’ philosophy or ‘the analysis of language’, one thing needs specially emphasising to counter misunderstandings. When we examine what we should say when, what words we should use in what situations, we are looking again not *merely* at words (or ‘meanings’, whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena. For this reason I think it might be better to use, for this way of doing philosophy, some less misleading name than those given above—for instance, ‘linguistic phenomenology’, only that is rather a mouthful.’

¹² In §4 I will argue that a proper understanding of state sovereignty can only be reached by providing an “explanatory definition” of state sovereignty.

taking a position on the relationship between sovereignty and values, none of them attempts to answer the question ‘what is state sovereignty?’ in light of the *fundamental values* that state sovereignty should promote. In this regard, I will submit that the what-question about (the nature of) state sovereignty should be approached by asking the question: what is the *point* of state sovereignty? (§2).

This last question appears to acknowledge the possibility that the point of state sovereignty may be inherently evil (i.e. to harm certain fundamental values). Indeed, it may be suggested that the history of the 20th century corroborates the notion that state sovereignty is more like a vice than a virtue. Hence, before arguing that – at least, for methodological reasons – the point of state sovereignty should be identified in the promotion of certain fundamental values, I will consider the merits of the view that, as in the case of a vice, we should not indulge in state sovereignty. In order to do so, I will engage with three arguments developed by Jacques Maritain (1882 – 1973) against the concept, and the reality, of state sovereignty (§3)¹³.

In the final section of the Chapter, I will argue that the *what-question* about state sovereignty should be answered in light of the following *why-question*: why (do we need) state sovereignty? More precisely, I will suggest that the *point* of state sovereignty should be identified in the promotion of certain fundamental values, by means of a proper response to certain basic human needs. This suggestion will allow me to formulate the research question of the Thesis, in terms of a search for the *standing human needs* that make state sovereignty (despite the potential dangers associated with its exercise) necessary and desirable (§4).

¹³ I have chosen Jacques Maritain as exemplar of how political philosophers have engaged with the topic of (state) sovereignty also because his critical appraisal of (state) sovereignty brings into view some of the arguments that I will discuss in the next Chapters of the Thesis.

1. The uses of the word ‘sovereignty’: a short linguistic survey

This section is intended to provide a short survey of the main uses of ‘sovereignty’: a word that occurs in a variety of linguistic contexts; most significantly, in theological, moral, political, and legal discourse¹⁴. At a general level, the terms ‘sovereignty’ and ‘sovereign’ are often associated with abstract nouns; for example, in expressions such as ‘the sovereignty of good’ or ‘sovereign wealth funds’¹⁵. In the first two of the four linguistic contexts mentioned above, the entities considered to be sovereign usually enjoy – at least, in the Western tradition – some personhood: one may think, for example, of the sovereignty of God, or of the individual self¹⁶. The character of personhood may appear to be less relevant in political and legal discourse, where the abstract nouns ‘state’ and ‘law’ are the most likely candidates for association with ‘sovereignty’ and ‘sovereign’¹⁷.

According to Stanley Benn the term ‘sovereignty’ can be used to express: (1) the supremacy of a norm in a legal hierarchy; (2) the omnicompetence of a legislative organ (or the supreme competence of a legislative organ within its field); (3) the self-

¹⁴ The abstract noun ‘sovereignty’ derives from ‘sovereign’, a word which came into English from the old French *soverain*. This last term, in turn, arose from the Late Latin *superanus* (chief), whose root was the Latin *super* (over). See the entry on ‘sovereignty’ in the *Oxford English Dictionary*.

¹⁵ See, e.g.: I. Murdoch, *The Sovereignty of Good*, London, Routledge, 1991; F. Bassan, *The Law of Sovereign Wealth Funds*, Cheltenham, Edward Elgar, 2011. See, also: E.H. Levi, ‘The Sovereignty of the Courts’, *University of Chicago Law Review*, L, 1983, pp. 679-700; R. Dworkin, *Sovereign Virtue: the theory and practice of equality*, Cambridge (Mass.), Harvard University Press, 2000; H. Wittman, A.A. Desmarais, N. Wiebe (eds.), *Food Sovereignty: reconnecting food, nature & community*, Oxford, Pambazuka, 2011.

¹⁶ See, e.g.: H.J. McCann, *Creation and the sovereignty of God*, Bloomington, Indiana University Press, 2012; B. Leiter, ‘Who is the ‘sovereign individual’? Nietzsche on freedom’, in S. May, *Nietzsche’s on the genealogy of morality: a critical guide*, Cambridge, Cambridge University Press, 2011.

¹⁷ See, e.g.: S.H. Hashmi (ed.), *State Sovereignty – Change and Persistence in International Relations*, University Park (Pennsylvania), The Pennsylvania State University Press, 1997; E.N. Kurtulus, *State Sovereignty: concept, phenomenon and ramification*, Basingstoke, Palgrave Macmillan, 2005; H. Spruyt, *The Sovereign State and Its Competitors – An Analysis of Systems Change*, Princeton (New Jersey), Princeton University Press, 1994; F.G. Jacobs, *The Sovereignty of Law – The European Way*, Cambridge, Cambridge University Press, 2007; T.R.S. Allan, *The Sovereignty of Law – Freedom, Constitution and Common Law*, Oxford, Oxford University Press, 2013.

sufficiency of a legal order; (4) the self-sufficiency of a particular partial legal order (the definition of which may vary from one legal order to another); (5) the ability of bodies, such as armed forces, to defeat all their rivals; and, (6) the ability of a sectional interest of society to influence the policy of a country in a decisive way¹⁸. Benn suggests that, of these six possible uses, meanings (5) and (6) capture the idea of *de facto* power: that is to say, the power to affect, and ultimately determine, the behaviour of a given agent. Instead, the idea of *de jure* power – i.e. a power conferred by a normative/legal standard – is captured by meaning (2). Finally, he argues that the remaining three uses, which refer to legal norms and legal orders, convey a purely formal understanding of sovereignty, as supremacy within a hierarchical structure of norms – a structure that can be conceived of as the Kelsenian *Stufenbau* (i.e. Kelsen’s idea of the pyramidal structure of a legal order)¹⁹.

More recently, Stephen Krasner has identified four principal ways in which the term ‘sovereignty’ is used by theorists, and practitioners, in socio-economics, state theory, international law, and political science²⁰. On the basis of these four main uses, Krasner classifies the following types of sovereignty:

- (i) *Interdependence sovereignty* refers to the ability of public authorities to control trans-border movements of people, goods, information, or capital;
- (ii) *Domestic sovereignty* refers to the formal structure of public authority within a state, and the effectiveness of the control exercised by that public authority;

¹⁸ S. Benn, ‘The uses of ‘sovereignty’’, in A. Quinton (ed.), *Political Philosophy*, Oxford, Oxford University Press, 1967, p. 81.

¹⁹ On the Kelsenian idea of *Stufenbau*, see S.L. Paulson, ‘How Merkl’s *Stufenbaulehre* informs Kelsen’s concept of law’, *Revus*, XXI, 2013, pp. 29–45. Kelsen’s view on (state) sovereignty is discussed in Chapter 2. The thesis that there is a causal relationship between the development of a hierarchy of norms and the emergence of a concept of sovereignty has been defended in: M. Troper, ‘The Hierarchy of Norms and the Emergence of the State’, *The Straus Institute for the Advanced Studies of Law & Justice*, Straus Working Paper No. 06/12, 2012. See, also: M. Troper, ‘Sovereignty and Natural Law in the Legal Discourse of the Ancien Régime’, *Theoretical Inquiries in Law*, XVI, 2015, pp. 337-366.

²⁰ S.D. Krasner, *Sovereignty – Organized Hypocrisy*, Princeton (N.J.), Princeton University Press, 1999, pp. 9 ff.

- (iii) *International legal sovereignty* refers to the mutual recognition between states (i.e. territorial entities that already have formal juridical independence);
- (iv) *Westphalian sovereignty* refers to the capacity to exclude external authorities from the domestic configuration of public authority.

Krasner affirms that types (iii) and (iv) involve issues of authority and legitimacy, but not of control; type (ii) involves issues of authority and control, but not legitimacy; whereas type (i) involves issues of control, but not of authority and legitimacy. The crucial distinction that lies behind these four uses of ‘sovereignty’ is the distinction between *authority* and *control*²¹. According to Krasner, it is the tension between control and authority that generates the “organized hypocrisy” which characterises the sovereign state²².

Considered together, the linguistic analyses carried out by Benn and Krasner can be said to generate three outcomes. The first outcome is the claim that state sovereignty cannot be defined *per genus et differentiam* because the word ‘sovereignty’ does not have a stable meaning²³. The second outcome is the claim that state sovereignty cannot be defined because the contingent connections between the concepts of control, authority and legitimacy (the combinations of which would generate different types of sovereignty) can only be established on a case by case basis²⁴. The third outcome is an

²¹ S.D. Krasner, *Sovereignty – Organized Hypocrisy*, Princeton (N.J.), Princeton University Press, 1999, p. 10: ‘Embedded in these four usages is a fundamental distinction between authority and control. [...] In practice, the boundary between control and authority can be hazy. A loss of control over a period of time could lead to a loss of authority. The effective exercise of control [...] could generate new systems of authority.’

²² Ibid, p. 40. The hypocrisy is generated by the fact that in relation to (iii) and (iv) – which are associated with logics of appropriateness – states have often followed logics of expected consequences. Krasner defines these two kinds of logics as follows: ‘Logics of consequences see political actions and outcomes, including institutions, as the product of rational calculating behavior designed to maximize a given set of unexplained preferences. [...] Logics of appropriateness understand political action as product of rules, roles and identities that stipulate appropriate behavior in given situations.’ Ibid, p. 5.

²³ This claim stems from Benn’s analysis.

²⁴ This claim stems from Krasner’s analysis.

illustration of the inter-connected problems of the *location* and of the *content* of state sovereignty.

The conclusion of Benn's analysis is that 'sovereignty' cannot be defined *per genus et differentiam*, and that, therefore, the word 'sovereignty' should simply be abandoned²⁵. When Benn's linguistic analysis is applied to 'state sovereignty', not only the problem of the *location* of state sovereignty is brought into view, but it also appears that this problem is intrinsically linked to the problem of the *content* of state sovereignty. This is particularly evident in relation to a purely formal understanding of sovereignty. On the basis of Benn's analysis, one may wonder whether state sovereignty should be understood as referring to: first, the supremacy of a norm in a legal hierarchy (possibly, of the set of norms that are considered to be the historically first constitution of a given state); or, secondly, the omnicompetence and/or supreme competence of a legislative organ of the State; or, finally, the self-sufficiency of a state legal order as a whole.

The conclusion of Krasner's analysis is that state sovereignty is the result of a contingent combination of his types (i), (ii), (iii), and (iv). Furthermore, Krasner argues that the types of sovereignty that he calls domestic sovereignty, international legal sovereignty, and Westphalian sovereignty are neither logically, nor empirically, connected²⁶. Krasner's linguistic analysis brings to view the problem of the *content* of state sovereignty, but it also suggests that this problem is intrinsically linked to the problem of the *location* of state sovereignty. In fact, on the basis of Krasner's analysis, it is not clear whether state sovereignty should be conceived of as one, or a combination of, the types of sovereignty he has identified.

²⁵ S. Benn, 'The uses of 'sovereignty'', in: A. Quinton (ed.), *Political Philosophy*, Oxford, Oxford University Press, 1967. This suggestion presupposes the notion that a concept can only be defined *per genus et differentiam*. This notion will be disproved in the final section of this Chapter.

²⁶ See S.D. Krasner, *Power, the State, and Sovereignty*, London & New York, Routledge, 2009, p. 17.

1.1 The problems of the location and of the content of state sovereignty

As indicated in the last section, the linguistic analysis carried out by Benn and Krasner illustrates the link between the problem of the *location* and the problem of the *content* of state sovereignty²⁷. The first problem can be expressed through the following question: (L) where is *state* sovereignty located? The second problem can be expressed through the following question: (C) what does state *sovereignty* amount to?

(L) Because of the ambiguity of the term ‘state’, the expression ‘state sovereignty’ can be interpreted as referring to either the sovereignty of a state political community as a whole (viz. ‘the sovereignty of *a state*’, in the context of public international law discourse); or to the sovereignty of the government of a given state political community (viz. ‘the sovereignty of *the State*’, in the context of constitutional and administrative law discourse)²⁸. Furthermore, when one considers the sovereignty *of* a state/the State, it is not straightforward whether sovereignty is a contingent, or a necessary feature of that state/State. In fact, it is possible to conceptualise sovereignty as being somehow entailed by the concept of state/State: especially in the context of international law and relations, it can seem that either a state is sovereign, or it is not a state at all²⁹. On the other hand, legal history suggests that both states and States can gradually acquire and lose sovereignty; and this would lead one to conceive of sovereignty as a contingent

²⁷ It may be argued that the linguistic analysis carried out by Benn and Krasner is only one of the possible ways in which the semantics and the pragmatics of ‘sovereignty’ can be considered. Yet, a different approach would not illustrate different problems. And because my research is not limited to linguistic analysis, for the purposes of my Thesis, the *answer* to the question ‘what is the meaning of ‘state sovereignty’?’ is irrelevant.

²⁸ On this distinction see J. Finnis, *Aquinas: Moral, Political and Legal Theory*, Oxford, Oxford University Press, 1998, pp. 219-222. For a detailed discussion of the distinction between ‘state’ and ‘State’, see *infra* Chapter 5. On the problematic notion of “the State” in English constitutional law discourse, see: G. Marshall, *Constitutional Theory*, Oxford, Clarendon Press, 1971, pp. 13-34.

²⁹ From this perspective, one may wonder whether sovereignty is simply one of the elements included in the *definiens* of ‘state’, or, rather, whether ‘sovereignty’ is synonymous with ‘statehood’. In the former case, sovereignty would be one of the necessary features of the concept of a state; in the latter case, instead, being a placeholder for the whole definition, sovereignty would be *the* necessary feature of that concept – i.e. the necessary condition of existence for a state.

feature³⁰. However, even leaving undecided the question of whether sovereignty belongs to a state/the State as a contingent or as a necessary feature, the ambiguity of the word ‘state’ demonstrates that the problem of the *location* of state sovereignty cannot be solved simply through linguistic analysis.

(C) It is not clear whether state sovereignty is a particular type of sovereignty: that is to say, the specific sovereignty of a state/the State, which is, as such, different from the sovereignty of other subjects. If one considers, for example, how the term ‘sovereignty’ is used in constitutional law discourse, the property of being sovereign may be predicated of: (i) the monarch (if present in the constitutional structure of the state at issue)³¹; and/or (ii) a State organ – typically the Parliament (or a similar legislative organ)³²; and/or (iii) the people³³. One may wonder, then, whether entities (i), (ii), and/or (iii) should be considered to enjoy different types of sovereignty; and, if so, whether the expression ‘state sovereignty’ should be interpreted as referring to a fourth, specific type of sovereignty³⁴. On the other hand, one may think of entities (i), (ii), and/or (iii) as enjoying the same kind of sovereignty. So, in the case of ‘state sovereignty’ the bearer of sovereignty may be the state political community; whereas in the case of ‘popular sovereignty’, for instance, the people would be the bearer of that very same sovereignty. The hypothesis that there is just one type – and one

³⁰ The recent developments of the European Union, for example, seem to show that, if anything, sovereignty is a contingent feature of states. On this issue, see: N. Walker, ‘Late Sovereignty in the European Union’, in N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003. For the purposes of this Thesis, I will discuss this issue by analysing the process according to the British Dominions acquired the status of sovereign states: see, *infra*, Chapter 3.

³¹ See, e.g., C. Turpin & A. Tomkins, *British Government and the Constitution*, Cambridge, Cambridge University Press, 2011, p. 377: ‘In a constitutional monarchy like ours the *sovereign* is the head of state and symbolically represents the nation, but he or she is not the head of government’. Emphasis added.

³² See, e.g.: J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, Oxford, Oxford University Press, 1999.

³³ See, e.g., Article 1 of the Constitution of the Italian Republic: ‘Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.’

³⁴ Of course, as indicated in §1 of this Chapter, the class of possible types of sovereignty may include more than four elements, as within ordinary language ‘sovereignty’ is predicated of a number of different entities.

corresponding concept – of sovereignty naturally generates the question of whether it is possible to have, at the same time, more than one sovereign subject. The acceptance of the principle of sovereign *equality* of states seems to suggest a positive, albeit qualified, answer to this question³⁵. Yet, if one considers a particular state political community, it seems impossible to have more than one bearer of sovereignty. In either case, the multiple possible uses of ‘sovereignty’ demonstrate that the problem of the *content* of state sovereignty cannot be solved simply through linguistic analysis.

It is worth highlighting that problems (L) and (C) are inter-related: the possibility of different bearers of sovereignty – especially when this bearer is a state/the State – can influence one’s understanding of the *content* of state sovereignty; conversely, the possibility of different types of sovereignty can influence one’s understanding of the *location* of state sovereignty. Most importantly, it should also be noted that these two problems capture the two main elements of what I would call the problem of the nature of state sovereignty.

2. What is (the nature of) state sovereignty?

In the previous section I asked two basic questions about state sovereignty: first, where is *state* sovereignty located? And, secondly, what does state *sovereignty* amount to? I submitted that these two questions express the inter-related problems of the location and of the content of state sovereignty. I also suggested that these two problems capture the two main elements of the problem of the nature of state sovereignty – a problem that can be expressed by the following question: what is (the nature of) state sovereignty?

This section is intended to provide a brief description of four conceptions of state sovereignty that can be isolated within the contemporary body of literature on the topic

³⁵ In this case, the crucial qualification concerns the territorial boundaries of the state and its jurisdiction, i.e. the sphere of competence of state sovereignty.

of (state) sovereignty: state sovereignty as a bridge between facts and norms (§2.1); state sovereignty as an essentially contested concept (§2.2); state sovereignty as a multi-layered system (§2.3); and state sovereignty as responsibility to protect (§2.4). These four conceptions of state sovereignty offer different solutions to the problem of the nature of state sovereignty. However, for the purposes of my Thesis, the significance of these four conceptions of state sovereignty lies in the way in which each of them approaches the question: what is (the nature of) state sovereignty? For despite providing four different answers, all four conceptions of state sovereignty share a common feature: in tackling the problem of the nature of state sovereignty, they (explicitly or implicitly) acknowledge the existence of a relationship between *sovereignty* and *values*. Nonetheless, in the final part of the Chapter, I will submit that none of these four conceptions of state sovereignty is able to provide a *satisfying* answer to the question: what is (the nature of) state sovereignty? In particular, I will argue that a satisfying answer to this question requires one not simply to consider whether (and if so, how) sovereignty and values are connected, but, rather, to pay attention to the fundamental values (understood as basic human goods) that state sovereignty should promote. I will suggest that attention to fundamental values (and basic human goods) can be triggered by asking the question: what is the *point* of state sovereignty? (§2.5).

2.1 State sovereignty as a bridge between facts and norms

Martti Koskenniemi's conception of (state) sovereignty is based on the argument that, because sovereignty has a descriptive *and* a normative dimension, 'modern discourse about sovereignty shifts constantly between a pure fact and a legal approach'³⁶. This means that, on the one hand, 'sovereignty' can be used to refer to the properties that an

³⁶ M. Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument*, Cambridge, Cambridge University Press, 2006, p. 270.

entity must possess to be considered a sovereign state (pure fact approach); and, on the other hand, ‘sovereignty’ can be also used to refer to the set of rights, duties, powers and immunities that are considered to be the normative basis of international law and relations (legal approach). Koskenniemi argues that ‘because [the pure fact approach and the legal approach] alone are vulnerable to criticism, neither can be maintained and argument is forced into constant movement between them’³⁷. This constant fluctuation forces the discussion on (state) sovereignty between two extremes: on the one hand, an apologetic vision, and on the other hand, a utopian conception of the sovereign state.

Like Krasner, Koskenniemi thinks that sovereignty includes a factual and a normative dimension. More precisely, Koskenniemi conceives of sovereignty as a two-way bridge between factual circumstances and normative situations (i.e. rights, duties, powers and immunities)³⁸. Like Benn, Koskenniemi thinks that, because of the constant fluctuation between the factual and the legal approach, the concept of sovereignty cannot ultimately be defined. Indeed, for Koskenniemi, the term ‘sovereignty’ appears to express a bundle of (vaguely defined) collective feelings³⁹.

Koskenniemi also argues that the tension between the “legal” and the “pure fact” approaches is an example of disagreement on the justification of sovereignty: yet, either approach can accommodate the arguments used, independently from these approaches,

³⁷ Ibid, p. 301.

³⁸ A similar thesis is defended, on the basis of Searle’s theory of institutional facts, in: W.G. Werner & J.H. De Wilde, ‘The Endurance of Sovereignty’, *European Journal of International Relations*, VII, 2001, pp. 283-313. See, also: W.G. Werner, ‘Speech Act Theory and the Concept of Sovereignty: a critique of the descriptive and the normative fallacy’, *Hague Yearbook of International Law* 2000, XIII, 2001, pp. 105-112.

³⁹ See, e.g., M. Koskenniemi, ‘What use for sovereignty today?’, *Asian Journal of International Law*, I, 2011, p. 70: ‘Sovereignty expresses frustration and anger about the diminishing spaces of collective re-imagining, creation, and transformation of individual and group identities [...] In the context of war, economic collapse, and environmental destruction, in spite of all the managerial technologies, sovereignty points to the possibility, however limited or idealistic, that whatever comes to pass, one is not just a pawn in other people’s games but, for better or for worse, the master of one’s life.’

to restrict or broaden the extent of state sovereignty⁴⁰. In my view, the most interesting aspect of Koskenniemi's argument is precisely this distinction between disagreements about the *justification* of sovereignty and disagreements about the *extent* of sovereignty. It is worth noting, however, that, according to Koskenniemi, the justification of sovereignty (whether "legal" or "purely factual") does not require an engagement with the values of a given political community, or of our international society as a whole.

2.2 State sovereignty as an essentially contested concept

This sub-section considers an alternative formulation of the view that the meaning of the word 'sovereignty' is unstable: the thesis that sovereignty is an *essentially contested concept*⁴¹. This thesis has been eminently defended by Samantha Besson, on the basis of the argument that the concept of sovereignty fulfils the three main conditions of an essentially contestable concept: it is a *normative, intrinsically complex, and a-criterial* concept⁴². The thesis that (state) sovereignty is an essentially contested concept has also been defended, with specific reference to the international law context, by Dan Sarooshi⁴³. Following Waldron's refinement of Gallie's definition of an essentially contested concept, Sarooshi argues that the contestation of the concept of sovereignty

⁴⁰ According to Koskenniemi, examples of disagreement on the extent of state sovereignty are provided by sociological, moral, and logical criticisms of sovereignty.

⁴¹ S. Besson, 'Sovereignty in conflict', in: C. Warbrick & S. Tierney, *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law*, London, The British Institute of International and Comparative Law, 2006, pp. 139-164.

⁴² *Ibid.*, p. 147. Emphasis in the original.

⁴³ D. Sarooshi, 'The essentially contested nature of the concept of sovereignty: implications for the exercise by international organizations of delegated powers of government', *Michigan Journal of International Law*, XXV, 2003-2004, pp. 1107-1140. Sarooshi's argument has been developed in his book: D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford, Oxford University Press, 2005.

revolves around a *problem*, rather than around an *exemplar*⁴⁴. According to Sarooshi, ‘the central problem of sovereignty about which there is continual contestation [...] is the following: what are powers reserved to government; who exercises which of them; and how should they be exercised?’⁴⁵

One of the premises of Sarooshi’s argument is that ‘the essentially contested nature of the concept of sovereignty [...] is the same whether sovereign powers are being exercised on the domestic or international planes.’ Sarooshi argues that the contestation of the concept of sovereignty occurs on a continuum between the domestic and the international arena⁴⁶. This means that the problem of the extent of sovereignty may receive different answers at a domestic or at an international level, even though the justificatory process used may be the same in both cases⁴⁷. Furthermore, Sarooshi holds the view that the international arena provides a crucial forum for the contestation of the concept of sovereignty⁴⁸. This view shares the common opinion that the international (law) context is a privileged standpoint from which to observe the reality of state sovereignty⁴⁹.

⁴⁴ On the relationship between an essentially contested concept and an exemplar of that concept: W.B. Gallie, *Essentially Contested Concepts*, p. 177-180. Waldron’s position is stated in: J. Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’, *Law & Philosophy*, XXI, 2002, p. 158.

⁴⁵ D. Sarooshi, ‘The essentially contested nature of the concept of sovereignty: implications for the exercise by international organizations of delegated powers of government’, *Michigan Journal of International Law*, XXV, 2003-2004, p. 1112.

⁴⁶ See, on this point, *ibid*, p. 1112: ‘The contestation of the concept of sovereignty has always moved to a more transcendent level of human institution: from the family unit to the tribe to the City-State to the region to the institution of independent and sovereign nation-States and now, finally, to international organizations.’

⁴⁷ In this respect, Sarooshi’s position appears to be aligned with Koskenniemi’s conception of (state) sovereignty.

⁴⁸ One the claims advanced by Sarooshi is that ‘the very existence of international organizations performs an important ontological function since these organization’s [sic] provide a forum, transcendental to the State, where conceptions of sovereignty – and more specifically the content of sovereign values – can be contested on the international plane.’ *Ibid*, p. 1120.

⁴⁹ It is from this standpoint that a number of scholars have tried to describe how state sovereignty *is* conceptualised and, sometimes, also prescribe how state sovereignty *ought to be* re-conceptualised. See, for example, Eli Lauterpacht’s suggestion that sovereignty ‘‘must be seen largely as myth – except when it is used as a word to describe a state’s title to territory’’. See E. Lauterpacht, ‘Sovereignty – myth or reality?’, *International Affairs*, LXXIII, 1997, p 149. On sovereignty in the context of international law,

In my view, the most interesting aspect of Sarooshi's understanding of the "problem of sovereignty" is the underlying acknowledgment of an explicit connection between the exercise of (governmental) sovereign powers and the "sovereign values" that *justify* those powers (and their exercise)⁵⁰. From this standpoint, the normative dimension of the concept of sovereignty can be appreciated, and the essentially contested nature of this concept can be understood as the source of an on-going debate about the identification and reconciliation of "sovereign values"⁵¹.

2.3 State sovereignty as a multi-layered system

In the context of his idea of "institutional cosmopolitanism", Thomas Pogge offers an interesting argument about how state sovereignty ought to be re-conceptualised⁵². Pogge begins with the following working definition of state sovereignty, according to which 'A is sovereign over B if and only if: A is a governmental body or officer ("agency"), B is a set of persons, and A has unsupervised, and irrevocable, authority over B'⁵³. Pogge

see, also: R. Jennings, 'Sovereignty and International Law', in: G. Kreijen, M. Brus, J. Duursma, E. De Vos, J. Dugard, *State, Sovereignty, and International Governance*, Oxford, Oxford University Press, 2002; D. Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding*, Oxford, Oxford University Press, 2007, Chapter 1 ('Sovereignty in International Society).

⁵⁰ D. Sarooshi, 'The essentially contested nature of the concept of sovereignty: implications for the exercise by international organizations of delegated powers of government', *Michigan Journal of International Law*, XXV, 2003-2004, p. 1114: 'The concept of sovereignty has always been associated with an entitlement to exercise governmental powers in the internal and external domain, but this has always been subject to sovereign values that have conditioned its exercise.' In this respect, Sarooshi's (methodological) approach is opposite to the one embraced by Koskenniemi. See previous sub-section: in particular, see how Koskenniemi understands the disagreements about the justification of (state) sovereignty.

⁵¹ According to Sarooshi, the contestation of the concept of sovereignty involves 'a set of ontological and legitimating decisions. The first is ethical; deciding who *We* are: who is a friend, who is an enemy, and who is a stranger. The other is metahistorical; where we came from, how we became friends, how we got here, where we are, and where we are going in the future.' Ibid, p. 1117.

⁵² See T.W. Pogge, 'Cosmopolitanism and Sovereignty', *Ethics*, CIII, 1992, pp. 48 ff.

⁵³ Ibid, p. 57. According to Pogge, the authority A has over B comprises any of the following four elements: (1) authority to lay down rules constraining their conduct; (2) authority to judge their compliance with rules; (3) authority to enforce rules against them through pre-emption, prevention, or punishments; and (4) authority to act on their behalf vis-à-vis other agencies (ones that do or do not have authority over them) or persons (ones whom A is sovereign over, or not).

acknowledges that sovereignty, in its “vertical distribution”, is concentrated at the level of the autonomous territorial state, commonly considered as the paradigmatic organisation of political – more specifically, governmental – authority. According to Pogge, if a government G has authority over a set of persons P, and no other agency has any authority over G or over P (an authority which is not supervised and revocable by G), then G is sovereign in relation to B. Therefore, under Pogge’s definition, the territorial state, as we know it, appears to be the best candidate to be the bearer of (absolute) sovereignty. On the contrary, Pogge’s proposal is that governmental authority should be re-distributed along the vertical dimension, in order to create a multi-layered system of sovereignty⁵⁴. This proposal is defended by Pogge for the following reasons:

- (i) Only a multi-layered system of sovereignty would be able to sustain a centrally enforced reduction of nuclear, biological, chemical, and conventional weapons of mass destruction; and this reduction would help to secure world peace and security.
- (ii) Only a multi-layered system of sovereignty would be able to provide a plurality of checks and balances; and this plurality would help to reduce the (actual or potential) oppressive actions of national governments over their people.
- (iii) Only a multi-layered system of sovereignty would be able to reform the use of natural resources to support the development of the poorest areas of the planet; and this reform would help to realise global economic justice⁵⁵.
- (iv) Only a multi-layered system of sovereignty would be able to provide a more efficient and democratic procedure to account for the externalities generated by

⁵⁴ This would mean that ‘persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state.’ T.W. Pogge, ‘Cosmopolitanism and Sovereignty’, *Ethics*, CIII, 1992, p. 58.

⁵⁵ Global economic justice is an end in its own right and therefore supports a reallocation of political authority, but it is also important as a means toward the first two purposes.

the contemporary modes of production; and this procedure would help stop the degradation of our natural environment.

Pogge identifies two objections to a multi-layered system of sovereignty of the kind that he proposes⁵⁶. First, it may be thought that sovereignty cannot be divided at all⁵⁷. Second, it may be thought that there are certain vertically indivisible governmental functions that form the core of sovereignty⁵⁸. Pogge's response to the first objection is that the practice of constitutional and federal states demonstrates the possibility of *divided sovereignty*, in both the horizontal and the vertical dimension. His response to the second objection is that this kind of objection is not based on either an empirical or a conceptual necessity, but rather, on a moral argument. Indeed, the four reasons offered by Pogge in favour of a multi-layered system of sovereignty are based on a moral ground. For reasons (i) to (iii) this is true only indirectly – since they presuppose that peace and security, the lack of an oppressive government, and economic justice are goals worth pursuing – whereas reason (iv) is directly based on a moral argument. Not only is a clean natural environment identified as a good worth-achieving, but hidden in reason (iv) lies a stronger, and deeper, moral argument. The problem identified under reason (iv) is that the current, state-based, distribution of sovereignty makes a large number of people suffer from the political choices which ultimately degrade their environment, without giving them the power to influence those choices. The case of environmental degradation is, therefore, a clear example of how the wrong distribution of sovereignty can transform political agents into political patients.

⁵⁶ It should be noted that these two objections are conceptual. The rest of the Chapter and the Thesis in general, will demonstrate that the most powerful objections to such a multi-layered system of sovereignty are based upon the possible impact of this distribution of sovereignty on human goods and needs.

⁵⁷ T.W. Pogge, 'Cosmopolitanism and Sovereignty', *Ethics*, CIII, 1992, p. 59: 'The traditional form of this objection rests on the belief that a juridical state (as distinct from a lawless state of nature) presupposed an absolute sovereign.'

⁵⁸ *Ibid*, p. 60. According to Pogge, a paradigmatic case of this kind of objection is Walzer's claim that 'the authority to fix membership, to admit and exclude, is at least part of an indivisible core of sovereignty.'

This is why Pogge argues that the argument from ecology, linked to reason (iv), may well be replaced “with a deeper and more general fourth reason, which might be labeled *democracy*”⁵⁹. Similarly to the conception of sovereignty as an essentially contested concept, Pogge’s multi-layered conception of sovereignty explicitly acknowledges the existence of a connection between sovereignty and values. There is, however, an important difference between the ways in which these two conceptions understand that connection. The conception of sovereignty (as an essentially contested concept) presupposes that there is an intersection between the sphere of sovereignty and sphere of the values of a political community – i.e. the set of values that justify sovereignty. Whereas, the latter conception of sovereignty (as a multi-layered system) presupposes that the sphere of sovereignty must be contained within the sphere of the values of a political community – more precisely, sovereignty must be part of the democratic values of a political community.

2.4 State sovereignty as responsibility to protect

In the contemporary literature of the topic of state sovereignty there is another normative conception of state sovereignty that, like in the case of Pogge, uses a moral argument to advocate for a re-conceptualisation of sovereignty. This other argument does not suggest a vertical distribution of sovereignty, nor does it connect sovereignty to the value of democracy. Instead, it suggests that state sovereignty should be conceived of as a specific modality of state *responsibility*.

⁵⁹ T.W. Pogge, ‘Cosmopolitanism and Sovereignty’, *Ethics*, CIII, 1992 p. 63. Pogge affirms that ‘persons have a right to an institutional order under which those significantly and legitimately affected by a political decision have a roughly equal opportunity to influence the making of this decision – directly or through elected delegated or representatives.’

In September 2000 the Canadian Government established an independent commission, co-chaired by Gareth Evans and Mohamed Sahnoun, to answer a question asked by the UN Secretary General Kofi Annan in his *Millennium Report*:

if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?⁶⁰

In December 2001, this commission, the International Commission on Intervention and State Sovereignty (ICISS), released a report about the “right of humanitarian intervention”⁶¹. According to the report the responsibility of the state to protect its people is *inherent* in the concept of state sovereignty⁶². The ICISS worked under the assumption of a Westphalian conception of state sovereignty and tried to illuminate this conception in the light of a few significant provisions of the UN Charter⁶³. In particular, the report acknowledges the continuous viability of the principles of sovereign equality (Article 2.1), non-intervention (Article 2.7), and self-defence for states (Article 51).

From the perspective of the ICISS, the UN Charter represents ‘an example of an international obligation voluntarily accepted by member states.’⁶⁴ Nonetheless, the report suggests that the acceptance of the responsibilities that flow from UN membership does not entail a “transfer or dilution of sovereignty”; nonetheless, by becoming a member of the UN, however, a signatory state accepts a “re-characterization” of its sovereignty: ‘from sovereignty as control to sovereignty as

⁶⁰ This question is included in the section entitled ‘Addressing the dilemma of intervention’. See http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf, p. 47 (last access 4 January 2016).

⁶¹ VV. AA., *The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty*, Ottawa, International Development Research Centre, 2001, p. VII.

⁶² Ibid, p. 13. According to the report, the responsibility to protect embraces three specific responsibilities: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild.

⁶³ Ibid, p. 12: ‘Sovereignty has come to signify, in the Westphalian concept, the legal identity of a state in international law.’

⁶⁴ Ibid, p. 13.

responsibility in both internal functions and external duties.’⁶⁵ This re-conceptualisation of state sovereignty in terms of state responsibility is certainly one of the most powerful normative arguments offered in the most recent literature on the topic, especially because it is not based upon a necessarily complete rejection of what Krasner calls ‘Westphalian sovereignty’ (i.e. the capacity to exclude external authorities from the domestic configuration of public authority).

For the purposes of this Chapter, the most interesting element of this conception of state sovereignty is that it presupposes that the sphere of the values shared by a number of political communities is contained within the sphere of sovereignty – in the sense that sovereignty as responsibility appears to be a meta-value that should comprehend and protect the values that are worth protecting (with special reference to human rights).

2.5 What is the *point* of state sovereignty?

The methodological approaches embedded in the four conceptions of state sovereignty described above instantiate four different understandings of the relationship between sovereignty and values: (2.1) the conception of state sovereignty as an argument that connects facts and norms relies upon the notion that sovereignty and the values of a political community belong to separate spheres; (2.2) the conception of state sovereignty as an essentially contested concept relies upon the notion that there is an intersection between the sphere of sovereignty and sphere of the values of a political

⁶⁵ Ibid, 13. The ICISS acknowledges that the idea of sovereignty as responsibility has been strengthened by the increasing importance, in international law discourse, of human rights and of the concept of human security. On the role played by the concept of human security in the work of the ICISS, see L. Axworthy, ‘Responsibility to Protect and the Evolution of State Sovereignty’, in: J. Genser, I. Cotler, D. Tutu, V. Havel, *The Responsibility to Protect*, Oxford, Oxford University Press, 2011, pp. 8-11. See, also: C. Reus-Smit, ‘Human Rights and the Social Construction of Sovereignty’, *Review of International Studies*, XXVII, 2001, pp. 519-538; E. Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’, *American Journal of International Law*, 2013.

community; (2.3) the conception of state sovereignty as a multi-layered system relies upon the notion that the sphere of sovereignty is contained within the sphere of the values of a political community; and (2.4) the conception of state sovereignty as responsibility to protect relies upon the notion that the sphere of the values of a political community is contained within the sphere of sovereignty.

These four conceptions of state sovereignty offer different solutions to the problems of the location and of the content of state sovereignty. In doing so, they show the different ways in which the problem of the nature of state sovereignty can be interpreted. Two of these four conceptions of state sovereignty, (2.1) and (2.2), can be seen as tackling this problem from a descriptive point of view; whereas the other two conceptions, (2.3) and (2.4) can be seen as tackling this problem from a normative point of view. Either way, I would submit that none of these four conceptions of sovereignty is able to provide a *satisfying* answer to the question: what is (the nature of) state sovereignty? For none of them approaches this question by asking the question: what is the *point* of state sovereignty?⁶⁶

The reason for asking this question is methodological and will be fully clarified in the final section of this Chapter. There I will explain that the *point* of state sovereignty should be identified in the promotion of certain fundamental values and basic goods, by means of a proper response to certain basic human needs. On this basis, the question ‘what is the point of state sovereignty?’ should be reformulated as follows: why (do we need) state sovereignty? For the time being, it will suffice to say that the four conceptions of state sovereignty considered in this section are not satisfactory, both formally and substantively, because of the way in which they (explicitly or implicitly)

⁶⁶ The methodological argument sketched in this section is fully explained in the last section of the Chapter.

interpret the relationship between sovereignty and values⁶⁷. From a formal point of view, none of the four conceptions above presupposes that the link between sovereignty and values should be understood as linking an appropriate response to (the existence of) certain basic human needs. From a substantive point of view, none of the conceptions listed above understands “values” as manifestations of basic goods⁶⁸.

On the basis of the position (directly or indirectly) taken on the relationship between sovereignty and values, another consideration is order. Especially the normative conceptions (2.3) and (2.4) suggest that state sovereignty is an undesirable feature of our political environment. And a descriptive investigation into the *point* of state sovereignty may well reveal that such a point is be inherently evil (i.e. it necessarily harm certain basic human goods). Indeed, it may be suggested that the history of the 20th century corroborates the notion that state sovereignty is more like a vice, than a virtue. Hence, before arguing that – at least, for methodological reasons – the point of state sovereignty should be identified in the promotion of certain basic human goods, it would be appropriate to consider the merits of the view that, as in the case of a vice, we should not indulge in state sovereignty. In order to do so, I will engage with a (three-fold) argument developed by Jacques Maritain against the concept, and the reality, of state sovereignty.

⁶⁷ It is true, however, that the four conceptions of state sovereignty described above suggest four very interesting issues of (state) sovereignty. The first issue is whether or not state sovereignty is justified (i.e. whether or not it follows from a justified choice). The second issue is whether or not state sovereignty constitutes a response to universal (instead of local) values. The third issue is whether or not state sovereignty should be ascribed to the state (as a political community), instead of other subjects. The fourth issue is whether state sovereignty should be seen as a matter of power or authority. These four issues of state sovereignty will be discussed in the rest of the Thesis.

⁶⁸ Now, the conception of state sovereignty as responsibility to protect may be seen as presupposing an idea of values as objective standards (expressed in the language of human rights). However, the conception of state sovereignty as responsibility to protect does not really engage with the idea of the basic goods as discussed in §4.

3. Jacques Maritain's three-fold criticism of state sovereignty

Jacques Maritain has devoted an entire chapter of one of his most famous books, *Man and the State*, to the concept of state sovereignty⁶⁹. This section engages with his contribution, taken as exemplar of how the problem of the nature of state sovereignty has been treated in the context of political philosophy⁷⁰. Maritain's main contention is that 'political philosophy must eliminate Sovereignty both as a word and as a concept [...] because, considered in its *genuine meaning*, [...] this concept is *intrinsically wrong*, and bound to mislead us if we continue using it.'⁷¹ From this perspective, there is no *need* for sovereignty whatsoever. For the purposes of this Chapter, it is interesting to see how Maritain is able to combine a moral argument with a linguistic analysis that is very similar to the one carried out by Benn. Another reason for engaging with Maritain's argument against the concept, and the reality, of state sovereignty is that he supports a view which is, in many ways, opposed to the argument I develop in the following chapters. On the other hand, Maritain's three-fold criticism provides useful insights about the idea of state sovereignty. These insights can be illustrated by discussing his historical, metaphysical and conceptual arguments against state sovereignty.

3.1 Maritain's historical argument against state sovereignty

According to Maritain, the concept of sovereignty (like the word 'sovereignty' itself) belongs to modern political theory. In particular, the modern theory of sovereignty can

⁶⁹ See Chapter 2 of J. Maritain, *Man and the State*, Chicago, University of Chicago Press, 1951, pp. 28-53; This Chapter of *Man and the State* reproduces a previous article by Maritain. See: J. Maritain, 'The concept of sovereignty', *The American Political Science Review*, XLIV, 1950, p. 343-357.

⁷⁰ For an analysis of how the concepts of external and internal (state) sovereignty have been treated in the context of legal philosophy see *infra* Chapter 2.

⁷¹ J. Maritain, 'The concept of sovereignty', *The American Political Science Review*, XLIV, 1950, pp. 343-344. Emphasis added.

be considered as having its origin with the writings of Jean Bodin (1530 – 1596)⁷². By considering Bodin’s account of the transmission of power from the people to their sovereign, Maritain identifies two intrinsic properties of the sovereign: first, the property of being *separate*; and, secondly, the property of being *transcendent*⁷³. In Maritain’s reconstruction of the concept of sovereignty, the idea of separation plays a crucial role. Maritain begins by maintaining the thesis that ‘there is no command without some kind of separation.’⁷⁴ The second move, which is crucial for his argumentative strategy, is to distinguish between separation as an *existential status* and separation as an *essential property*. The former, required by (any) political command is a condition for the exercise of the right to govern; whereas the latter, required by sovereignty, is intimately connected with the possession of the right to govern. It is precisely the idea of separation as an *essential property* of sovereignty that reveals what is ‘basically wrong with the concept of sovereignty and the original error of the theorists of sovereignty.’⁷⁵ According to Maritain the modern theorists of sovereignty acknowledge that ‘the right to self-government is naturally possessed by the people’; yet, ‘they replaced [the medieval concept of vicariousness] with the concept of physical transfer and donation.’⁷⁶ In light of the contribution from medieval thought – unfortunately Maritain does not provide any reference to specific authors – the sovereign (either the king or the prince) ‘should have been considered at the peak (but not over the peak) of the political structure, as a part representing the whole (and not as

⁷² J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 344. See also, 348: ‘The concept of sovereignty took definite form at the moment when absolute monarchy was budding in Europe. No corresponding notion had been used in the Middle Ages with regard to political authority.’

⁷³ Ibid, p. 346: ‘Either Sovereignty means nothing, or it means supreme power *separate* and *transcendent* – not at the peak but *above* the peak [...] and ruling the entire body politic *from above*.’ Emphasis in the original. Cf. Pogge’s definition of sovereignty, as discussed in section 2.2.

⁷⁴ Ibid, p. 346.

⁷⁵ Ibid, p. 347.

⁷⁶ Ibid, p. 347.

a separate whole).⁷⁷ From this standpoint, Maritain suggests that the sovereign should have been ‘separate from the people as to the existential status required by the exercise of the right to command.’⁷⁸

The two main propositions in Maritain’s argument are the following: (i) the right to govern (or, rather, to self-government) is “naturally” possessed by the people (as a body politic)⁷⁹; and, (ii) the right to govern can be possessed either by essence or by participation⁸⁰. By understanding the right to govern as an *essential property* of the sovereign, the modern notion of sovereignty treats sovereign power ‘as monadic and supernal power existing *above* the body politics and *separately* from it.’⁸¹

Historically, two theories supported this conclusion: first, the theory of the divine right of kings; and second, the theory that the king possessed a natural and inalienable right, from above, to rule. Maritain thinks that the original connotation of the modern notion of sovereignty entails this conception of sovereign power and that ‘we cannot use the concept of sovereignty without evoking, even unawares, that original connotation.’⁸² Further, according to Maritain, the notion that there are (or there can be) absolute States entails a notion of sovereignty which directly descends from the way in which the sovereignty of the absolute Kings was conceived of – namely, as ‘a property which is absolute and indivisible, which cannot be participated in or admit of degrees, and which belongs to the Sovereign independently of the political whole, as a right of his own.’⁸³

⁷⁷ J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 347.

⁷⁸ Ibid, p. 347.

⁷⁹ The authority of the sovereign relies upon such a right. Yet, the right to govern is not a good – which can be “held either in ownership or in trusteeship”. Ibid, p. 347.

⁸⁰ Ibid, p. 347: ‘God is possessed by essence of the right to command; the people are possessed of this right both by participation in the divine right, and by essence in so far as it is a human right.’

⁸¹ Ibid, p. 348. Emphasis in the original.

⁸² Ibid, p. 348.

⁸³ Ibid, p. 349. Maritain thinks that both the Hegelian State and the Hobbesian Mortal God constitute exemplar theorisation of absolute sovereign States.

According to Maritain, ‘Jean Bodin is rightly considered as the father of the modern theory of sovereignty.’⁸⁴ Maritain is not the only one who supports the thesis that the idea of sovereignty is a result of modern political thought⁸⁵. Certainly, the idea of sovereignty became a central problem in legal and political theory – as acknowledged by recent historiography⁸⁶ – during the times of great social change culminating with the Peace of Westphalia (1648). Nonetheless, it cannot be overlooked that medieval legal discourse constitutes one of the unavoidable sources of most of the concepts which characterise modern European political theory and practice⁸⁷. Furthermore, it is sufficient to analyse Bodin’s definition of sovereignty to see how the “modern theory” of sovereignty is connected to the past. In the definition provided by Bodin, the *definiens* of ‘sovereignty’ is explained in terms of ‘*maiestas*’⁸⁸. The association of sovereignty with the concept of *maiestas* – and the intentional use of the Latin word (as synonymous with ‘puissance’) in the original text of his *Les Six livres de la République* (1576) – constitutes a clear reference to the Roman tradition. During the Roman Republic, *maiestas* was a property of the Roman people and its diminution constituted a

⁸⁴ J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 344.

⁸⁵ See, for instance, B. Crick, ‘Sovereignty’ in: D.L. Sills (ed.), *International Encyclopedia of the social sciences*, Volume 15, New York, Macmillan, (reprint edition 1972), p. 78: ‘Before Bodin the use of the concept of sovereignty is an anachronism, although a depressingly common one. It was unknown to the Roman tradition of politics. [...] The concept of sovereignty was also unknown to medieval Christendom.’

⁸⁶ S. Beaulac, *The power of language in the making of international law. The word sovereignty in Bodin and Vattel and the myth of Westphalia*, Leiden-Boston, Martinus Nijhoff Publishers, 2004.

⁸⁷ On the fundamental importance of medieval cultural heritage to modernity, see: J. Huizinga, *The autumn of the Middle Ages*, (1919), Chicago, University of Chicago Press, 1996; E. Gilson, *The spirit of mediaeval philosophy*, (1932), Notre Dame, University of Notre Dame Press, 1991. See also: W. Ullmann, *The medieval idea of law as represented by Lucas de Penna: a study in fourteenth century legal scholarship*, London, Methuen & Co. Ltd., 1946, p. vi: ‘The modern idea of law is essentially and substantially the offspring of the medieval ideal of law’; J. Coleman, *A history of political thought. From the Middle Ages to the Renaissance*, Oxford, Blackwell, 2000, pp. 42-43: ‘Indeed, the juridical culture of the twelfth- and thirteenth-century Roman and canon lawyers contributed to the seedbed from which grew the forest of early-modern political theories, most notably exemplified in the writings of Hobbes, Locke and Rousseau.’

⁸⁸ ‘La souveraineté est la puissance absolue et perpétuelle d’une République que les latins appellent maiestas.’ See J. Bodin, *On Sovereignty: four chapters from the six books of the commonwealth* (1576), Cambridge, Cambridge University Press, 1992, p. 1: ‘Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins call *maiestas*.’

crime⁸⁹. It is worth mentioning that the Romans had a crime of *lèse majesté*, because during the Middle Ages one of the most discussed topics in relation to the legal and political supremacy of the Emperor was precisely that crime's definition (mixing Roman law and contemporary legal arguments)⁹⁰. This definition of the *crimen laesae maiestatis* is connected to the development of the medieval idea of sovereignty through the question of whether or not the Emperor (of the Holy Roman Empire) had authority – and, in particular, jurisdictional powers – over the Kings of the Kingdoms constituting the Empire⁹¹. The recognition of the importance of medieval thought for the modern theory of sovereignty has more than merely historical significance. At a theoretical level, the reference to medieval thought allows – or, at least, assists – me to show how the ideas that (state) sovereignty and (state) absolutism are not synonymous⁹².

This definition of *lèse majesté* underpins the development of the medieval idea of sovereignty. The idea that the Emperor, being “*dominus mundi*”, had jurisdictional authority over every King within the Empire was set forth by Johannes Teutonicus (c. 1180 – 1252)⁹³. Yet, especially in relation to the French King, the jurisdictional supremacy of the Emperor was far from accepted⁹⁴. In his *Speculum Judiciale*,

⁸⁹ On the idea of *maiestas minuta populi Romani*, see: A. Lintott, *The constitution of the Roman Republic*, Oxford, Clarendon Press, 1999, pp.159-160. See, also the entry ‘maiestas’ in the *Oxford Dictionary of the Classical World*. It is then possible to say that the concept of *maiestas* had, for the Romans, both a moral and a legal dimension. C.W. Chilton, ‘The Roman Law of treason under the Early Principate’, *The Journal of Roman Studies*, XLV, 1955, pp. 73-81.

⁹⁰ W. Ullmann, ‘The development of the medieval idea of sovereignty’, *The English Historical Review*, LXIV, 1949, p. 3: ‘...theoretically the emperor was lawful overlord and supreme monarch of Europe: every king and prince was inferior to him. Now, in practice this imperial superiority meant, firstly, that the *crimen laesae maiestatis* could not be committed against a king, e.g. the French or Spanish.’

⁹¹ Ibid, p. 1. On the concept of Empire, see: J. Muldoon, *Empire and order: the concept of Empire, 800-1800*, Basingstoke – New York, Macmillan – St. Martin’s Press, 1999. See, also: A.J. Carlyle, *A history of medieval political theory in the West*, (Volume IV), Edinburgh – London, W. Blackwood & Sons Ltd., 1970.

⁹² I have explored this idea in my MSt thesis, in which I discuss the relationship between the concepts of sovereignty and jurisdiction in Dante’s theory of a universal monarchy.

⁹³ W. Ullmann, ‘The development of the medieval idea of sovereignty’, *The English Historical Review*, LXIV, 1949, p. 3.

⁹⁴ Ibid, p. 8: ‘The overwhelming opinion amongst the French, however, was that, neither in fact nor in theory, could the French monarch be considered inferior to the emperor.’

Guilelmus Durandus (c. 1237 – 1296) considered the King equal to the Emperor, and applied the principle ‘*rex Franciae est princeps in regno suo*’ to the legal question of ‘whether a baron who rises against the French king would be guilty of the *crimen laesae maiestatis*’⁹⁵.

The event that practically tested the allegedly universal overlordship of the Emperor over the Kings of the Empire was the quarrel between Henry VII (c. 1275 – 1313) and Robert of Naples (1277 – 1343)⁹⁶. The King of Naples was charged by the Emperor with the *crimen laesae maiestatis* and ‘summoned to appear before the emperor through the imperial edict of 12 September 1312’⁹⁷. Yet, Robert of Naples ignored the summons. In doing so he challenged the authority of the Emperor. I would submit that such a challenge expresses Robert’s certainty that he was as sovereign as the Emperor (at least in relation to his Kingdom). Robert was able to challenge the authority of Henry VII because he was supported by the Pope, as the Kingdom of Naples was a fiefdom of the papal curia⁹⁸. In order to challenge the validity of Robert’s summons by Henry VII, Pope Clement V consulted the famous jurist Oldradus de Ponte⁹⁹. According to Oldradus, the King of Naples was outside the jurisdiction of the Emperor, who was therefore denied *plenitudo potestatis* in relation to territory controlled by Robert. Furthermore, Robert of Naples could not have committed *crimen laesae maiestatis*

⁹⁵ Ibid, p. 10. According to Ullmann, Durandus’ principle also provides a ‘clear conception of the king as ‘majestas’.’

⁹⁶ Henry VII became the Holy Roman Emperor in 1312 and died on 24 August 1313, at Buonconvento, near Siena, Tuscany. Robert of Anjou was King of Naples from 1309 to 1343. The rule of the house of Anjou meant that Naples was closely connected with the Kingdom of France. W.M. Bowsky, *Henry VII in Italy: the conflict of empire and city-state*, Lincoln, University of Nebraska Press, 1960.

⁹⁷ W. Ullmann, ‘The development of the medieval idea of sovereignty’, *The English Historical Review*, LXIV, 1949, p. 24.

⁹⁸ Raymond Bertrand de Got (1364-1314) was Pope, under the name of Clement V, from 1305 to 1314. He repudiated the political supremacy of the Holy Roman Empire over the Kingdoms of the Empire with the Bull *Pastoralis cura*. See, Ibid, p. 26: ‘The coincidence of papal interests and anti-imperial forces is one of the most fascinating aspects of the political life in the later middle ages.’

⁹⁹ His opinion on this issue can be found in his *Consilium 43*.

because Henry VII had no *major potestas*¹⁰⁰. Notwithstanding the papal support, Robert of Naples' strongest resource was the set of legal arguments produced by the jurists of the Neapolitan school. Amongst these, it is worth remembering the Neapolitan professor Andreas de Isernia (1230ca–1316) for his argument against Imperial supremacy. Andreas here stated that the Roman Empire – from which the authority of the Holy Roman Empire was derived by the theory of *translatio imperii*¹⁰¹– subjugated the world solely by the use of force, and that, therefore the authority of all *Romani Principes* was unlawful. He also observed that many Kings had never recognised the Emperor as their overlord and that each province of the Empire could have its own monarch¹⁰². There were, therefore, free kings (and the King of Naples was one of these) having the same *maiestas* (i.e. supreme political power) as the Emperor¹⁰³. According to Andreas, a free king was as sovereign within his kingdom, as the Emperor was within imperial territory.

I hope that this short excursion in the medieval debates about sovereignty will have shown that, *pace* Maritain, the “modern” idea of (state) sovereignty appears to be firmly rooted in medieval political and legal theory.

3.2 Maritain's metaphysical argument against state sovereignty

The question underpinning Maritain's analysis is whether the concept of sovereignty – “taken in its proper and genuine meaning”¹⁰⁴ – should be applied to the State or to the

¹⁰⁰ W. Ullmann, ‘The development of the medieval idea of sovereignty’, *The English Historical Review*, LXIV, 1949, p. 28.

¹⁰¹ J. Bryce, *The Holy Roman Empire*, London, Macmillan and Co. Ltd., 1910.

¹⁰² “*Rex est monarcha in regno suo*”. See W. Ullmann, ‘The development of the medieval idea of sovereignty’, *The English Historical Review*, LXIV, 1949, p. 22.

¹⁰³ *Ibid*, p. 23: ‘This sovereign position of a free king entailed, above all, the possibility of the *crimen laesae maiestatis* against his person.’

¹⁰⁴ J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 351. Emphasis added.

body politic. In order to understand this question, it is necessary to clarify two crucial distinctions: (i) between the legal and the “philosophical” meaning of ‘sovereignty’; and (ii) between State and body politic.

- (i) Maritain seeks to examine the “genuine philosophical meaning” of the concept of sovereignty, under the assumption that a sound discussion of sovereignty should consider it “not in terms of juridical theory, but in terms of political philosophy”¹⁰⁵.
- (ii) According to Maritain, a body politic is a (complete/perfect) political community, whereas a State is simply a part of the body politic – more precisely, it is “a part and an instrumental agency of the body politic”¹⁰⁶.

In light of his historical reconstruction of the origin of the notion of sovereignty, Maritain suggests that the meaning of ‘sovereignty’ includes two elements: first, “a [*natural* and *inalienable*] right to supreme independence and supreme power”; and, secondly, “a right to an independence and a power which, in their proper sphere, are supreme *absolutely* or *transcendently*, not *comparatively* or as a *topmost part* in the whole”¹⁰⁷. On this semantic ground, Maritain submits one of his most interesting comments about the concept of sovereignty. Maritain holds that although the use of the concept of sovereignty in political philosophy is wrong and generates confusion, in metaphysics this concept can be used in a valid way¹⁰⁸. In the political sphere, human agencies cannot be transcendently separate from (and supreme over) the whole of the people (i.e. the whole of the body politic). Yet, in the metaphysical sphere, it is correct

¹⁰⁵ J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 343. Maritain accepts Jellinek’s historical reconstruction of the history of the idea of sovereignty, according to which the concept of sovereignty was originally a political concept, and only later acquired a legal dimension.

¹⁰⁶ *Ibid*, p. 351.

¹⁰⁷ *Ibid*, p. 349.

¹⁰⁸ *Ibid*, p. 355: ‘Sovereignty is a curious example of those concepts which are right in one order of things and wrong in another.’

to say that God is transcendentally separate from (and supreme over) the whole of creation¹⁰⁹.

3.3 Maritain's conceptual argument against state sovereignty

In light of the considerations (and, partly, stipulations) above, Maritain maintains the proposition that the concept of sovereignty should be discarded from political philosophy. This proposition is also supported by the claim that the concept of sovereignty can be applied neither to the State, nor to the body politic¹¹⁰.

As to the body politic: true, by virtue of its nature “as a perfect or self-sufficient society”¹¹¹, it has a right to full autonomy. But this right has two dimensions. Full internal autonomy entails self-government with comparatively supreme independence and comparatively supreme power. Full external autonomy entails comparatively supreme independence and comparatively supreme power with regard to the international community. Furthermore, the right to full autonomy is a natural and inalienable right (full autonomy is not inalienable, but the right to full autonomy is). Hence, in a sound political philosophy, one can only apply the first dimension of autonomy to the body politic.

As to the State: by virtue of its instrumental nature, it has no right to supreme independence and to supreme power. Because the State depends upon the body politic, neither the first nor the second element of sovereignty can (in a sound political

¹⁰⁹ J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 355.

¹¹⁰ This claim, in turn, presupposes that the “proper and genuine meaning” of ‘sovereignty’ is a *natural* and *inalienable* right to *absolute* and *transcendent* supreme independence and supreme power.

¹¹¹ *Ibid*, p. 350.

philosophy) be applied to the State¹¹². In light of his definition of sovereignty, Maritain thinks that ascribing sovereignty to the State “vitiates the State”¹¹³. In order to demonstrate this point (connected to the moral rejection of absolutism), Maritain considers the possible three implications of the ascription of sovereignty (given its proper and genuine meaning) to the State.

- 1) In relation to its external dimension, the existence of sovereign States would entail that “no international law binding the States can be consistently conceived.”¹¹⁴
- 2) In relation to its internal dimension, any sovereign State would require maximum centralisation, eventually tending to totalitarianism¹¹⁵.
- 3) Any sovereign State would be entitled to exercise its supreme power without accountability.

According to Maritain these three implications are unacceptable and so the State cannot – rightly, that is, as a matter of sound political philosophy – be considered sovereign. On the other hand, the body politic can rightly be said to be sovereign, but, of course, only in a diminished way. Maritain thinks that the *natural* and *inalienable* right to supreme independence and supreme power which belongs to any body politic does not justify the use of the concept of sovereignty in political philosophy. Similarly, one does not need to use this concept (or word) to distinguish the State from other ‘subordinate government agencies and other associations.’¹¹⁶

I disagree with Maritain’s definition of sovereignty – according to which state sovereignty equals state absolutism – and in the next chapters I develop a different

¹¹² J. Maritain, ‘The concept of sovereignty’, *The American Political Science Review*, XLIV, 1950, p. 352: ‘Any right to power in political society is possessed by a man or a human agency in so far as he or it is in the body politic a *part* at the service of the common good...’.

¹¹³ *Ibid*, p. 355.

¹¹⁴ *Ibid*, p. 356.

¹¹⁵ *Ibid*, p. 356.

¹¹⁶ *Ibid*, p. 355.

(explanatory) definition of state sovereignty. Furthermore, I disagree with the conclusions of his three-fold argument: first, I think that the idea of sovereignty has a medieval origin; I think that sovereignty is not only a metaphysical concept, but also a political and a legal one; and I think that sovereignty can be predicated of a state political community (i.e. Maritain's body politics). However, for the purposes of this Chapter, whether or not the point of state sovereignty is indeed evil is secondary. The three-fold argument developed by Maritain is enough to suggest that the possibility of an inherently evil point of state sovereignty may still be part of the nature of state sovereignty. The next section will discuss the methodological implication of the acknowledgment of such a possibility.

4. Why (do we need) state sovereignty?

On the basis of a linguistic survey of the uses of the term 'sovereignty' described in the first section of the Chapter, it appears that this term cannot be defined *per genus et differentiam* (not even when is associated with the term 'state', which is, in turn, equivocal)¹¹⁷. I would argue that this is not an insoluble problem, since there are other types of definition available. In particular, the "central case approach" appears to offer a viable instrument for defining state sovereignty. This final section is intended to explain how the question about the point of state sovereignty can be combined with the central case approach. This combination will help me to identify and explore the paradigm case of state sovereignty (which, in turn, will allow me to explain the nature of state sovereignty by means of an explanatory definition of state sovereignty).

In the second section, I suggested that the problem of the nature of state sovereignty should be tackled in light of the question: what is the *point* of state

¹¹⁷ Of course, this is the case unless one decides to use a stipulative definition of sovereignty.

sovereignty?¹¹⁸ The fact that none of the four conceptions of state sovereignty described in that section engaged with this question, led me to conclude that a different investigation of the nature of sovereignty is in order. In this section, I will also suggest that the point of state sovereignty should be identified in connection with the basic human goods that allow us to explain our (individual and collective) actions.

Yet, I have acknowledged the possibility that the point of state sovereignty may be inherently evil (i.e. it may necessarily harm one or more of the basic goods). In the third section of this Chapter, I discussed a strong case against state sovereignty and I argued that the point of state sovereignty should not be conceived of – at least, *prima facie* – as evil. In any case, I would submit that, for the purposes of my research, whether or not the point of state sovereignty is evil, is a secondary problem. In fact, my main contention here is that the problem of the nature of state sovereignty can only be properly tackled in light of the “reasonably” good case of state sovereignty. In my view, this “reasonably” good case of state sovereignty should be described as the paradigm case of state sovereignty. The reason for this lies in a lesson from contemporary general jurisprudence: the method outlined, and fruitfully employed, by John Finnis to answer the *quaestio vexata* ‘what is law?’ (A question which is very similar, at least formally, to the question ‘what is state sovereignty?’)¹¹⁹. As Finnis has clarified, the challenge for a general theory in the social sciences ‘is not to find or devise definitions which will extend to *all* circumstances in which, regardless to particular points of view, the word

¹¹⁸ Some commentators takes this kind of question to be a moral question. See, for example, P.C. Oliver, ‘Sovereignty in the twenty-first century’, *King’s College Law Journal*, XIV, 2003, p. 137: ‘What difficult questions underlie sovereignty? First, we have to acknowledge that sovereignty takes in issues related not only to law, but to politics, economics, culture and morality. We might then ask questions such as how economics, politics and culture relate to legal sovereignty. A state with all the attributes of legal sovereignty may have lost much of its ability to control its destiny politically, economically and culturally. Considerations such as these bring us on to a *central moral question: what is sovereignty for?*’ Emphasis added. As the rest of the Thesis will demonstrate, this kind of question should be thought of as a “practical”, rather than a moral question.

¹¹⁹ See, e.g., Chapters I and X of J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011 (second edition). See, also: T. Endicott, ‘The Logic of Freedom and Power’, in S. Besson & J. Tasioulas (eds.), *The Philosophy of International Law*, Oxford, Oxford University Press, 2010.

being defined could ‘correctly’ be employed.’¹²⁰ One should, instead, look for, and establish, the “focal meaning” of theoretical concepts with the intention of developing an *explanatory definition*¹²¹. In order to do so, it is necessary to follow a method which aims at the explanation of ‘the links between human institutions and the values and requirements of practical reasonableness.’¹²² In relation to his definition of law – as a general concept – Finnis underlines that his purpose has not been to explain: ‘an unfocused ‘ordinary concept’ but to develop a concept for use in a theoretical explanation of a set of human actions, dispositions, interrelationships and conceptions’¹²³. It is important to remember that such a set is united ‘by virtue of their adaptation to a specifiable set of *human needs* considered in the light of empirical features of the human condition.’¹²⁴

The “definition” of state sovereignty that I aim to provide in this Thesis is not intended to be a definition applicable to each and every instance of the expression ‘state sovereignty’. In other words, my search for a definition of state sovereignty is meant to illuminate the *focal meaning* of the concept of state sovereignty. This will be done by reference to the human standing needs of the members of sovereign states¹²⁵. From this standpoint, I will reflect upon the institutions and the norms that constitute state sovereignty, by asking: *why* do we – members of those political communities that we

¹²⁰ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011 (second edition), p. 265. Emphasis in the original.

¹²¹ Ibid, p. 277.

¹²² Ibid, p. 265. On this method, see, more generally: Ibid, pp. 3-22.

¹²³ Ibid, p. 278.

¹²⁴ Ibid, p. 279. Emphasis added. See, also, Ibid, p. 265: ‘...the point of a jurisprudence such as is exemplified in this chapter is to explain certain human institutions by showing how they are responses to the requirements of practical reasonableness.’ Cf. T. Endicott, ‘The Irony of Law’, in J. Keown & R.P. George (eds.), *Reason, Morality, and Law: The Philosophy of John Finnis*, Oxford, Oxford University Press, 2013.

¹²⁵ On (human) needs, and their importance for our understanding of human affairs, see: J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford, Oxford University Press, 2011 (second edition), p. 205 (where Finnis refers to H.L.A. Hart). See, also: D. Wiggins, *Needs, Values, Truth: Essays in the Philosophy of Value*, Oxford, Oxford University Press, 1998 (third edition).

call ‘states’ – *need* (state) sovereignty? For those norms and institutions belong to the domain of human affairs; and in this domain *why-questions* have the strongest explanatory power¹²⁶. Indeed, I think that the nature of state sovereignty, qua social construction, should be studied in light of an appreciation of our practical reasoning¹²⁷. This also demonstrates awareness of the difference between the final causes and the material conditions of a given state of (human) affairs. This awareness offers further support to the importance of why-questions for the identification, and examination, of the paradigm case of state sovereignty in the context of our complex social reality¹²⁸.

Our social reality, like our world in general, is characterised by a multi-dimensional complexity¹²⁹. This complexity can be approached by asking different types of questions. When investigating the nature of state sovereignty, one can ask a

¹²⁶ On the philosophical importance of the why-question, see E. Agazzi, ‘La filosofia come invenzione del perché’, *Bollettino della Società Filosofica Italiana*, CXXVII, 1986, pp. 15-22; and, more recently, G. Webber, ‘Asking Why in the Study of Human Affairs’, *American Journal of Jurisprudence*, LX, 2015, pp. 51-78.

¹²⁷ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford, Oxford University Press, 2011 (second edition), p. 138. For Finnis, attention to the why-type question is at the heart of the fourth order of inquiry. It is of course possible to study any social construction by asking the types of questions that characterise the other three orders of inquiry, in order to explain the natural, logical, or material conditions for the existence of state sovereignty. Yet, these explanations would not be able to illuminate the paradigm case of state sovereignty. I expand on this point in Chapter 6.

¹²⁸ The significance of the difference between final causes and conditions of a given state of human affairs has been explained, with a very clear example, by Socrates (Phaedo 98c2-99b4): ‘...he seemed to me to be in exactly the position of someone who said that all Socrates’ actions were performed with his intelligence, and who then tried to give the reasons for each of my actions by saying, first, that the reason why I’m now sitting here is that my body consists of bones and sinews, and the bones are hard and separated from each other by joints, whereas the sinews, which can be tightened and relaxed, surround the bones, together with the flesh and the skin that holds them together; so that when the bones are turned in their sockets, the sinews by stretching and tensing enable me somehow to bend my limbs at this moment, and that’s the reason why I’m sitting here bent in this way; or again, by mentioning other reasons of the same kind for my talking to you, imputing it to vocal sounds, air currents, auditory sensations, and countless other such things, yet neglecting to mention the true reasons: that Athenians judged it better to condemn me, and therefore I in my turn have judged it better to sit here, and thought it more just to stay behind and submit to such penalty as they may ordain. [...] ...to call such things “reasons” is quite absurd. It would be quite true to say that without possessing such things as bones and sinews, and whatever else I possess, I shouldn’t be able to do what I judged best; but to call these things the reasons for my actions, rather than my choice of what is best, and that too though I act with intelligence, would be a thoroughly loose way of talking. Fancy being unable to distinguish two different things: the reason proper, and what without which the reason could never be a reason!’ Plato, *Phaedo*, translated with notes by D. Gallop, Oxford, Clarendon Press, 1975 (reprinted with corrections 1983), pp. 50-51. See also: D. Bostock, *Plato’s Phaedo*, Oxford, Clarendon Press, 1986, pp. 142-146; Plato, *Phaedo*, edited by C.J. Rowe, Cambridge, Cambridge University Press, 1993, pp. 236-237.

¹²⁹ It is possible to study our complex reality through four types, or orders, of inquiry, see: J. Finnis, *Aquinas: Moral, Political and Legal Theory*, Oxford, Oxford University Press, 1998, pp. 20-23.

number of what-questions that conceive of sovereignty as a fact independent from us, or as a set of propositions that can be known and logically combined, or as a reality that we can transform. I suggest that the *what-questions* about state sovereignty should be considered secondary vis-à-vis the *why-question* about state sovereignty; in particular, the why-question about the point of state sovereignty.

In light of the methodology outlined by Finnis, I consider the paradigm case of state sovereignty, like the paradigm case of law, is that able to promote and realise certain basic goods, by means of a proper response to certain basic human needs. In light of my discussion of Maritain's three-fold criticism against state sovereignty, it is my view that my search for an explanatory definition of state sovereignty should take into account the crucial distinction between external and internal sovereignty¹³⁰. I would, therefore, formulate the research question of the Thesis as follows: what are the standing human needs that make *sovereignty* (despite the risks associated with its exercise) necessary and desirable for a *state*, both externally and internally?

¹³⁰ This distinction is crucial for Maritain's theoretical argument against state sovereignty. Furthermore, my initial linguistic analysis of 'state sovereignty' alluded to the distinction between external and internal sovereignty – a distinction that emerged (without being explicitly discussed) in the context of my description of the four conceptions of state sovereignty.

Chapter 2

External and internal sovereignty in legal theory

In this Chapter I will describe, and analyse, the way in which (state) sovereignty has been conceptualised in the seminal work of the following legal theorists: John Austin (1790 – 1859); Hans Kelsen (1881 – 1973); Alf Ross (1899 – 1979); H.L.A. Hart (1907 – 1992); and Neil MacCormick (1941 – 2009). On the basis of my analysis, I will examine how different explanations of the relationship between law, state and sovereignty can generate different explanations of external and internal sovereignty, considered severally and altogether.

Legal theorists have studied (state) sovereignty mainly in the context of a general theory of law¹. I would submit, however, that legal theory's perspective on (state) sovereignty is particularly relevant for my research, despite the fact that its main object of inquiry is the nature of state sovereignty, rather than of law. In this regard, I would suggest that there are, at least, two good reasons to think that the insights offered by legal theory – and, especially, by analytical jurisprudence² – into (state) sovereignty will be helpful in answering my research question.

The first reason concerns my methodological approach to state sovereignty: an approach which requires me to search for an *explanatory definition* of state sovereignty. In the previous Chapter, I argued that the method expounded in *Natural Law and Natural Rights* to explain the central case of (positive) law should also be applied to state sovereignty. Now, it should be remembered that Finnis' version of the central case

¹ In some cases, also in the context of theory of the state: this is particularly true in the Continental tradition.

² My understanding of the main features of this philosophical approach to the study of law in general follows: P. Chiassoni, *L'indirizzo analitico nella filosofia del diritto*, Turin, Giappichelli, 2009, pp. 2-5.

approach was not made from scratch. It was, in fact, developed by acknowledging: (i) the methodological progress that occurred in the last century's analytical jurisprudence – progress that ultimately led theorists to appreciate the significance of the internal point of view; (ii) the importance of value-judgements for the epistemology of the social sciences; and (iii) the role played by basic goods and requirements of practical reasonableness in our understanding of human deliberations and actions³. Hence, I would suggest that, as comparing different “analytical” theories of law has proved to be useful for the development of an explanatory definition of law, one can expect that comparing different “analytical” conceptions of (state) sovereignty would provide fruitful assistance in my search for an explanatory definition of state sovereignty. It is true that, despite being a remarkable achievement, (i) was not sufficient, alone, to develop an explanatory definition of law. Similarly, I should clarify that the results of this Chapter, whatever they may be, will not be sufficient, alone, to develop an explanatory definition of state sovereignty⁴. They will be, nonetheless, useful: at least, insofar as they will demonstrate the importance, for the purposes of my research, of the correlation between (state) law and (state) sovereignty.

The second reason why it would be helpful, for the purposes of my Thesis, to reflect upon the insights into (state) sovereignty offered by analytical jurisprudence follows from the specific formulation of my research question. A key element of that question is the distinction between external and internal sovereignty⁵. Legal theorists tend to discuss (state) sovereignty in light of the question: What is the relationship, if

³ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011 (second edition), pp. 3-22; 426-436.

⁴ I have defended (ii) in Chapter 1, and I will defend it again in Chapter 6. Chapters 4 to 6 analyse and expand on the connection between (iii) and the needs that make state sovereignty necessary and desirable.

⁵ In the final section of Chapter 1, I formulated my research question in the following terms: what are the standing human needs that would make sovereignty (despite the risks inherently associated with it) necessary and desirable for a state, both externally and internally?

any, between (positive) law and (state) sovereignty?⁶ Within analytical jurisprudence, state law has been commonly considered to be the exemplar of positive law: legal theorists have, consequently, paid much attention to the relationship between state law and (state) sovereignty. As indicated in the first Chapter, external and internal sovereignty are usually distinguished by reference to the idea of state jurisdiction. Hence, I would suggest that analytical jurisprudence, because of its focus on state law, may illuminate different conceptions of the relationship between external and internal sovereignty.

In the first section of the Chapter, I will discuss Austin's conception of sovereignty, with special reference to the idea of an independent political society (§1). I will then discuss Kelsen's argument that sovereignty is the property of only one legal order – and that, as such, sovereignty can only be predicated of either a municipal legal order, or the international legal order (§2). Subsequently, I will engage with Ross' thesis that state sovereignty is a bundle of "functional" concepts (§3). These last two sections will also include Hart's critical remarks on the theoretical assumptions proper to the conception of sovereignty under scrutiny. Hart's own view on state sovereignty – as exposed in Chapter X of *The Concept of Law* – will be presented separately (§4). Finally, I will examine MacCormick's idea of post-sovereignty; and his argument that, as demonstrated by a modern *Rechtsstaat*, external sovereignty may be present even though internal sovereignty may be absent (§5). I will conclude the Chapter comparing these five different conceptions of (external and internal) sovereignty. In light of this comparison, I will argue that (state) law and (state) sovereignty are co-related. And on the basis of this correlation, I will submit that an analysis of legal discourse will help me discover the content of (external and internal) sovereignty claims (§6).

⁶ For a recent example, see: P. Eleftheriadis, 'Law and Sovereignty', *Law and Philosophy*, XXIX, 2010, pp. 535-569. On the basis of their understanding of the relationship between law and sovereignty, different legal theorists have offered different solutions to the problems of the location and of the content of (state) sovereignty.

1. John Austin: the idea of an independent political society

Lecture VI of John Austin's *The Province of Jurisprudence Determined* is mainly devoted to an analysis of: '...the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*.⁷' Austin conceives of sovereignty as a key concept in his theory of law, according to which: '[e]very positive law [...] is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.'⁸

It is worth remembering that Austin explicitly aims to distinguish sovereignty from other forms of *might*. This demonstrates that, according to his view, sovereignty is a matter of *de facto* power. From this standpoint, he suggests that sovereignty is distinguishable from other forms of (factual) superiority in light of two situations that can be observed in a given society: a positive and a negative state of affairs⁹. The positive situation is that the bulk of a given society is in a habit of obedience to a (collective or individual) person; and that this superior person must be determinate and common. The negative situation is that this superior person is not in a habit of obedience to any another determinate (collective or individual) person¹⁰. Austin argues that it is possible to talk about sovereignty in a given society only if, in a given society, it is possible to observe the union of these two situations. Indeed, Austin's definition of sovereignty (and of an independent political society) is the following:

⁷ J. Austin, *The Province of Jurisprudence Determined* (1832), edited by W.E. Rumble, Cambridge, Cambridge University Press, 1995, p. 165. Emphasis in the original.

⁸ *Ibid*, p. 165.

⁹ According to Austin, these two characteristics of a given society also allow one to distinguish an independent political society from other forms of society.

¹⁰ Interestingly, both features rely upon the idea of a habit of obedience – which is at the core of Hart's criticisms.

If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.¹¹

It should be noted, however, that Austin very carefully qualifies this definition by saying that, in fact, only the sovereign – or, more precisely, the sovereign portion of the society – and not the political society as a whole, is independent. Nonetheless, the presence of such an independent superior in a given society is, for Austin, sufficient to distinguish that society from a subordinate society. An independent political society is, for Austin, a society that includes both a sovereign and subjects.

On the contrary, a society that is not independent simply includes subjects (i.e. the whole society is in a habit of obedience to a superior)¹². In this regard, Austin affirms that a given society is not an independent society unless its “sovereign” – i.e., the portion of the society that is usually obeyed by the rest of the society – is *not* in a habit of obedience to a determinate and common superior. Austin also affirms that a given society is not a political society unless the generality, or *bulk*, of its members is in a *habit* of obedience to a *determinate* and common superior¹³. This means that, for Austin, it is possible for a human society to be classified in light of the following four categories: (i) political and independent¹⁴; (ii) political, and not-independent (i.e.

¹¹ J. Austin, *The Province of Jurisprudence Determined* (1832), edited by W.E. Rumble, Cambridge, Cambridge University Press, 1995, p. 166.

¹² Another possibility, not explicitly acknowledged by Austin at this point, is, of course, that of a society where the superior is in a habit to obedience to another (collective or individual) person. See, *infra*, the example – provided by Austin – of a Province governed by a Viceroy (see, *infra*, fn. 15).

¹³ This condition includes three quantitative requirements. The first concerns the number of subjects: for Austin, this number should be ‘considerable’ (or, at least, ‘not extremely minute’). The second concerns the temporal dimension of the relationship between subjects and sovereign: for Austin, the habit of obedience must be continuous over a period of time. The third concerns the sovereign, who, for Austin, must be one and the same (collective or individual) person for all the relevant subjects.

¹⁴ Austin explicitly uses the expressions ‘independent political society’ and ‘independent and sovereign nation’ as synonymous. See *Ibid*, p. 167.

subordinate)¹⁵; (iii) non-political (i.e. natural) and independent¹⁶; and, (iv) non-political (i.e. natural) and not-independent (i.e. subordinate)¹⁷. According to Austin's theory, sovereignty only pertains to those societies that can be classified under (i). For the purposes of my research, this last point appears to encapsulate the most interesting aspect of Austin's conception of sovereignty: that is, the suggestion that sovereignty is inherently connected with a society that is *political and independent*¹⁸. In addition, there is another element of Austin's theory that is worth considering, especially in relation to the idea of sovereign equality of states: the (natural) society formed by the intercourse of independent political societies.

According to Austin, it is true that a number of independent political societies co-exist in the world. The following two propositions, for Austin, are also true¹⁹. First, independent political societies, when considered collectively, are commonly said to live in a state of nature. Secondly, independent political societies, when considered collectively, are commonly said to form a natural society. Having said that, it is worth remembering that, according to Austin, the two expressions 'state of nature' and

¹⁵ Austin uses the following example to illustrate a political society that is not independent: a Province, in which the bulk of the population habitually obey the Viceroy, who in turn is in a habit of obedience to the King. In this case, Austin argues, the inhabitants of that Province (including the Viceroy) form a subordinate political society, in the sense that, despite being a political society (because they create an inferior-superior situation), they all obey, directly or indirectly, the King, who is the sovereign of the larger society.

¹⁶ See J. Austin, *The Province of Jurisprudence Determined* (1832), edited by W.E. Rumble, Cambridge, Cambridge University Press, 1995, pp. 170-171: 'A natural society, a society in a state of nature, or a society independent but natural, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence.'

¹⁷ See *ibid.*, p. 172: 'Although it consists of members living in a state of subjection, it consists of subjects considered as private persons. – A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.'

¹⁸ In Chapter 6, I will defend the view that state sovereignty is inherently connected with a political community's claims to independence and supremacy. It should be noted, however, that the argument – developed throughout Chapters 4 to 6 – that supports that view is very different from Austin's argument, both methodologically and theoretically.

¹⁹ *Ibid.*, p. 171.

‘natural society’ are not perfectly apposite²⁰. For, since each independent society is *political*, independent political societies, even when considered collectively, cannot be said to be in a state of nature; and, secondly, the society formed by the intercourse of those independent societies cannot be said to be a natural society. Austin argues that, in fact, the international society is formed by the intercourse of the sovereign portion of each independent political society. This means that international law – the province of which is, for Austin, the intercourse of independent political societies – ‘regards the conduct of sovereign considered as related to one another.’²¹

1.1 Dewey’s criticism of Austin’s theory of law and sovereignty

As well known, Austin’s conception of (positive) law as has been extremely influential in the English speaking world and beyond. Yet, despite the many praises that have welcomed it, Austin’s theory has also received a number of criticisms²². For the purposes of my research, I would like to focus attention on a critical appraisal of Austin’s theory of law and sovereignty. I would like to remember John Dewey’s criticism of Austin’s theory of law and sovereignty. For Dewey’s article ‘Austin’s Theory of Sovereignty’ calls into question three important aspects of Austin’s theory²³.

²⁰ J. Austin, *The Province of Jurisprudence Determined* (1832), edited by W.E. Rumble, Cambridge, Cambridge University Press, 1995, p. 171.

²¹ Ibid, p. 171. From this, it follows that international law, or the law obtaining between nations, ‘is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.’ Ibid. The duties imposed by international law are backed up, for Austin, only by moral sanctions.

²² Most famously, in Chapter IV of *The Concept of Law*. See H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), pp. 50-78

²³ J. Dewey, ‘Austin’s Theory of Sovereignty’, *Political Science Quarterly*, IX, 1894, pp. 31-55. The article begins by raising an interesting exegetical point. In the first section of the article, Dewey argues that Austin’s theory has been misconceived – possibly, perverted – and that such a misconception (attributed by Dewey to George Cornwall Lewis and Thomas Hill Green) generated what Dewey calls “the Austinian myth”. Yet, Dewey’s article is concerned with three questions that stem from a theory like Austin’s theory, leaving aside the problem of the correct attribution of that theory: ‘It would be worth while [...] to reopen the question of Austin’s theory of sovereignty, were it only for the purpose of bringing to light this current misapprehension; but this is not my main motive at present. Austin’s real

First, Dewey claims that ‘...there is a confusion of sovereignty with the organs of its exercise.’²⁴ In this regard, Dewey’s argument begins by highlighting how Austin’s understanding of sovereignty is deeply linked to the way in which he distinguishes between moral and positive law – both types of laws being a command of a superior to an inferior. According to Dewey, this distinction is drawn by Austin on the basis of the type of superior that issues the command. Positive laws would then be distinguishable from moral laws because the former are issued by a political superior who is the (collective or individual) sovereign in a given society. Yet, Dewey notices how Austin acknowledges that, despite not being in a habit of obedience to another person, the sovereign of a given political society habitually defers to the shared opinions and sentiments of the society. Nonetheless, the political sovereign can be distinguished from the public because the sovereign is determinate, whereas the public is not. Dewey underlines this last point: ‘it is the determinateness of the authority which issues the commands, then, which is the sole essential *differentia* of sovereignty from the force exerted by public opinion.’²⁵ The first question asked by Dewey is whether it is really the case that sovereignty resides in a specific numerical portion of the body politic. Dewey answers the question in the negative, by considering whether Dicey’s theory can really explain the facts. In particular, Dewey argues that, if Austin’s theory is correct, then the theory of popular sovereignty – which is commonly accepted in American constitutional law discourse – would be wrong. Furthermore, Dewey argues that despite the appearance, Austin’s theory entails what it tries to reject – i.e. the notion that the sovereign is indeterminate. In relation to the US, Austin’s theory affirms that,

theory raises questions as important as does that of Lewis [...] It is these questions which I propose to raise in this article.’ Ibid, p. 34.

²⁴ Ibid, p. 34.

²⁵ Ibid, p. 36. Emphasis in the original.

ultimately, the electorate is the sovereign, but for Dewey this leads to an indeterminate definition of sovereignty. In relation to this first issue, Dewey affirms that the

ultimate weakness of Austin's theory is that it identifies sovereignty with a part only of the body politic, he gives (and allows) no reason why this limited body of persons have the authority which they possess.²⁶

This key feature of Austin's theory is, for Dewey, problematic because it excludes from the range of the theory itself the social forces that over time give governments not only their determinate nature but also their authority.

The second question raised by Dewey is about the relationship between government and sovereignty: can government be identified with sovereignty? Dewey answers this question in the negative, and argues that 'the most important operations of sovereignty, namely, the institution and development of law, are incompatible with an identification of sovereignty with government.'²⁷ This argument is based upon the notion that the institution and development of law requires a theory according to which 'government is an organ of sovereignty, not sovereignty itself.'²⁸ Now, law, and in particular constitutional law, appears to determine the character of the government of a given polity; and this last point is acknowledged by Austin. Dewey argues that if there is a force capable of giving government its character, then that force 'is sovereign, and the formation of constitutional law is the primary and radical exercise of sovereignty.'²⁹ Clearly, this last proposition could not be accommodated within Austin's theory, since constitutional law is, for Austin, positive morality (and as such, constitutional law belongs to a space where it does not make sense to talk about sovereignty). So the main

²⁶ J. Dewey, 'Austin's Theory of Sovereignty', *Political Science Quarterly*, IX, 1894, p 41.

²⁷ Ibid, p. 42. This thesis is in line with Dewey's view – related to his first question – that 'there is no ground for holding that the residence of sovereignty can be found in a certain definitely limited portion of political society.' Ibid, p. 42.

²⁸ Ibid, p 42.

²⁹ Ibid, p 43.

disagreement between Dewey and Austin is about the ultimate base of order in a polity: Dewey thinks that that base is also moral, whereas Austin thinks it is only moral. In particular, Dewey holds the view that

Austin makes a complete gap between the social forces which determine government and that government itself. The former cannot state law, the latter can; the former is a mere aggregate, the latter is sovereign; the former is *merely* moral, the latter *merely* legal.³⁰

Furthermore, Dewey criticises Austin's theory because, by considering constitutional law to be positive morality, it cannot accommodate the modifications that a government is always undergoing despite its continuity.

The third question raised by Dewey concerns the relationship between "municipal law" and sovereignty. In particular, Dewey considers whether Austin's theory can properly explain the role played by custom in the development of law. According to Austin, custom can never be the source of law: custom can be recognised as law by the courts as a result of an explicit or tacit law (i.e. a command of the sovereign). Dewey thinks that two facts can disprove this thesis: 'the abolition, in the American colonies, of English law, both common and statute, by mere disuse... [and] the recognition given by the United States to some of the customs of the Indian tribes relating to marriage and inheritance.'³¹

In connection with the role played by custom, Dewey makes an interesting point about the way in which a theory like Austin's theory is able to accommodate the authority of institutions that are not the "sovereign" government: for examples, families, churches, schools, or business partnerships. For Dewey it does not make sense to argue – as Holland does to defend Austin's theory – that these authorities are delegated or permitted by the sovereign. According to Dewey:

³⁰ Ibid, p 43.

³¹ Ibid, p 47.

it is not that there is already a sovereign and institutions, and the former then delegates to the latter authority to act. The institution exists only as it has this effective authority, and sovereignty is only a metaphysical substratum, save as it is embodied in positive institutions.³²

2. Hans Kelsen: the monistic conception of state sovereignty

According to Kelsen, the idea of (state) sovereignty can only be explained as a normative concept³³. Indeed, Kelsen explains (state) sovereignty in light of the relationship between legal orders. More precisely, the thesis defended by Kelsen is that (state) sovereignty can be predicated of only either a particular national legal order, or the international legal order³⁴. From a methodological point of view, Kelsen conceives of the idea of sovereignty as a *hypothesis* in legal thinking that a given legal order has the quality of being autonomously valid. As a consequence, the problem of when a given state may be said to be sovereign should be rephrased, for Kelsen, as a question concerning the psycho-sociological conditions under which a jurist makes that hypothesis³⁵.

If one embraces, as Kelsen does, a monistic view of the legal domain, when a valid legal order is considered in relation to another valid legal order, they can only be simultaneously valid only if the non-sovereign legal order is comprehended in the sovereign legal order as a part in the whole. According to Kelsen, therefore, the

³² J. Dewey, 'Austin's Theory of Sovereignty', *Political Science Quarterly*, IX, 1894, p 49.

³³ Kelsen distinguishes between the *idea* of sovereignty and the *dogma* of sovereignty. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts (Beitrag zu einer Reinen Rechtslehre)*, Tübingen, 1928; not available in English, but available, for example, in Italian as H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale (Contributo per una dottrina pura del diritto)*, Milan, Giuffrè, 1989.

³⁴ This section will show how this thesis rests upon two fundamental presuppositions: first, the identity between the state and the state legal order; and, second, a monistic conception of the relationship between the international legal order and the national legal orders.

³⁵ H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts (Beitrag zu einer Reinen Rechtslehre)*, Tübingen, 1928, p. 14-15. The idea of sovereignty here is a presupposition made by a jurist who seeks to know the law (i.e. their legal order) and to understand sovereignty as a legal concept.

sovereign legal order is a sort of total legal order. This is the reason why, for Kelsen, in order to accept the notion that each and every national legal order is valid, it is necessary to assume the existence of an authority superior to the states, and also able to coordinate the state legal orders. As a consequence, Kelsen maintains the thesis that either the state is sovereign, and no international legal order is above it; or the international legal order is sovereign, and, as such, it determines the sphere of validity and the reason of validity of the state legal orders³⁶.

The thesis that sovereignty is a quality of a normative order has been discussed by Kelsen within his analysis of the concepts of the state and the legal order. Kelsen rejects the state – legal order dichotomy, by arguing that a state is simply a legal order which has reached a certain degree of centralisation³⁷. From this perspective, Kelsen criticises the traditional definition of a state in terms of territory, people, and power. According to Kelsen, the power of a state lies in the validity and the efficacy of its national legal order. The territory and the people merely represent the special and the personal sphere of validity of a legal order; whereas the subject-matter regulated by, and the persistence in time of the legal order, represent its material and temporal sphere of validity, respectively³⁸.

Kelsen suggest that recognising a given legal order as sovereign means presupposing its validity; more precisely, it means presupposing the validity of the so-called “historically first constitution” – this presupposition is what Kelsen calls the

³⁶ International law determines not only juxtaposition in space, but also succession in time.

³⁷ H. Kelsen, *An introduction to the problems of legal theory* [A translation of the first edition of the *Reine Rechtslehre* or “Pure Theory of Law” (1934)], Oxford, Oxford University Press, 1992, p. 99: ‘Not every legal system, however, is characterised as a state [...] When the legal system has achieved a certain degree of centralisation, it is characterised as a state.’ Kelsen distinguishes between decentralised and centralised legal systems – as well as between primitive and state legal communities – as a matter of quantitative and not of qualitative degree.

³⁸ The territorial and material spheres of validity of a state legal system are limited since they are not valid everywhere and they do not regulate all human actions/relations. Ibid, p. 100: ‘...that the state is the sovereign legal system means, in particular, that it has the capacity, unrestricted by any higher legal system, to extend its validity territorially as well as materially. This is usually characterised as absolute sovereignty.’

Grundnorm. This “basic norm”, in one of its formulations, states that one ought to behave as the constitution prescribes: ‘Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribes.’³⁹ Kelsen argues that the function of the *Grundnorm* becomes particularly apparent when a constitution is changed by means of a revolution, i.e. when ‘the existence – that is, the validity – of the entire legal order directly based on the constitution, is in question.’⁴⁰ According to Kelsen’s theory of legal discontinuity, the identity of a legal order changes when its “historically first constitution” changes. Therefore, every revolutionary change implies that a new legal order has been recognised to be sovereign. Kelsen attempts to explain such recognition in terms of “effectiveness” and “authorisation”, concepts related to principles of international law⁴¹.

In other words, state sovereignty is interpreted by Kelsen as the sovereignty of a centralised legal order. Such an order is identified by referring to a unique basic norm, which is the source of validity for all the norms belonging to that legal order. Hence, the problem of state sovereignty can be seen as the problem of the simultaneous validity of two legal orders. Is the state legal order the highest legal order, vis-à-vis other (supposedly valid) legal orders? According to Kelsen, the original and absolute sense of

³⁹ H. Kelsen, *Pure Theory of Law* (translated by M. Knight), Berkeley and Los Angeles, 1967, p. 201.

⁴⁰ Ibid, p. 208; see also H. Kelsen, *General Theory of Law and State*, Cambridge (Mass.), Harvard University Press, 1945, p. 118: ‘It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government [...] If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by large, in conformity with the new order, then this order is considered as a valid order. [...] But this means that a new basic norm is presupposed.’

⁴¹ Sovereignty as a problem related to relation between nation law and international law, Ibid, pp. 383-388. See also H. Kelsen, ‘Sovereignty’, in: S.L. Paulson, *Normativity and Norms*, Oxford, Oxford University Press, 1998, pp. 525-36. Cf. S.L. Paulson, ‘Material and formal authorisation in Kelsen’s pure theory’, *Cambridge Law Journal*, XXXIX, 1980, pp. 172-93; J. Raz, ‘The identity of a legal system’, in: J. Raz, *The Authority of Law*, Oxford, Oxford University Press, 1979, pp. 78-102; J. Raz, ‘Kelsen’s theory of the basic norm’, Ibid, pp. 122-45; T. Honoré, ‘Reflections on revolutions’, *The Irish Jurist*, II, 1967, pp. 268-78. See also: H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), pp. 61-66; R.W. Dias, ‘Legal politics: norms behind the *Grundnorm*’, *Cambridge Law Journal*, XXVI, 1968, pp. 233-59; J.W. Harris, ‘When and why does the *Grundnorm* change?’, *Cambridge Law Journal*, XXIX, 1971, pp. 103-33.

sovereignty requires the sovereignty of one state to be incompatible with the sovereignty of another state, and of the international legal order. This means that, according to Kelsen, a monistic construction based on the primacy of the legal order of one's own state is incompatible with the notion of a plurality of coordinate states, i.e. with a set of states ranked equally and legally separated from each other in their own spheres of validity.

2.1 Kelsen's doctrine of the unity of law

Kelsen's idea of sovereignty is grounded in his doctrine of the unity of law – a doctrine that revolves around the following thesis: (P) all valid laws form a single system. This section of the Chapter will consider the arguments offered by Hart against Kelsen's doctrine of the unity of law. By criticising (P), those arguments will suggest a way to critically analyse Kelsen's monistic conception of state sovereignty.

Kelsen's monistic conception of state sovereignty presupposes two theoretical positions: (i) the identification of the state with the state legal order; and (ii) the monistic conception of the relationship between the international legal order and the state legal order(s). The last position, in particular, depends on Kelsen's theory of the unity of law. This theory has been criticised by H.L.A. Hart in his essay *Kelsen's Doctrine of the Unity of Law*⁴².

In this essay, Hart considers how the doctrine of the unity of law affects the Kelsenian explanation of the (possible or actual) relationships between the international law and the systems of municipal law. According to Hart, Kelsen's doctrine is characterised by two central theses.

⁴² H.L.A. Hart, 'Kelsen's Doctrine of the Unity of Law', in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983.

- A positive thesis (P): All valid laws form a single system
- A negative thesis (N): Valid laws cannot conflict

Hart identifies a strong (SD) and a weak (WD) version of Kelsen's doctrine of the unity of law. In the context of (SD), the theses (P) and (N) *necessary* hold. In the context of (WD) the theses (P) and (N) hold *contingently*. According to (SD) international law and the systems of municipal law necessarily form one single system and necessarily cannot be in conflict, whereas according to (WD) international law and the systems of municipal law may or may not form one single system, and may or may not be in conflict. Hart holds the view that both (SD) and (WD) are mistaken. If the strong and the weak version of the doctrine of the unity of law are mistaken, the theoretical position (ii) must be called into question⁴³.

I believe, however, that the argumentative strategy used by Hart is useful for my analysis of the idea of sovereignty as a quality of a state political community⁴⁴. Yet, before discussing how the Hart's explanation of the relationships between legal orders can provide a framework to illuminate the idea of state sovereignty, it is necessary to illustrate which aspects of the Kelsenian conception of sovereignty are affected by the arguments offered by Hart. According to Kelsen, international law and municipal law constitute one single legal system. Interestingly enough, Kelsen thinks that the choice between the two possible forms of the monistic theory – i.e. primacy of international

⁴³ The doctrine of the unity of law provides the basis not only for the theoretical position (ii) but also for the analysis of the relationship between law and morals (i.e. between a legal order and a moral order). In this case, the question would be the following: is it possible to have simultaneously valid legal and valid moral norms? According to Kelsen, the legal and the moral point of view are exclusive of each other and they are also exhaustive. This thesis that these two points of view cannot conflict, in particular, is supported by (N). See H.L.A. Hart, 'Kelsen Visited', in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983.

⁴⁴ For the purposes of my research, it is useful to focus attention on arguments that link state sovereignty to (the relationship between) legal systems. Hart submits that his critiques of the theses (P) and (N) might allow him to shed some light on the following three problems: first, the notion of a legal system; second, the nature of the criteria for determining the membership of a legal system; and, third, the principles of individuation of a legal system. How these three problems might be relevant for an analysis of the idea of state sovereignty will become clear in the rest of the chapter.

law, or primacy of municipal law – is a matter of political ideology. This means that, despite the “formal” difference, the substance of international law and municipal law – i.e. the legal rights and obligations of states and individuals – remain the same in both forms of the monistic theory. The target of Hart’s criticism is constituted by the necessary and sufficient conditions for “laws” to belong to the same legal system. In the last sentence, the term ‘laws’ may be understood as either legal norms or legal systems: in the former case, Hart’s criticism would refer to the relationship between legal norms and their legal system (as a problem of membership); in the latter case, Hart’s criticism would refer to the relationship between legal systems. Hart holds the view that Kelsen’s theory mistakenly treats the *necessary* conditions for “laws” to belong to the same legal system as if they were *sufficient* conditions. Hart points out that this mistake has its roots in the way Kelsen’s pure theory of law apprehend legal phenomena.

According to Hart, the pure theory of law “concentrates too exclusively on the contents of laws and pays too little attention to circumstances that concern the making or origin of laws and whether they are recognised as authoritative and by whom”⁴⁵. Hart’s scepticism about the methodology of the pure theory of law is followed by a theoretical consideration that is significant for my research about the concept of state sovereignty. Laws may (explicitly or implicitly) be in a relationship with: other laws; the existence of other laws; or the validity of other laws. Hart’s view is that these relationships, even when proven necessary, are not sufficient to determine whether or not these laws all belong to the same system.

As indicated above, thesis (P), in the context of the strong version of the doctrine of the unity of law, affirms that all valid laws necessarily form a single system. Consequently, international law and municipal law necessarily form a single system. Hart identifies two arguments used by Kelsen to sustain this thesis. The first is an

⁴⁵ H.L.A. Hart, ‘Kelsen’s Doctrine of the Unity of Law’, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983.

epistemological claim concerning the unity of law as an object of knowledge. The second rests upon the thesis that valid laws cannot be in conflict. For the purposes of my inquiry, however, Hart's discussion of thesis (P) in the weak version of the doctrine of the unity of law is more interesting. In the weak version of (P), Hart identifies two relationships between norms or normative orders which are accepted as true in Kelsen's arguments for the unity of international and municipal law. The first relationship is the completion relationship, whereas the second relationship is the relationship of validating purport.

2.1.1 The completion relationship and the relationship of validating purport

International law rules do not apply directly to individuals. For this reason, Kelsen holds the view that these rules must be "completed" with the rules of municipal law. Hart describes the completion relationship as 'the relationship between a set of rules one of which leaves to the other or others the identification of the individuals to whom the first applies.' The point stressed by Hart is that the fact that a completion rule exists, and connects certain rules – like in the case of international law and municipal law – is not sufficient to conclude that those rules belong to one and the same system of rules. Hart explains his point by referring to the completion relationship existing between the rules of an English statute and the rules of a corporation. Hart distinguishes two cases: in the first case the corporation is English, whereas in the second case the corporation is Swedish. Although the source of validity of the corporation's rules is different in each case, it is still possible to have a completion relationship between rules which belong to separate systems: in fact, in the former case the relationship holds between laws of the same system (English statute and English corporation), but in the latter case the completion relationship holds between laws of different systems (English statute and Swedish corporation).

Kelsen connects the reason for the validity of a municipal legal order with the principle of effectiveness. For Kelsen, this principle belongs to the international legal order. On the basis of that connection, it is possible to argue that municipal law and international law belong to the same legal system? The principle of effectiveness says that if a given set of rules of a certain description are valid, as a matter of fact, a set of rules able to satisfy that description exists. The relationship between the principle of effectiveness and the set of rules satisfying the description is defined by Hart as the relationship of validating purport. Yet, demonstrating that this relationship holds between two laws (or legal systems) is not sufficient to demonstrate that those laws belong to the same system. A different perspective on this thesis is provided by Hart through the example of him writing his own paper under the order of the Vice-Chancellor: the correspondence between the content of the order and the description of the conduct is not sufficient to demonstrate that Hart wrote the paper in obedience to the order of the Vice-Chancellor. Similarly, the example offered by Hart of an imaginary Soviet Laws Validity Act passed by the British Parliament in 1970 has the function of stressing the importance of recognition by the courts and other law-enforcing agencies, for the identifications of the rules that belong to a given legal system.

2.2 The sovereignty of a state legal order

According to Hart the recognition proper to the law-identifying and law-enforcing agencies effective in a given *territory* is crucial for determining the system to which the recognised laws belong. The importance of this kind of recognition should not be ignored by any fruitful legal or political theory. In developing his argument, Hart is aware of a well-known problem of Kelsen's theory, i.e. the lack of distinction between the existence and the validity of legal norms. In Kelsen's theory a legal norm exists as a

member of a legal order when it is a valid norm of that order. The basic norm, in fact, has a double function: it provides both the ultimate source for the validity of all the norms of the order, and the unifying criterion for that legal order. When one considers the concept of a legal order, it is necessary to consider the problem of the unity of that order. How is it possible then to identify a legal order (i.e. a unified set of legal norms)? I agree with Hart that the recognition performed by the legal agencies of a political community is clearly important; nonetheless, it is necessary to acknowledge that this kind of recognition presents some problems, especially if one considers a legal order during a constitutional crisis. In this respect, Kelsen was right in affirming that the function of the basic norm – as a criterion of identification for a legal order – becomes particularly apparent when a constitution is changed by means of a revolution.

Let us think again about the example of the Soviet Laws Validity Act. It is certainly useful to distinguish between the laws which are valid according to that Act (but only for the purposes of English Law) and the laws which are valid because they are recognised by the Soviet law-applying and law-enforcing agencies. Now, the question is the following: how is it possible to identify these agencies, assuming that they are based in Moscow, as Soviet agencies and not Tsarist or Russian agencies? Hart, in his analysis of the emergence of the secondary rules of a legal system – as well as in his discussion of the minimum content of natural law – may be interpreted as suggesting that the needs of the members of the relevant political community should be taken into account. Later in the Thesis I will explain in what sense the problem of the identity of a legal order should be solved in light of the identity of the political community it refers to. From a Kelsenian angle, the identification of a legal order is crucial for any investigation about the idea of state sovereignty, because the question of whether a given state is sovereign would be re-phrased, by Kelsen, as the question of whether a given legal order is sovereign. Now, for Kelsen, in order to be sovereign, a legal order

must be in a relationship of supremacy with, at least, another legal order. Sovereignty is indeed a relational property, as something is sovereign when it is in the first position in an order. How can a legal order be in a relationship of supremacy with one or more other legal orders?⁴⁶ One possibility is to take into account the extension of the spheres of validity of the orders at issue. These spheres can be in a relationship of total exclusion, total inclusion, or partial exclusion/inclusion. Another possibility is to consider whether or not a given normative order considers the norm of another order valid. The first order might be indifferent towards those rules, but it might also either reject or incorporate them (here one should distinguish between mere reference – private international law – or real incorporation). These two possibilities only provide a necessary condition (the existence of a relationship) but not a sufficient condition (the quality of primacy) for a normative order to be sovereign. My suggestion is that, in order to define the limits of the series of related normative orders considered to be potentially sovereign, it is necessary to refer to the relevant state political community. Furthermore, it is possible to consider not only the structure, but also the function of a normative order, in the light of the political community it refers to. This might clarify why it is the state legal order, which is the one that is usually defined as sovereign (vis-à-vis the international order). This legal order, in fact, not only exists in relation to other legal orders – in a relationship of total or partial inclusion – but it also exists in relationship with different kinds of normative orders – in a relationship of indifference, rejection, or acceptance. If we take the state legal order as our reference point, all the

⁴⁶ This question cannot be addressed in exactly the same terms by which the hierarchical relationships between norms are explained. Riccardo Guastini has identified four kinds of normative hierarchies: power-hierarchies, sources-hierarchies, logical hierarchies, axiological hierarchies. R. Guastini, 'Invalidity', *Ratio Juris*, VII, 1994, p. 217: 'Each normative power is created by a power-conferring rule enacted by another normative power. The normative power P₁ which enacted the power-conferring rule is "superior" to the power conferred, P₂, in the sense that this second power is grounded on the first one and draws its legitimacy from it. One could say that there is a "structural" hierarchy between P₁ and P₂. As a consequence, the rules enacted by P₁ are higher-ranked than the rules enacted by P₂. E.g. in every legal system there is a structural hierarchy between the constitutional power and the ordinary legislative power (independently of the flexible or rigid character of the constitution), since legislative power was created by the constitution itself.'

other normative orders might be: above, below, beside, or against the legal order. This implies that the state legal order might claim authority over and against other normative orders. In the context of international law discourse, the terms ‘sovereignty’ and ‘sovereign’ are predicated of political communities in a way which suggests that the idea of sovereignty is a characteristic feature of the concept of a state. Any state, being a sovereign entity, has powers, rights and duties under international law. By considering the subjects which are recognised to be sovereign in international law discourse one may conclude that, in this context, sovereignty conveys the idea of independence. Here a given subject is sovereign (i.e. is recognised to be a state) when it is legally independent. The independence of a political community is usually accepted as a result of the mutual recognition that ensures that no state can be legally subordinate to another (the principle of sovereign equality). This is what has been called external sovereignty, which refers to the “normative situations” which allow a state to relate to other independent political communities (whereas internal sovereignty refers to the “normative situation” of the holder of the supreme authority within a given independent political community). Within a unitary political community, not only the state legal order, but also the State itself (or one of its organs, for example the Parliament) is often considered to be sovereign. The power of the State to exercise public functions within its territory is called ‘jurisdiction’. In particular, States have jurisdiction to prescribe behaviour (by enacting laws), to adjudicate (by interpreting the law and settling legal disputes), and to enforce their laws (by ensuring that legal standards are complied with through coercive means). The rights of the State include the right to exclude other states and persons from the state’s territory (*ius excludendi alios*) as well as the right to immunity from the jurisdiction of foreign courts for actions performed by the state in its sovereign capacity⁴⁷.

⁴⁷ A. Cassese, *International Law*, Oxford, Oxford University Press, 2005, pp. 48-51.

Kelsen's analysis of state sovereignty is relevant for my research because it forces one to think about the sovereignty of a state legal order. More precisely, it forces one to think about the claims of a state legal order vis-à-vis other normative orders (externally and/or internally). Nonetheless, there are at least two serious shortcomings in Kelsen's monistic conception of state sovereignty. The first problematic aspect of his account of sovereignty is Kelsen's re-definition of a state political community in terms of state legal order. The second problematic aspect of his account of sovereignty is the negation of the distinction between internal and external sovereignty. If, as Kelsen argues, state sovereignty is the sovereignty of a state legal order, then only that normative order is valid. Therefore, no other normative order can compete with the sovereign legal order (either externally or internally).

3. Alf Ross: state sovereignty as an empty concept?

As shown in the previous section, Kelsen's monistic conception of (state) sovereignty entails the denial of the conceptual distinction between external and internal sovereignty. The significance of this distinction has been challenged, from another angle, by another mid-20th century theorist: Alf Ross. According to Ross, the expression 'state sovereignty' denotes an empty concept, as it lacks real semantic reference⁴⁸. This means that the expression 'state sovereignty' should be conceived of as merely a 'tool in the technique of presentation.'⁴⁹ Ross' conception of state sovereignty relies upon the

⁴⁸ Ross would argue that, if anything, that expression simply shows a residual of metaphysical speculation in the language of legal doctrine.

⁴⁹ For the notion that legal concepts are technical tools of presentation, see: A. Ross, *On Law and Justice*, London, Stevens and Sons, 1958, pp. 170 ff. According to Ross, the property of having no semantic reference is common to legal terms such as 'right' (i.e. a subjective normative situation), 'ownership', or 'marriage'. Interestingly, Ross thinks that 'the same technique of presentation can frequently be employed without the idea of an intervening right.' On this point, see, e.g., Ibid, p. 174: 'In international law, for example, one series of rules may state which area belongs to a specific State as its territory. That this area has the character of 'territory' is *per se* meaningless. The meaning come into existence only when this set of rules is taken together with another set of rules expressing the legal consequences that are attached to

empiricist philosophy that is proper to Scandinavian Realism: it is in light of that empiricism that the expression ‘state sovereignty’ – like most terms used in legal language – is seen to be *per se* meaningless⁵⁰. If Ross’ conclusion were accepted as valid, then one should also conclude that a conceptual distinction between external and internal sovereignty would have no logical ground (possibly, it might simply have a rhetorical significance).

I will begin this section by describing the *pars construens* of Ross’ argument – i.e. the part developed to support a “functional” conception of state sovereignty (§3.1). In order to fully appreciate the background of this conception, I will also describe Ross’ critical analysis of the substantive conception of (state) sovereignty (§3.2). I will, then, engage with Ross’ view on definitions and the semantics of legal concepts (§3.4). Ross’ “narrow empiricist conception of rational meaningful discourse” has been strongly criticised by H.L.A. Hart, in a way that many find definitive⁵¹; hence, there are good reasons to consider Ross’ conception of state sovereignty not convincing. Yet, in the final sub-section I will argue that Ross’ analysis, albeit not convincing, provides an insight into the understanding of state sovereignty as a concept “typically” related to the supreme and independent power of self-governing, autonomous political communities

an area’s character as territory. In this example it would also be possible to state the legal relations without using the interpolated concept (‘territory’), although such a statement would undeniably be complicated.’ Emphasis in the original. For the classical analysis of the concept of ownership, see: A. Ross, ‘Tû–Tû’, *Harvard Law Review*, LXX, 1957, pp. 812-825.

⁵⁰ It is meaningless in the sense that it does not have any (descriptive or prescriptive) significance. On this point, see: J. Bjarup, ‘Scepticism and Scandinavian Legal Realists’, in T. Endicott, J. Getzler, E. Peel, *Properties of Law. Essays in Honour of Jim Harris*, Oxford, Oxford University Press, 2006, p. 68: ‘The Scandinavian realists [...] are committed to the view that the language of law is a magical language, devoid of any normative or cognitive content.’ See, also: J. Bjarup, ‘The Philosophy of Scandinavian Legal Realism’, *Ratio Juris*, XVIII-1, 2005, pp. 1-15.

⁵¹ See: H.L.A. Hart, ‘Introduction’, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983, p. 13. See, also, *ibid*: ‘For the understanding [of law and of any form of normative social structure] the methodology of the empirical sciences is useless; what is needed is a ‘hermeneutic’ method which involves portraying rule-governed behaviour as it appears to its participants.’ For an early example of the positive reception of Hart’s critique against Ross, see: J. Stone, *Legal System and Lawyers’ Reasoning*, London, Stevens & Sons Limited, 1964, pp. 205-208. Cf. most recently, T. Spaak, ‘Alf Ross on the Concept of a Legal Right’, *Ratio Juris*, 2013.

(§3.4).⁵² This means that, even though it can be correctly said that Hart's explanation of the *function* of legal concepts has superseded Ross' one, it is still useful, for the purposes of my research, to closely examine the arguments deployed by Ross to redefine (state) sovereignty as a bundle of "functional" concepts.

3.1 Ross' functional conception of state sovereignty

In order to achieve a proper (i.e. "scientific") definition of (state) sovereignty, Ross argues that it is necessary 'to overcome the idea of sovereignty as a substance, or a unitary quality, from which various effects follow.'⁵³ From this perspective, the traditional understanding of state sovereignty – and, especially, what Ross calls 'the substantive conception of sovereignty – should be dismissed as "metaphysical", and replaced with 'three special functional concepts': (i) self-government; (ii) capacity of action; and (iii) liberty of conduct⁵⁴.

According to Ross, functional concept (i) refers to 'the original core of the concept of sovereignty, which may be retained [in his redefinition of the concept].'⁵⁵ Yet, the concept of self-government has, for Ross, only the function of determining the status of a given subject – a political community – as a subject of international law. Functional concept (ii) may or may not apply to a given self-governing community, as one can determine whether or not a state (i.e. a political community) has capacity of action only in light of the content of the valid – that is, for Ross, effective – legal norms

⁵² For a full discussion of the idea of a complete political community, see Chapter 6. The *locus classicus* for a discussion of this idea (especially in relation to the concept of law) is: J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011 (second edition), pp. 147 ff.

⁵³ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 44.

⁵⁴ *Ibid*, p. 44.

⁵⁵ *Ibid*, p. 44.

which bind that state. Functional concept (iii) is equally contingent, as it depends upon the content of the international law norms which are in force at a particular time; more specifically, ‘the extent of a state’s liberty of action is the sphere of action not affected by general or special international norms.’⁵⁶ Ross indirectly connects these three functional concepts to the ideas of the *supremacy and independence of a political community*. This connection can be identified by means of the circumstances in which, according to Ross, a state may lack sovereignty. In his view, a sovereignty lack results from the dependence of a state on another state – dependence which can be linked to (at least) one of the following situations: abrogation/limitation of (i); abrogation/limitation of (ii); an “unusually far-reaching limitation” of (iii)⁵⁷.

It is worth noting that, although (i), (ii), and (iii) are all qualified by Ross as “functional”, there are two important differences between these concepts. First, functional concept (i) captures a set of *conditions for* the application of legal rules; on the contrary, functional concepts (ii) and (iii) result from the *consequences of* the application of legal rules. Second, whereas functional concepts (i) and (iii) are connected exclusively with international law norms, functional concept (ii) may depend upon the application of either constitutional or international norms.

Now, the idea of supremacy is, according to Ross, “the central factor of the concept of sovereignty”; but this factor has to be understood within a descriptive theory of law. Ross acknowledges that the concept of sovereignty describes two factual situations: internally, ‘that there is not within the state any power which the legal order of the state cannot supplant’, and externally, ‘that there is not outside the state any

⁵⁶ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 44. According to Ross, no state enjoys absolute liberty of conduct, because the liberty of a state is always restricted by the existence of international norms.

⁵⁷ Ibid, p. 45. Ross specifies that whereas the first situation is generated by (heteronomous) interference on a state’s internal affairs, the second situation is generated by (heteronomous) interference on its external affairs.

power which can supplant the law of the state in its direct relation to the citizens.’⁵⁸ These two perspectives are considered by Ross through the lenses of the key concept of his definition of international law – the concept of a self-governing community, ‘that is to say [...] the community which is the supreme legal power in relation to citizens.’⁵⁹ From this perspective, Ross maintains that ‘sovereignty in its two branches [the internal and the external] is *merely another term for self-government*.’⁶⁰ For the purposes of my research, it is important to underline that, first, the distinction between internal and external sovereignty seems to blur in Ross’ redefinition of sovereignty in terms of self-government. Secondly, attention should be paid to Ross’ methodological choice of beginning his research by suggesting that the current concept of sovereignty is ill-adapted to its proper *function*⁶¹.

According to Ross, this function ought to be put in relation to a ‘scientific study’ of international law, bearing in mind that ‘the subject of science is problems and their solution.’⁶² Strikingly, Ross works under the assumption that the juristic construction of the concept of sovereignty has never been ‘associated with a definite problem’; instead, the use of this concept has been mirroring ‘the fact that emotional ideas of the sublimity and sacredness of the power of the state are more or less associated with it.’⁶³ It is against this “mystic” understanding of the concept of sovereignty – which, in his

⁵⁸ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 36.

⁵⁹ Ibid, p. 36. According to Ross, a plurality of sovereign states (i.e. self governing communities) is the necessary prerequisite for the existence of international law, which is defined by him ‘as the law valid for (binding upon) self-governing communities.’ Ibid, p. 17. For a discussion of the relationship between the concept of self-government and the concept of legal power, see, *infra*, §3.4.

⁶⁰ Ibid, p. 36. The concept of sovereignty/self-government is meant to determine, in Ross’ theory, a particular class of political communities, by describing *a set of factual conditions* for the application of legal rules.

⁶¹ Ibid, pp. 33 and ff. See, in particular, p. 34: ‘It is not only that there are almost as many definitions of the term ‘sovereignty’ as there are authors, but also that there is no agreement as to *what purpose is served* by this concept’. Emphasis in the original.

⁶² Ibid, p. 34.

⁶³ Ibid, p. 34.

opinion, has to be isolated and dismissed by means of a descriptive theory of international law – that Ross develops his critique of the traditional understanding of sovereignty.

Alf Ross begins his analysis of the concept of sovereignty with the desire of shedding some light on the obscure landscape of the current doctrinal and theoretical contributions on the topic. Yet, his project does not seek to scrutinise each and every conception of sovereignty offered in legal scholarship⁶⁴. Instead, his argumentative strategy is, first, to identify some elements which are common to those (juristic) conceptions and, second, to call these common elements into question. Ross identifies two common elements, which together constitute what he considers to be the “traditional” understanding of state sovereignty. The *first element* is that sovereignty is conceptualised as a feature which characterises the paradigmatic subjects of international law (i.e. national states). The *second element* is that sovereignty is conceptualised as the source of a series of (so-called) sovereign rights (and – we may add – duties, and capacities or powers).

According to Ross, “the subjects of international law, or at any rate the subjects of international law *par excellence*” are usually characterised by reference to their sovereignty⁶⁵. Of course, because *states* are usually considered to be the paradigmatic subjects of international law, sovereignty is often conceived of as a proxy to identify states. From this perspective, sovereignty is the characteristic feature that differentiates states from other “territorial law communities”⁶⁶.

⁶⁴ Ross does not specify the sources of these conceptions, but from the few footnotes available in the text, one can think that his focus is on secondary, rather than primary, legal sources. See, especially: A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 35.

⁶⁵ *Ibid*, p. 35. Emphasis in the original.

⁶⁶ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 35. This (implicit) definition of a state as a type of *territorial law community* is particularly interesting. For a discussion of this point, see *infra*, §3.4.

The constitutive elements of a territorial law community have been traditionally identified in what follows: (i) a human population; (ii) a territory (where that population lives); and (iii) a legal order which organises the group as a unit⁶⁷. Yet, these three characteristics have not proved to be sufficient to distinguish between states (as subjects of international law) and other communities organised on a territorial basis (e.g. municipalities, or states within a federation). According to the traditional view, Ross thinks, the element of sovereignty must then be introduced to solve that insufficiency. Element (iv) is conceptualised as ‘*a certain quality of the state* (or the legal order of the state) by which it differs in principle from other communities in such a way as to *qualify the state to be a subject of International Law*.’⁶⁸

What is – one might ask – this specific quality of the state? It is the quality of being ‘the highest order’ or ‘the highest power’⁶⁹. This quality is commonly understood to have two dimensions: one internal and the other external. Internally, the highest power of the state ‘is manifested [...] by the fact that *the state is the highest ruling power* which does not know any other power by its side or above itself.’⁷⁰ Externally, the highest power of the state ‘[is manifested] by the fact *the state is legally independent* of other states even though it must recognise these as equals.’⁷¹ In light of the internal/external dimensions distinction, the first element of the traditional understanding of (state) sovereignty acquires two further qualifications: the internal dimension of sovereignty can be thought of in terms of supreme (and illimitable) power,

⁶⁷ Ibid, p. 35.

⁶⁸ Ibid, p. 35. Emphasis in the original. Note the Kelsenian influence on the parallel state/state legal order.

⁶⁹ Ibid, p. 35. Again, this definition seems derivative from Hans Kelsen. For a discussion of Kelsen’s definition of sovereignty as the supreme (legal) order, see Chapter 4.

⁷⁰ Ibid, p. 35. Emphasis added. For a very similar definition, see N. MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 1999, p. 127: ‘Sovereign power is [...] territorial in character, and is power not subject to limitation by higher or coordinate power.’ This definition is discussed in Chapter 2.

⁷¹ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 35. Emphasis added.

whereas the external dimension of sovereignty can be thought of in terms of (mutually) independent power⁷².

The second element, common to the majority of conceptions of sovereignty considered by Ross, is that sovereignty is conceived of as the source of a series of sovereign rights. Ross identifies the substantive rights included in the second element of the traditional understanding of sovereignty by referring, once again, to the internal/external dichotomy. Internal sovereign rights usually include the right of the state to possess its own political organisation; and the right to possess its own legislation and administration⁷³. External sovereign rights usually include: the right to diplomatic intercourse; the right to conclude treaties; the right to wage war; the right to equality and respect; and the right to inviolability of territory and citizens⁷⁴. Ross acknowledges that the enumeration of specific sovereign rights by different legal scholars differs from one to the other. Nonetheless, he recognises that there are at least three features which are commonly considered to be “effects of sovereignty”, and, therefore, constantly included amongst the sovereign rights of any (sovereign) state: (i) internal self-government; (ii) full capacity of action; and (iii) extensive freedom of conduct⁷⁵. The conceptualisation of these features as *effects of sovereignty* is, according to Ross, the main problem which makes the traditional understanding of sovereignty unacceptable. As seen above, Ross rejects the notion that sovereignty is ‘a substance or

⁷² This distinction is maintained, at a conceptual level, in: R. Guastini, *Lezioni di teoria del diritto e dello stato [Lectures on legal theory and the theory of the state]*, Turin, Giappichelli, 2006. For a discussion of Guastini’s argument, see Chapter 6. On Ross’ analysis of the principle of “sovereign equality” in relation to the UN, see: A. Ross, *Constitution of the United Nations. Analysis of Structure and Function*, Copenhagen, Ejnar Munksgaard, 1950, pp. 118-134.

⁷³ Internal sovereignty is often conceptualised as including supremacy over territory and over persons. According to Ross, the former refers to the right to legislate and administrate in relation to the territory of the state; the latter refers to the right to legislate and administrate over the population of the state (independent of location).

⁷⁴ All these rights can be gathered under the umbrella concept of “full capacity” under international law.

⁷⁵ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 36.

a unitary quality from which various effects follow.⁷⁶ Yet, although Ross considers the substantive conception of sovereignty to be unsatisfactory for methodological reasons, he does not dismiss the *content* of the individual (supposed) “effects” of sovereignty. In fact, Ross aims to ‘present the separate effects of sovereignty as positive legal situations created directly by rules of law.’⁷⁷ The substantive conception of state sovereignty is, for Ross, strongly misleading, because entails the thesis that rights/duties can be directly deduced by the concept of (state) sovereignty. The exclusion of this thesis as methodologically unsound constitutes the core of Ross’ critique of the substantive conception of state sovereignty; a critique in line with Scandinavian Realism’s metaphysical assumptions.

3.2 Ross’ critique of the substantive conception of state sovereignty

Ross holds the view that the concept of sovereignty *qua concept* cannot have any *normative* consequences, in the sense that no rights/duties (i.e. normative subjective situations) can follow from a concept as such. This view is defended by Ross in light of the notion that the concept of sovereignty – like any other (legal) concepts – can simply *describe a state of affairs* in the world and/or *present a set of (legal) rules*⁷⁸. Within his descriptive and “scientific” theory of law, the first element of the traditional understanding of sovereignty is reconstructed by Ross as merely stating ‘the position of a state as a subject of International Law (a subject of international obligation).’⁷⁹ Hence, the actual rights and duties of any given sovereign state can only follow from the

⁷⁶ Ibid, p. 44.

⁷⁷ Ibid, p. 44.

⁷⁸ For a discussion of Ross’ theory of legal concepts see, *infra*, §4.1.

⁷⁹ A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 36.

international legal principles and rules applicable to the state at issue⁸⁰. In adopting this realistic approach, Ross reverses the chain of reasoning that yields the substantive conception of state sovereignty. If traditionally the starting point was provided by the idea of state sovereignty and, from that, one could deduct a set of state rights/duties, Ross' approach starts with the identification of a set of international legal norms in force and, by applying those rules, he ascribes rights/duties to states (i.e. political communities that meet the self-government requirement).

Interestingly, the reason that the idea of state sovereignty has been conceptualised as a substantive quality of the state can be found, according to Ross, in the historical development of that idea. Ross held the view that 'the current concept of sovereignty consists of a goodly portion of mysticism and a consequent confusion of various legal functions.'⁸¹ The mystic nature of sovereignty should be regarded as a *fiction*, in the sense that throughout history it has been a device to rationalise the emotional experience of the moral force of positive law⁸². Ross looks back to medieval legal and political thought to show that Bodin's doctrine of sovereignty was an attempt to justify what was, in fact, the linguistic expression (through legal documents, court decisions, legal opinions and treatises) of a clash of political powers⁸³.

Further, the thesis that it is possible to deduce "state sovereign rights" from the concept of state sovereignty can be explained, according to Ross, in light of that

⁸⁰ In line with his realistic view about law, Ross maintains that the rights and duties of any given sovereign state depend upon "the content of the norms of International Law actually in force". Ibid, p. 37.

⁸¹ Ibid, p. 44.

⁸² Ross thinks that instead of denoting a state of affairs, the word 'sovereignty' has been used to express 'the invisible mystic power or ability to create valid law which is the source of all positive law.' Ibid, p. 38.

⁸³ That was the clash of the powers of the Pope, the Emperor and the new European Monarchs (such as the French King). See, A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 38: 'The concept of sovereignty can be traced back into the political thought of the Middle Ages and has always been connected not with the fact of state power, but with the question of its *right, validity or legitimacy*.' Emphasis in the original. From this perspective, the aim of the modern theories of sovereignty was to legitimise political authority.

traditional “mystic sense” of sovereignty and its subsequent projection from the personality of the Prince to the personality of the State. This conceptual shift is the origin, in Ross’ opinion, of the absolute state and of the theories (such as Hegel’s political philosophy) that supported this voluntaristic conception of state sovereignty⁸⁴.

It seems that the idea of an absolutely supreme and independent “will of the state” is incompatible with the existence of international law. In Ross’ historical reconstruction, this is the reason that led 19th century legal scholarship to develop more nuanced versions of the “absolutistic theory of sovereignty”⁸⁵. All these nuanced versions tried to impose some limitation on the absolute power of the state and redefined sovereignty in terms of “power within the limits of international law”. However, by considering sovereignty as the “primal power” of the state and also as “sole subjection to international law”, these conceptions of sovereignty still retained the traditional notion that sovereignty is an inherent property of the state⁸⁶. Hence, Ross concludes, the traditional understanding of sovereignty is a merely a fictional conceptual construction, which is of no use for a “scientific treatment” of international law, because of its “methodological unsoundness”⁸⁷.

⁸⁴ A very similar historical understanding of sovereignty, which connects Bodin’s theory of sovereignty to the modern idea of the absolute state, can be found in Maritain’s critique of the concept of sovereignty. For a discussion of Maritain’s analysis see: *supra*, Introduction. Ross thinks that the ascription of absolute sovereignty to the state – as an abstract personal subject – resulted from the fact that “in the constitutional states, it was not possible [...] to point to a single person as invested with this mysterious sovereign power”. A. Ross, *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947, p. 39. For an analysis of the conceptual tension between state constitutionalism and state sovereignty (especially in relation to its internal dimension) see Chapter 2.

⁸⁵ In order to accommodate the existence of international law with the theory of state sovereignty, the concept of sovereignty was redefined as supreme power “within the limits of international law”. *Ibid.*, p. 40.

⁸⁶ *Ibid.*, p. 41: “This is the core of all the more modern theories of sovereignty; decisive importance is attached to the basis of validity for the obligations incumbent on the state, and it is thought that this formal element is determining for the status of the state as a subject of International Law.”

⁸⁷ *Ibi.*, p. 45.

3.2.1 The legal and the political dimension of the substantive conception

In the previous section, I showed how Ross has reconstructed the historical redefinition of the substantive conception of state sovereignty as “sole subjection to international law”. Yet, Ross argues that a definition of sovereignty as subjection only to international law cannot be defended unless one accepts the definition of international law as law derived from agreements⁸⁸. First, he identifies in the following definition the core of the traditional understanding of International law: “a legal rule is international when its sole source is an agreement”⁸⁹. Then, he frontally attacks this definition of international law by arguing that “the international [...] character of a rule [...] is dependent on its content alone (whether or not it is binding upon a self-governing community) not on the *basis of its validity* (its coming into existence, possibility of amendment)”⁹⁰. Ross maintains that from the idea of *subjection only to international law* it is impossible to deduce the properties of (i) self-government, (ii) complete capacity of action and (iii) extensive liberty of conduct. Here, Ross provides a two-fold argument⁹¹.

- 1) Consider the case of a state that could be subject to international law *as well as to a superior constitution* (e.g. a state which is part of a federation): the state could receive full or partial self-government, complete capacity of action, and extensive liberty of conduct from the rules of the constitution, yet not from international legal rules.

⁸⁸ See: Ibid, p. 20. According to Ross, this is a way to transfer the command theory from the state to the international level.

⁸⁹ Ibid, 21. Yet this, he says, is just dogma and not a theory that describes international phenomena; it focuses on the nature of the legal source of international law (i.e. the agreement between states), understanding that source as the basis of the validity of international law.

⁹⁰ Ibid, p. 22.

⁹¹ Ibid, pp. 42-43.

- 2) Consider the case of a state *solely subject to international law* (e.g. a state bound by an international treaty): the international legal rules of the treaty could bind the state to surrender its capacity of self-government, to transfer its power of action, or to abolish its liberty of action⁹².

All the qualities (i), (ii), and (iii), may only depend, Ross concludes, upon the content of the international law rules, but never upon the *formal basis of the validity of those rules*. Ross criticises the substantive conception of sovereignty on a second front, by stating that such a conception should be rejected because of its “practical political tendency”⁹³. The undesirable political consequence that makes the substantive conception of sovereignty untenable is its hostility to the development of international law. According to Ross, this hostility is present in both grand and restricted conceptions of sovereignty. In the former case, “the notion of the state’s absolute self-glorification and lack of restriction by anything but its own will and its own welfare is an idea which [...] is apt to render suspect any development of international solidarity”⁹⁴. In the latter case, the survival of dogmatic constructions such as the theory of the “reserved domain”, or the unanimity principle, or the principle of the equality of state creates a series of obstacles that may be used to stop the development of international law and international institutions⁹⁵. All these dogmatic constructions are, for Ross, examples of how the “conceptual jurisprudence” which yields the substantive conception of state sovereignty makes “the mystical, vague, ambiguous concept of sovereignty marked by an emotional attitude [...] well suited to mobilise natural egoistic tendencies of the state opposed to

⁹² These two cases are abstract and general examples. For a discussion of the relationship between state and supranational rules and of their impact on state sovereignty in light of an historical case study, see Chapter 1.

⁹³ Ibid, p. 45.

⁹⁴ Ibid, pp. 45-46.

⁹⁵ On the political significance of the principle of “sovereign equality” for international law (and especially for the development of the United Nation), see: A. Ross, *The United Nations. Peace and Progress*, Totowa (New Jersey), The Bedminster Press, 1966, pp. 77-80.

the desire for an international organisation and solidarity, and to lend to these tendencies [...] a semblance of an objective motivation”⁹⁶.

3.3 Questioning Ross’ conception of state sovereignty

In the last two sections, I provided the background of Ross’ critique of the substantive conception of state sovereignty. In this section, I will argue that Ross’ functional conception of state sovereignty is not entirely convincing, because of his problematic theory of definitions and legal concepts. This problem, I submit, originates from the methodological assumptions of Ross’ legal theory.

At the beginning of this Chapter, I have mentioned Hart’s general critique of Ross’ empiricism – a critique based on Hart’s understanding of the relationship between normative vocabulary and “internal statements” (i.e. statements that manifest *acceptance* of a given standard of behaviour as a *reason* for action). Hart’s position is fully articulated in his essay on Scandinavian Realism, whose main target is Ross’ treatment of “statements of legal validity [...] as an external statement of fact predicting judicial behaviour and feeling”⁹⁷. Hart’s view is that Ross distinguishes between “an internal and an external aspect of the phenomenon presented by the existence of social rules [...] but unfortunately he draws the line between aspects in the wrong places and misrepresents the internal aspect of rules as matter of ‘emotion’ or ‘feeling’ – as a special psychological ‘experience’”⁹⁸. Now, by challenging Ross’ reduction of “the internal aspect of rules” (in Hart’s terminology) to an emotional, and irrational, element, Hart does not simply provide an argument against Ross’ theory of legal validity, but call

⁹⁶ Ibid, p. 46.

⁹⁷ H.L.A. Hart, ‘Scandinavian Realism’, in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983, p. 167.

⁹⁸ Ibid, pp. 165-166.

into question one of the main principles of Ross' methodology⁹⁹. Indeed, when Ross connects the existence of legal rules – in the sense of effective directives to courts – only to “external statements” (in Hart's terminology) about them, he shows what Hart describes as “the peculiar dogmatic insistence [...] that if a statement cannot be analysed as a statement of fact or expression of feeling it must be ‘metaphysical’”¹⁰⁰.

For the purposes of my research, there are three aspects of Hart's critique which is particularly worth noticing. First, Hart does not deny that, as a matter of course, emotions (e.g. feelings of compulsion) may emerge in connection with the making of internal statements; nonetheless, he thinks that those feelings “are neither necessary nor sufficient conditions” for the normative use of internal statements¹⁰¹. The proper meaning of normative terms is provided, for Hart, by their “critical normative functions”; and this functions can be observed when people use normative terms and expressions – e.g. ‘wrong’ or ‘you ought not to have done that’ – in order to criticise deviant behaviours, “making claims and justifying hostile reactions by reference to the accepted standard”¹⁰². The main difference between Hart's attention for the critical normative functions of legal concepts and Ross' functional conception of state sovereignty is that the former opens up the possibility of explaining *why* (and not simply *how*) people accept a given standard of behaviour as a *reason* for action.

⁹⁹ While acknowledging that “English and Scandinavian legal theory have long shared many points of view”, Hart underlines how these two traditions are characterised by a “different *tone*”. See *Ibid*, p. 161. Hart, however, recognises that the “most sophisticated product” of the Scandinavian tradition is Alf Ross' *On Law and Justice*, and acknowledges some merit to its general methodology: “Though there is much that is questionable, indeed blinding, in the attempt to force the analysis of legal concepts or of any rules into the framework adapted for the empirical sciences, Ross' sceptical attack on conventional doctrines is far more sophisticated than many previous attempts to uncover behind legal forms and theories the ‘facts of social reality’”. *Ibid*, p. 162.

¹⁰⁰ *Ibid*, p. 166.

¹⁰¹ *Ibid*, p. 167.

¹⁰² *Ibid*, p. 167.

Second, Hart underlines that some normative concepts belong to the class of concepts “into which variable standards are built”¹⁰³. However, he maintains that “the dependence of concepts like justice on implicit, varying and challengeable criteria does not render them meaningless when applied to law”¹⁰⁴. The concept of state sovereignty – as indicated by the results of Chapter 1 and 2 – belongs to this class of concepts, as a state can be more or less sovereign, both diachronically and synchronically (that is in relation to other sovereign states, all considered at the same time). It seems to me that, if the understanding of state sovereignty as a concept containing various standards is combined with the methodological preference for the internal point of view, it is possible to approach the problem of explaining the concept of state sovereignty by explaining *why* certain standards built into this concept are accepted as *reasons* for action by the members of a political community¹⁰⁵. Such an approach takes into account, but is not limited to, a presentation of *how* the concept of state sovereignty is used in doctrinal and/or comparative constructions within that political community’s legal order¹⁰⁶.

Third, Hart recognises that most concepts, especially in legal discourse, cannot be defined *per genus et differentiam*¹⁰⁷. On this basis, he develops the thesis that there is “proper sense” in which one can talk about a concept¹⁰⁸. It is true that Ross also

¹⁰³ Ibid, p. 163. Hart mentions, as examples, the concepts expressed by ‘long’, short, genuine, false, and useful.

¹⁰⁴ Ibid, p. 163.

¹⁰⁵ For the sake of clarity, this distinction between internal and external points of view on sovereignty ought not to be confused with the distinction between internal and external sovereignty. The two distinctions belong to two different levels of discourse, the former to meta-doctrinal discourse, whereas the latter to doctrinal discourse.

¹⁰⁶ On the relationship between inferences, concepts, and doctrinal constructions, see Sartor’s distinction between the possession of an inferentially defined concept and the belief in the concept’s applicability. G. Sartor, ‘Legal concepts as inferential nodes and ontological categories’, pp. 247-248.

¹⁰⁷ H.L.A. Hart, ‘Definition and Theory in Jurisprudence’, in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, pp. 31 ff.

¹⁰⁸ H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), p. X.

acknowledges that certain concepts – such as the concept of democracy – cannot be defined *per genus et differentiam*¹⁰⁹. He clearly states that the transition from a democratic to an undemocratic form of government (or vice versa) is a *gradual* process. Hence, in order to define this concept, Ross suggests developing “a concept that denotes the most extreme, pure democracy one can imagine, and indicated the line along which the forms can move further and further away from the paragon in order to arrive at last at its diametrical opposite, in a certain respect. This pure fundamental concept, or paragon, is called idea type”¹¹⁰. Of course, Ross is eager to stress that such an ideal type has no moral value: “the ideal type is not something good that one ought to endeavor to realize”¹¹¹. The ideal type has various dimensions in relation to which the real types – i.e. the concrete instances of the concept of issue – can be measured and topographically described. Unfortunately, Ross does not seem to consider the logical structure of the concept of (state) sovereignty similar to that of democracy. On the contrary, he projects on state sovereignty the same methodological and theoretical assumptions that yield his conception of legal concepts such as “ownership” or “right”¹¹².

3.3.1 Ross’ theory of definitions and legal concepts

In order to understand the methodological and theoretical assumptions of Ross’ definition of (state) ‘sovereignty’, it is useful to consider Ross’ suggestion that the only way to achieve a proper definition of ‘international law’ is to redefine the concept of a (sovereign) state in terms of “self-governing community”. This redefinition is thought

¹⁰⁹ A. Ross, *Why Democracy?*, Cambridge (Mass.), Harvard University Press, 1952, p. 87.

¹¹⁰ *Ibid*, p. 87.

¹¹¹ *Ibid*, p. 87.

¹¹² On Ross’ conception of ‘legal right’ see: B. Bix, ‘Ross and Olivecrona on Rights’, *Australian Journal of Legal Philosophy*, XXXIV, 2009, pp. 103-119.

to avoid the circularity that, according to Ross, characterises the (standard) following definition: “*International Law* is the body of legal rules binding upon states in their relations with one another”¹¹³. In Ross’ view, the circularity is generated by the fact that the concept of international law is defined in relation to the concept of state, which is, conversely, defined in relation to international law – ‘state’ is defined in terms of ‘sovereignty’, which is in turn defined as “sole subjection to international law”. Ross seeks, therefore, to provide an autonomous definition of ‘state’ which would allow him to achieve an appropriate definition of international law, capable of making sense of the distinction between “internal” and “international” law¹¹⁴.

According to Ross, “a definition is a statement as to what the speaker intends to understand by a certain word”¹¹⁵. From this perspective, a definition can receive various justifications, but can never be “proved”; this is because, for Ross, a definition cannot be true or false, it can only be “more or less convenient”¹¹⁶. Ross identifies two formal requirements that must be unconditionally satisfied by any sound definition: first, not being self contradictory, and second, not being circular. Once these two requirements are satisfied, it is possible to measure how appropriate a definition is in light of the following two aspects: (i) the relevance of the definition; and (ii) the convenience of the definition¹¹⁷. Aspect (i) refers to the value of the definition “as an instrument for scientific exposition. [...] Its value is measured by the capacity of the definition to

¹¹³ A. Ross, *A Textbook of International Law*, p. 11. In light of this definition international law is understood in contrast to “internal law” (e.g. French or German Law). Ross identifies two implicit premises of this common understanding of international law. First, legal rules are always associated (as legal systems) with “concrete human societies”. For this reason, international law is considered to be the legal system associated with the society of states. Second, that the sum of national legal systems and the international legal system exhausts “the whole legal universe”.

¹¹⁴ For a discussion of Ross’ definition of ‘sovereign state’ in terms of ‘self-governing community’, see §5.

¹¹⁵ A. Ross, *A Textbook of International Law*, p. 13 (fn. 2).

¹¹⁶ *Ibid*, p. 13 (fn. 2).

¹¹⁷ Interestingly, Ross notes that there might be a tension between these two aspects of a definition.

formulate the scientific exposition in the simplest way”¹¹⁸. Aspect (ii) refers to the property of the definition of being in “agreement with the traditional conception”; this means that the definition should be able to capture “precisely those phenomena which usually [...] are denoted by the concept defined”¹¹⁹.

As seen in Section 1, in his redefinition of (state) sovereignty, Ross tries to capture the three elements that the traditional understanding of sovereignty considered to be “effects of sovereignty” by means of three “functional concepts”. Through this move, Ross aims to justify the *convenience* of his redefinition. In order to justify its *relevance*, Ross argues that no “real” entity should be postulated behind the term ‘sovereignty’. It is worth remembering that Ross does not endorse the view that sovereignty – like ownership – is completely meaningless. Even though they lack any semantic referent, it is still possible to ascribe a “meaning” to them – that is their *function* in connecting a set of facts to a set of consequences¹²⁰. And in doing so, Ross links his theory of definitions to his theory of concepts.

The latter theory has been criticised by Brian Simpson precisely for making “the mistake of attempting to link an explanation of the nature of legal concepts to a theory of the logical function of words or sentences”¹²¹. This mistake is connected, according to Simpson, to the idea that unless a word has an empirical referent (or a referent that

¹¹⁸ Ibid, p. 13 (fn. 2).

¹¹⁹ Ibid, p. 13 (fn. 2).

¹²⁰ See: A. Ross, ‘Tû–Tû’, *Harvard Law Review*, LXX, 1957, pp. 820: ‘It will be clear from this that the ‘ownership’ inserted between the conditioning facts and the conditioned consequences is in reality a meaningless word, a word without any semantic reference whatever, serving solely as a tool of presentation.’ See, also: L. Lindahl, ‘Deduction and Justification in the Law: The Role of Legal Terms and Concepts’, *Ratio Juris*, XVII, 2004. Of course, as Lars Lindahl has noticed, Ross’ insistence on the ‘role played by middle terms in the representation of a given system of rules’ is not the only possible option available. It is also possible, for instance, to try to explain legal concepts and terms in relation to ‘contested concepts, persuasive definitions, and the rationale of various legal rules.’ Ibid, p. 200.

¹²¹ B. Simpson, ‘The Analysis of Legal Concepts’, *Law Quarterly Review*, LXXX, 1964, p. 549. According to Simpson, this mistake is also shared by Hohfeld and Hart, even though “the conclusions reached are different”.

can be completely reduced to empirical data) such a word is *meaningless*¹²². Simpson acknowledges that Ross does embrace this idea only partially, as Ross – on the basis of a lack of semantic reference – ascribes a *function* to the middle term. This function is found in light of the possible uses of a natural language, uses that in Ross’ opinion are, on the one hand, to describe states of affairs, and on the other hand, to prescribe a course of action. Hence, there are three objections raised by Simpson to criticise Ross’ theory:

- (i) Ross’ analysis fails to explain *why* that particular word and not another is used in the statements at issue;
- (ii) Ross’ analysis fails to accommodate a feature of legal rules, which has a crucial impact on his explanation of legal concepts, the fact that “legal rules commonly have exceptions to them”¹²³;
- (iii) Taking the example of ownership, “sometimes a decision that a certain result ought to follow turns upon the question, ‘Is X owner?’ How can this be explained if the application of the word ‘owner’ depends upon the consequences?”¹²⁴

I find the third objection particularly interesting¹²⁵. This objection forces one to focus attention on the factual circumstances (in Ross’ terminology), rather than on the normative consequences, of a given legal concept (and its associated legal norms). For the purposes of my research, Simpson’s third objection can be rephrased in terms of the following question: “Is X sovereign?”; or, more precisely, “Is X a sovereign state?”

When asking if X is a sovereign state, one can consider the concept of state sovereignty

¹²² This idea was one the fundamental meta-philosophical axioms of the Logical Positivism of the 20th century. See: J.R. Weinberg, *An Examination of Logical Positivism*, London, Kegan Paul, Trench, Trübner & Co., 1936.

¹²³ Ibid, 553. For an analysis of exceptions to legal rules, see: D. Mendonca, ‘Exceptions’, in: J.F. Beltran & G.B. Ratti, *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford, Oxford University Press, 2012.

¹²⁴ B. Simpson, ‘The Analysis of Legal Concepts’, p. 553.

¹²⁵ The first objection is also very interesting, as it opens up space for a dialogue between legal theory and the history of ideas. Yet this is not what I intend to study in the next chapters.

as (partially) disconnected from the norms in which is articulated, but also from the norms that regulate it (e.g. if X is a sovereign state, then X has the right to φ)¹²⁶. In a sense, Ross focuses on the factual circumstances of sovereignty when he replies to the question above by considering the existence conditions for a self-governing community. Yet, to what extent the existence of a self-governing community can be disconnected from legal and/or non legal norms is a fascinating problem that requires a specific analysis.

3.4 The power of a self-governing community

In this final section, I would like to discuss Ross' definition of a 'sovereign states' in terms of self-governing communities. Ross' definition of 'state' begins with a factual consideration: "all law occurs as a development in a human community, a legal community"¹²⁷. For Ross, legal communities – which usually have a territorial basis – may interact in different ways: they can be co-ordinate (equal in status), or they can be in a relationship of sub-ordination/super-ordination¹²⁸.

The latter case can come into existence in two different ways. First, a superior community may "enter into *direct* communication with the individuals in the subordinate communities so that the more comprehensive legal system is binding upon the individuals in the narrower sphere"¹²⁹. Second, "the connection between the higher

¹²⁶ It is worth underlying two points. First, the norms taken into account can be legal (e.g. if X is a sovereign state, then X has the right to φ under international law), but also non legal (e.g. if X is a sovereign state, then X has the moral right to φ). Second, when the meaning of a term has to be defined in an inferential way, not only norms, but also other (non-normative) sentences, can be taken into consideration. This is true, for example, of non-normative terms, such as "theoretical" terms in natural sciences.

¹²⁷ A. Ross, *A Textbook of International Law*, p 14.

¹²⁸ These three relationships can be compared with the possible relationships between normative orders discussed in Chapter 3, in light of Kelsen's theory of state sovereignty.

¹²⁹ *Ibid*, p. 14.

order and the individuals may be *effected through* the incorporated community's own legal system and its enforcement of this"¹³⁰. This means that for the individual members of the community the *highest legal power* – which in the first case was associated with the superior community – is still associated with the inferior community. In the second case, it is the whole community, and only the community, which is subject to the *higher legal power* of the superior community.

As seen in the previous section, Ross holds the view that international law should be defined as the law valid for “self governing communities”, rather than for “states” (the term commonly used in the context of international law discourse). In Ross' definition, “a legal community is called self-governing when and insofar as it is the *highest legal power* in relation to its individual members”¹³¹. Ross' redefinition of ‘state’ (as denoting a subject of international law) in terms of “*self-governing legal community*” has two consequences. On the one hand, international law “is never *directly binding* upon individuals but must always be *rendered effective* through the medium of the internal law of the self-governing communities”¹³². On the other hand, a self-governing community (as a whole) may have an obligation toward another community, an obligation which exists only under international law. This second consequence deserves some further comments.

According to Ross, “the prerequisite for international legal relations is [...] that the self-governing community has acted *jure imperii*, not *jure gestionis*”¹³³. Here, Ross points to two different concepts of ‘state’. So far, he has discussed the concept of state

¹³⁰ Ibid, p. 14.

¹³¹ Ibid, p. 15. Ross distinguishes between fully self-governing legal communities, partly self-governing legal communities, and non self-governing legal communities. Emphasis added.

¹³² Ibid, 17. Emphasis added. This thesis – that clearly depends on Ross' theory of validity – has been almost immediately identified as problematic in one of the reviews of Ross' book: [...]

¹³³ Ibid, p. 17. This means, in other words, that the idea of international law arises only when “an obligation is present which the state cannot control in any of its ramification.” Ibid.

within international law discourse, and in this case the state (i.e. a self-governing community) may have obligations only towards other states; on the contrary, “in state law terminology the state may incur obligations towards the citizens with reference to its own legal system”¹³⁴. In the latter case the term ‘state’ “stands for a certain branch of the administration, not for the self-governing community as a whole”¹³⁵. This is the meaning of the concept of State when used in constitutional law discourse¹³⁶.

When discussing the obligations of the state towards its citizens, Ross affirms that the self-governing community “in the last instance controls these relations itself”¹³⁷. There seems to be, embedded in this proposition, the acknowledgment of a priority of the state community (as a self-governing community under the higher power of the international legal order) over the State (as an administrative authority within the state community). This priority, in fact, will be analysed in the next Chapter, where I discuss how a political community may emerge and subsist, also in relation to the constitution of a State and of a (state) legal system. Now, although Ross does not properly illuminate the key concept of a (political) community, his redefinition of sovereignty in the context of international law, still provide an insight into the understanding of the concept of state sovereignty. By connecting the category of *power* to the relationship between State (administrative) authority and state (self-governing) community, Ross’ exposition provides a useful suggestion on how to make sense of the coexistence of different sovereign states¹³⁸.

¹³⁴ Ibid, p. 17.

¹³⁵ Ibid, p. 17.

¹³⁶ For an accurate discussion of the meaning of ‘State’ in constitutional law discourse, see: A. Ross, ‘On the concepts of “state” and “state organ” in constitutional law’, in: F. Schmidt, *Scandinavian Studies in Law*, Uppsala, Almqvist – Wiksell, 1961, pp. 111- 129.

¹³⁷ A. Ross, *A Textbook of International Law*, p. 17.

¹³⁸ In this respect, Ross’ analysis is superior to the kelsenian explanation of state sovereignty.

The power of each sovereign state – that is, each self-governing community – is supreme over the members of the community (as demonstrated by the control over the relations between those members and the State) and also independent from the power exercised by other sovereign state (as demonstrated by the fact that the relationship between states is controlled an higher legal order, i.e. international law). Furthermore, in light of his definition of democracy, it may be possible to regard Ross’ three-fold concept of (state) sovereignty as related to the (supreme and independent) power of a self-governing (political) community in the form of an “ideal type”. Yet, there two problems here. First, it is not clear whether the international community, by controlling the relations between different states may become a self-governing community itself (perhaps by establishing a world State). The second problem is related to the first, because it is not clear whether the “ideal-type” based theoretical explanation may illuminate only a self-governing community of individuals, or also a (possibly sovereign) community whose individual members are self-governing communities, rather than persons.

These two problems arise because Ross does not devote sufficient attention to the idea of a political community, neither as such or as in “ideal type” for state sovereignty. Nonetheless, when discussing the importance of law for the evolution of international society, Ross distinguishes between the ideas of a “world society” (i.e. all nations united under a world government); an “international society” (i.e. a society of nations characterised by the mere fact of interdependence – the current international situation); and an “international community” (i.e. a community in which factual interdependence between states is replaced by a feeling of solidarity, people feeling themselves members of the same group)¹³⁹. It is possible to translate the idea of a community from the

¹³⁹ See: A. Ross, ‘Law and the Growth of International Society’, *University of Illinois Law Forum*, 1956, pp. 262-269. On the evolution of laws and societies, see, more generally: F.A. von Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, London, Routledge & Kegan Paul, 1973-79.

international level to the domestic one. Indeed, Ross states that “the ultimate foundation of all political power, all legislation, all law in the state is an integration of minds in a common political ideology or allegiance. [...] The feeling of identity and community is not created by commands or preaching; it grows slowly through common life in common institutions”¹⁴⁰.

Now, if this proposition has to be taken as the solution to the problem of the identification of a community as a self-governing community, I do not find the argument convincing. It is true that a great deal of work can be done by the social sciences, in identifying the different types of relationships that tie a number of individuals to a group. I think, nonetheless, that the findings of the social sciences cannot provide the whole picture, especially when the group at issue is meant to constitute a community and, even more so, when this community is a legal community. Even the most informed description of the psycho-sociological attitudes of the members of a given community cannot shed much light on the complexity that lies behind the concepts of political allegiance and legal obligation. Of course there is space for a sociological study of ideology within the political and legal sphere, but this must not obscure the explanatory power of practical reasoning. In the arguments that I discuss in the next Chapter I hold the view that the subsistence of a political community (as a reality which is not co-existent with the “nation”) is not simply a fiction, nor is just a possibility¹⁴¹. This is particularly true when one tries to explain the ideas of state (as a

¹⁴⁰ A. Ross, ‘Law and the Growth of International Society’, *University of Illinois Law Forum*, 1956, p. 265. According to Ross, the existence of a given “social order” is determined by the interaction of the following four elements: (i) an actual system of compulsion; (ii) an interested behaviour attitude (fear of the exercise of compulsion); (iii) a disinterested behaviour attitude (notions of validity of a specifically legal nature induced by the social suggestive power of custom); and (iv) the authoritative establishment of “norms”). See: A. Ross, *Towards a Realistic Jurisprudence*, Copenhagen, Einar Munksgaard, 1946, pp. 88-89.

¹⁴¹ M. Koskenniemi, ‘What use for sovereignty today?’, *Asian Journal of International Law*, I, 2011, p. 70: ‘Sovereignty expresses frustration and anger about the diminishing spaces of collective re-imagining, creation, and transformation of individual and group identities by what present themselves as the unavoidable necessities of a global modernity. [...] In the context of war, economic collapse, and environmental destruction, in spite of all the managerial technologies, sovereignty points to the

political community and also as an internal institution of the community) and state sovereignty as including standards that are *accepted* by practical reasoning in order to respond to a set of human needs.

4. H.L.A. Hart: a rule-based conception of state sovereignty

One of the most notable contributions made by Hart in Chapter X of *The Concept of Law* is the equation of independence with sovereignty. This equation is based upon the following four considerations. First, the concept of (state) sovereignty seems to be legally synonymous with the concept of (state) independence¹⁴². Secondly, the concept of (state) sovereignty seems to be linked – up to a certain extent – to the lack of control of external agents on the state: it is worth noting that, according to Hart, this lack of control has a legal and a factual dimension¹⁴³. A third point, which emerges from the last consideration, is that in order to assess the “measure” of the (lack of) control of a given agent Y in relation to a particular state X, it seems necessary to have previously identified the borders of state X. Finally, Hart seems to suggest a correlation – but no causation – between being independent and being sovereign “in international law”.

In Section 3 of Chapter X, Hart focuses on the tension between international obligations and state sovereignty (i.e. the sovereignty of states, which are the primary subjects of international law). Hart’s analysis originates from the following question: how is it possible, for a state, to be sovereign and to have, at the same time, an

possibility, however limited or idealistic, that whatever comes to pass, one is not just a pawn in other people’s games but, for better or for worse, the master of one’s life.’

¹⁴² H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), p. 220: ‘Great Britain, Belgium, Greece [...] are random examples of states which the layman would think of as independent and the lawyer would recognize as ‘sovereign’.’

¹⁴³ Ibid, p. 221: ‘States such as Great Britain or Brazil, the United States or Italy, again to take random examples, possess a very large measure of independence from both legal and factual control by any authorities or persons outside their borders, and would rank as ‘sovereign states’ in international law.’

obligation under international law? This problem – as the title of the section already suggests – calls into question the binding character of international law¹⁴⁴. In the previous section – entitled “Obligations and Sanctions” – Hart discusses (and rejects) the notion that “international law is not binding because of its lack of organized sanctions”¹⁴⁵. Yet, the argument supporting this notion is contingent: regardless of the validity of its premises, international law may one day be backed by sanctions. On the contrary, the problem considered in Section 3 relies upon a “radical inconsistency, said or felt to exist, in the conception of a state which is at once sovereign and subject to law”¹⁴⁶. This is, therefore, a conceptual issue.

According to Hart, “whenever the word 'sovereign' appears in jurisprudence, there is a tendency to associate with it the idea of a person above the law whose word is law for his inferiors or subjects”¹⁴⁷. Often, this tendency is demonstrated by those who consider the concept of sovereignty in the context of municipal law¹⁴⁸. Nonetheless, the same mistaken tendency can affect the analysis of the problem identified in Section 3 – a problem which “involves a scrutiny of the notion of sovereignty, applied not to a legislature or to some other element or person within a state, but to a state itself”¹⁴⁹. That mistaken tendency entails a certain understanding of the state. Although it is possible to conceive of the state as a person above or outside the law – “inherently lawless but the source of law for its subjects”¹⁵⁰ – Hart rejects this possibility. He

¹⁴⁴ Indeed, the main object of Chapter X is to explain the binding character of international law.

¹⁴⁵ *Ibid*, p. 217.

¹⁴⁶ H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), p. 220.

¹⁴⁷ *Ibid*, p. 221.

¹⁴⁸ On this point, see Hart’s criticisms of Austin’s theory of law in Chapter IV of *The Concept of Law*. See also the first objection discussed by Pogge above: Pogge identifies in the state theory of Thomas Hobbes the best example of the notion that an absolute sovereign is necessary to establish a legal and political community.

¹⁴⁹ *Ibid* pp. 220-221.

¹⁵⁰ *Ibid*, p. 221.

thinks, instead, that by using the expression ‘a state’ one refers to the following two facts: (i) “that a population inhabiting a territory lives under that form of ordered government provided by a legal system with its characteristic structure of legislature, courts, and primary rules”; and (ii) “that the government enjoys a vaguely defined degree of independence”¹⁵¹. Hart acknowledges that the term ‘state’ has an area of vagueness about it, but he also thinks that the two facts just mentioned “will suffice to display [the] *central meaning* [of ‘state’]”¹⁵². It seems therefore, that according to Hart, the word ‘state’ describes a given reality in the world, i.e. the state of affairs generated by the combination of facts (i) and (ii) above.

Now, talking about “sovereign states in international law” seems to be equivalent, in legal terms, to talking about a population living in a given territory under an ordered government (i.e. a government provided by a legal system) which has large measure of legal and factual independence from the control of external agents. As it is well known, however, not all “states” are “sovereign states” (in international law). According to Hart it is the measure of legal and factual independence that makes the difference between sovereign and not sovereign states.

The members of a federal union – such as the USA or the Commonwealth of Australia – enjoy some degree of independence but they are nonetheless subject to the “control” of the federal government. It is true, Hart continues, that the independence enjoyed by the member states of the USA, for instance, is larger than the independence enjoyed by an English county. It seems, therefore, that the degree of independence that an English county has would not be sufficient to pass the test of (ii) above. Indeed, the word ‘state’ is never used to refer to a county (despite the fact that (i) might be present,

¹⁵¹ Ibid, p. 221.

¹⁵² Emphasis added.

to a certain extent)¹⁵³. A sovereign state and, on the other hand, a county can be considered the two extremes of a spectrum of (in)dependence. In both cases (and therefore along the entire spectrum) one will find fact (i) above – that is to say a territorial unit with an “ordered government”. As indicated above, it is fact (ii) that is the problematic stage in the identification of a territorial unit as a state.

It is possible to say, therefore, that there are four requirements that must be satisfied for a group to be a sovereign state:

- (i) There must be a territorial unit, the population of which lives under an ordered government (i.e. a government provided by a legal system);
- (ii) The government of the territorial unit is characterised by a legislature, courts, and primary rules;
- (iii) The government of the territorial unit enjoys a vaguely defined degree of independence;
- (iv) The independence enjoyed by the government can be described as a “large measure” of legal and factual independence from the control of agents (authorities or persons) external to the territorial unit.

The next section will be devoted to an analysis of (iv), because this is the requirement that really allows one to distinguish between a “state” and a “sovereign state”.

4.1 Legal and factual independence

According to Hart, it is often the case that “the dependence of one unit on another is expressed in legal forms, so that what is law in the territory of the dependent unit will,

¹⁵³ See H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), pp. 221-222: ‘A county may have a local council discharging, for its area, some of the functions of a legislature, but its meagre powers are subordinate to those of Parliament and, except in certain minor respects, the area of the county is subject to the same laws and government as the rest of the country.’

at least on certain issues, ultimately depend on law-making operations in the other”¹⁵⁴. Yet, it is also possible for a state to be legally independent and still not independent enough to meet requirement (iv). For Hart, “this may be so either because it is merely formally independent and the territory is in fact governed, through puppets, from outside; or it may be so because the dependent territory has a real autonomy over its internal but not its external affairs, and its dependence on another country in external affairs does not require expression as part of its domestic law”¹⁵⁵.

In the cases mentioned in the last quotation it is another territorial unit/state that limits the independence of the first state. However, the limitation may be due to that existence of international authority, which is able to affect the status of the individual states (which would otherwise be independent of each other). Of course, Hart submits, “it is possible to imagine many different forms of international authority and correspondingly many different limitations on the independence of states”¹⁵⁶. But why is it important to acknowledge the possibility of a variety of forms and degrees of (in)dependence? The answer provided by Hart is that that acknowledgment is a good starting point from which to answer the problem identified at the beginning of Section 3.2 – i.e. how is it possible, for a state, to be sovereign and at the same time to have an obligation under international law?

Further, from this perspective it is possible to better understand the synonymy of sovereignty with independence. When one recognises a state as sovereign/independent, one is implicitly recognising the existence of a certain degree of legal and factual independence. This two-fold independence is manifest by a lack of control by those

¹⁵⁴ Ibid, p. 222.

¹⁵⁵ Ibid, p. 222.

¹⁵⁶ H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition),, p. 222.

authorities external to the state¹⁵⁷. However, the requirement of a degree of autonomy is already present in the idea of a state – even a state which is not sovereign (see requirement (iii) above).

Now, it is really important to note that requirement (iv) is, in Hart's view, an empirical and contingent question. This view, which locates Hart within the group of the descriptive theories of (state) sovereignty, depends upon his methodological approach to the study of sovereignty. In relation to sovereignty – both at the domestic and the international level – Hart can be said to have done a “Copernic Revolution”, overturning the relationship between law and sovereignty, as established by the Austinian jurisprudence.

4.2 Law and sovereignty

This sub-section is devoted to Hart's understanding of the relationship between (international) law and (state) sovereignty. With a different argument, Hart reaches the same conclusion reached by Maritain and by most the contemporary works on the topic: state sovereignty as absolute power cannot be accepted.

Hart thinks, correctly in my view, that a certain absolutistic theory of sovereignty “has been inspired by too much abstract dogma and too little respect for the facts”¹⁵⁸. Also, the contention that state autonomy must be unlimited – this would mean turning requirement (iv) into a necessary condition of absolute freedom of action – “is at best the assertion of a claim that states ought to be free of all other restraints, and at worst is

¹⁵⁷ In this sense, independence is “negative in force: a sovereign state is one not subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous.” See *Ibid*, p. 223.

¹⁵⁸ Hart uses these words in relation to the ‘the general theory that all international obligation is self-imposed.’ See H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), p. 226.

an unreasoned dogma”¹⁵⁹. States are in fact limited by the authority of international law. Hence, sovereignty is the space left open by international rules which apply to states.

Hart focuses attention on the freedom of a state (as a subject of international law) from other authorities (in Chapter X of *The Concept of Law*, the authority of international law). Nonetheless, he offers a very interesting insight on the relationship between law and sovereignty. According to Hart, the idea of sovereignty cannot be used to understand the general character of international law¹⁶⁰. On the contrary, it is on the basis of a proper understanding of municipal and international law that one can illuminate the nature of sovereignty. Hart urges the reader to invert the order of the inquiry: first one must identify the content of the law, and then one can make a proper assessment of sovereignty. The acceptance of this approach would lead one to ask the following two questions:

- What is the extent of the supreme legislative authority recognized in the system?
- What is the maximum area of autonomy which the rules allow to states?

The first question considers sovereignty in relation to municipal law, whereas the second question considers sovereignty in relation to international law. This means that, for Hart, the (positive) law perspective is the privileged standpoint from which one can solve the two problems identified at the beginning of this Chapter: the problems of the location and of the nature of sovereignty.

In my view, the problem with Hart’s approach is that it considers the problem of sovereignty simply as a question of particular jurisprudence – in order to identify a state as sovereign, one must know (the content of) the international rules in force. Now, I

¹⁵⁹ Ibid, p. 223. This statement is also true, for Hart, of the contention that state autonomy/sovereignty can only be limited by a particular kind of obligation (usually self-imposed obligations).

¹⁶⁰ See Ibid, p. 223: ‘An uncritical use of the idea of sovereignty’ – Hart writes – ‘has spread [confusion] in the theory of both municipal and international law [...]. Under its influence, we are led to believe that there must in every municipal legal system be a sovereign legislator subject to no legal limitations; just as we are led to believe that international law must be of a certain character because states are sovereign and incapable of legal limitation save by themselves.’

agree with Hart's criticism of the "dogmatic" use of the idea of sovereignty, as well as with his preference for "the legal point of view". Yet, his approach does not allow him to add any novel element to what can be called the received view: internally sovereignty is the supreme power of an organ of the state (usually the Parliament); externally sovereignty is the freedom of action of the state (as a subject of international law). As indicated in the next and final section, I think that a recent lesson from general jurisprudence may help one to illuminate the idea of sovereignty. More precisely, I submit that the application of the "central case approach" – as usefully developed and employed by Finnis to define the concept of law – is necessary to understand state sovereignty.

5. Neil MacCormick: sovereignty and post-sovereignty

In his critical discussion of the concept of sovereignty, Maritain makes use of the distinction between internal and external sovereignty¹⁶¹. As mentioned above, this distinction has found a place in legal scholarship, both at a doctrinal and a theoretical level. In relation to this last level, Chapter 8 of MacCormick's *Questioning Sovereignty* presents to the readers *two conceptual distinctions* that are relevant for an understanding of sovereignty. MacCormick devotes the first two parts of the Chapter to elucidating the ideas of sovereignty, sovereign state, and sovereign people; whereas in the third and fourth sections, he considers how these ideas may help one to describe and evaluate the relatively recent – at that time – development of the European Union. In doing so, he pays particular attention to EU law, which is conceived of as a legal order distinct from the legal orders of the Member States, and to EU institutions, which are desired to be

¹⁶¹ J. Maritain, 'The concept of sovereignty', *The American Political Science Review*, XLIV, 1950, pp. 355-356.

accountable to democratic scrutiny¹⁶². In this context, MacCormick puts forward two claims about “the demise of sovereignty”: a factual claim that (i) Europe is “beyond sovereign statehood”, and a normative claim that (ii) the fact that Europe is “beyond sovereign statehood” has a positive political value¹⁶³.

In relation to (i), MacCormick thinks that the legal and political development of the EU has created a situation in which “absolute or unitary sovereignty” has disappeared¹⁶⁴. More precisely, Member states no longer have ultimate legal or political power over their internal and external affairs and for this reason they cannot be said to be “fully sovereign states”¹⁶⁵. On the other hand, the EU “is plainly not a state. Nor does it possess sovereignty as a kind of Federation or Confederation. It is neither legally nor politically independent of its members”¹⁶⁶. In relation to (ii), MacCormick thinks that democracy would benefit from the development of a pluralism of legal orders and institutions in Europe. The main reason supporting this argument is that concentration of power, typical of the traditional doctrine of sovereignty, “can create opportunities for what might be called monolithic democracy”¹⁶⁷. MacCormick contrasts the problematic character of such a monolithic organisation of power – favoured by the doctrine of unitary sovereignty – with the more advantageous approach provided by the principle of subsidiarity. This principle is interpreted by MacCormick in a way that “requires decision-making to be distributed to the most appropriate level”¹⁶⁸.

¹⁶² According to MacCormick it is not difficult to accept the idea that EU law is a distinct legal order if one looks at EU law ‘from the point of view of a soundly pluralistic theory of law as institutional normative order.’ See N. MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 1999, p. 131.

¹⁶³ According to MacCormick, (i) and (ii) challenge our current theories of law and democracy respectively. See: *Ibid*, 135.

¹⁶⁴ N. MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 1999, p. 132.

¹⁶⁵ *Ibid*, p. 132.

¹⁶⁶ *Ibid*, p. 132.

¹⁶⁷ *Ibid*, p. 134.

¹⁶⁸ *Ibid*, p. 135.

MacCormick acknowledges that much of his line of argument in support of (i) and (ii) is grounded on a detailed *analysis* of the *concept* of sovereignty. The two-fold outcome of this analysis – the distinction between legal and political sovereignty, and the distinction between external and internal sovereignty – generates a matrix on the basis of which, I submit, a fruitful theory of state sovereignty can be developed. Yet, before considering the elements of this matrix, it is worth noting that both distinctions share a common proposition about the *nature* of sovereignty.

MacCormick holds the view that “sovereignty is a form of power”¹⁶⁹. Furthermore, he affirms that sovereign power is “territorial in character, and is power not subject to limitation by higher or coordinate power”¹⁷⁰. According to MacCormick, the “foundation doctrine” for both theory and practice in politics has been “the absolute power of the sovereign state”¹⁷¹. MacCormick distinguishes between political and legal power: the former is *de facto* power, whereas the latter is *de jure* power. Political power is “interpersonal power over the conditions of life in a human community or society”¹⁷²; it is power “to make sure that somebody in fact acts in a certain way, rather than power to bring it about that somebody ought to act in a certain way”¹⁷³. Legal power is, instead, a normative power, that is to say “power confined to the realm of the ‘ought’”¹⁷⁴.

¹⁶⁹ N. MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 1999, p. 126.

¹⁷⁰ *Ibid*, p. 127.

¹⁷¹ MacCormick considers different traditions (Hobbes, Hume, Bentham, Hegel, Hagerstrom) which favoured ‘the idea of an unchallengeable sovereignty in the state’. See *Ibid*, p. 124. Historically, it seems that the French revolution was one of the defining moments in the affirmation of absolute state sovereignty. Nonetheless, MacCormick leaves the problems of where and when the sovereign state might have emerged unsolved, as his main interest is in the current development of the European Union (as a legal and political order). From a logical point of view, however, a discussion of the thesis this development is linked to the demise of state sovereignty does not require to answer the (historical) question of the emergence of the sovereign state in Europe.

¹⁷² *Ibid*, p. 127.

¹⁷³ *Ibid*, p. 126.

¹⁷⁴ *Ibid*, p. 126.

MacCormick's SOVEREIGNTY matrix

Internal Political SOVEREIGNTY IPS	Internal Legal SOVEREIGNTY ILS
External Political SOVEREIGNTY EPS	External Legal SOVEREIGNTY ELS

By combining the above four concepts it is possible to identify the following six relations:

- 1) ILS and IPS: **Internal Legal Sovereignty** and Internal Political Sovereignty
- 2) ILS and EPS: **Internal Legal Sovereignty** and External Political Sovereignty
- 3) IPS and ELS: Internal Political Sovereignty and **External Legal Sovereignty**
- 4) EPS and ELS: External Political Sovereignty and **External Legal Sovereignty**
- 5) ILS and ELS: **Internal Legal Sovereignty** and **External Legal Sovereignty**
- 6) IPS and EPS: Internal Political Sovereignty and External Political Sovereignty

There is a question which is crucial for the whole project which is endorsed by MacCormick, and relevant for all the six relations identified above. This question is whether is it possible to have a loss of sovereignty by a given subject without

necessarily having another subject gain the sovereignty lost by the first subject¹⁷⁵. A second general question – pertinent to the discussions considered in Chapters 3 and 4 – is what relationship, if any, exists between the concepts of sovereignty, law and state¹⁷⁶. A third general question is whether it is possible to provide a coherent account for divided or limited sovereignty¹⁷⁷.

Such an account is possible, according to MacCormick, in light of the distinctions that constitute what I have called his sovereignty matrix. If sovereignty is a form of power (and if it is possible to distinguish between political and legal forms of power), then political sovereignty is a form of political power, whereas legal sovereignty is a form of legal power¹⁷⁸. If sovereignty is power (not subjected to limitation by higher or coordinate power) held independently over some territory, the subject enjoying sovereign power can be either within the state (i.e. a political community under international law), or the state itself as a member of the international community¹⁷⁹. The notion of popular sovereignty seems to be connected to the idea of external sovereignty as well as to the idea of internal sovereignty. MacCormick affirms, first, that “where a state is sovereign in the external sense, it makes perfect sense to say that this sovereignty belongs to the whole people of the state”¹⁸⁰. Secondly, he affirms that the absence of any internal sovereign organs “forces us to identify the people as the

¹⁷⁵ N. MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 1999, p. 126.

¹⁷⁶ MacCormick seems to endorse the thesis that ‘sovereignty is neither necessary to the existence of law and state nor even desirable.’ Ibid, p. 129.

¹⁷⁷ Especially when influential authors such as Austin and Schmitt considered divided sovereignty to be a contradiction in terms. See: N. MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 1999, p. 129.

¹⁷⁸ Ibid, p. 126.

¹⁷⁹ Ibid, p. 129: ‘...a state, whatever its internal distribution of legal and political power, is a ‘sovereign state’ in the sense that the totality of legal or political powers exercised within it is in fact subject to no higher power exercised from without.’

¹⁸⁰ Ibid, p. 130.

ultimate possessor of the sovereignty of their state”¹⁸¹. Yet, in both cases, the main problem is to define who constitute the people. In this respect, MacCormick holds two interesting views: (a) the people do not have “an existence distinct from or prior to their constitution”¹⁸²; (b) the nation as cultural, or linguistic, or historical, or even ethnic community is not coextensive with the [...] traditional ‘nation-state’¹⁸³.

Even without embracing MacCormick’s focus on popular sovereignty one can certainly acknowledge two merits to his analysis of the concept of sovereignty: first, it provides conceptual distinctions which are crucial for any attempt to better understand what (state) sovereignty is; and, second, such distinctions can also be fruitfully employed in a normative inquiry on the *practical* value (understood in terms of appropriate response to a set of human needs) of (state) sovereignty. Furthermore, the distinction between legal and political sovereignty as well as that between external and internal sovereignty has been used by jurists, legislators, and judges in the description, regulation and assessment of the development of political communities from their foundation to their acquisition of the status of independent, sovereign state. The next Chapter takes a historically situated doctrinal example to illustrate the ways in which this conceptual distinction has been employed.

6. Law, state and sovereignty

In the previous sections, I considered five different conceptions of (state) sovereignty. Each of them tells us something about external and internal sovereignty; and also something about their relationship. In Austin only internal sovereignty matters; whereas

¹⁸¹ Ibid, p. 131.

¹⁸² Ibid, p. 131. The people can be identified by virtue of the constitution.

¹⁸³ Ibid, p. 135.

in Kelsen only external sovereignty matters. Both Ross and Hart give priority to the “normative” (in the sense of based-upon-norms) dimension of state sovereignty, both externally and internally. However, because of their different understanding of legal norms, they have different views on sovereignty. Finally, MacCormick argues that external and internal sovereignty are disjoined; and that the relationship between them is contingent. It should be noted, however, that, despite their differences, these five conceptions of sovereignty share one feature: they all acknowledge that law and sovereignty are somehow co-related. In particular, a comparison between their views shows that there is a correlation between (state) law and (state) sovereignty.

Legal theorists tend to approach (state) sovereignty in light of the question: what is the relationship, if any, between (positive) law and (state) sovereignty? This question is topical for my research question. I have accepted the notion that both law and sovereignty respond to certain standing human needs (natural law). Now, at the end of the first Chapter, I have suggested that, in order to develop an explanatory definition of state sovereignty, the specific needs that make state sovereignty necessary and desirable must be identified (as in the case of positive law, that can only be properly explained in light of the human goods and needs that require the establishment of a positive legal system. Therefore, the relationship between positive law and state sovereignty is worth considering because it may reveal something about the human needs that underpin state sovereignty (*vis-à-vis* the human needs that underpin a positive legal system)¹⁸⁴. Furthermore, the existence of this relationship (if law, then sovereignty; or, if sovereignty, then law) leads one to examine legal discourse as a very important source of information about sovereignty claims.

¹⁸⁴ This point will be discussed in Chapter 6.

Chapter 3

External and internal sovereignty in legal discourse: the British Dominions as a case study

In the previous Chapter, I examined how external and internal (state) sovereignty have been conceptualised in the context of analytical jurisprudence. By comparing different conceptions of (state) sovereignty, I established that (state) law and (state) sovereignty are co-related. I also drew attention to the fact that legal discourse is the context in which sovereignty claims are most eminently presented¹. On this basis, I submitted that an analysis of the role played by claims to external and internal (state) sovereignty in legal discourse – especially, in the context of public international law and constitutional law discourse – would help me answer my research question². For such an analysis would ultimately enable me to identify which needs underpin external and internal (state) sovereignty; and the purpose of my research, it will be remembered, is to identify the standing human needs that make state sovereignty necessary and desirable, both externally and internally³.

This Chapter will examine the way in which the concepts of external and internal (state) sovereignty can be employed to describe, and evaluate, the development of a polity: from just a territory to an independent sovereign state. In particular, I will present, and analyse, some foundational moments in the (international and

¹ See Chapter 2, §6, where I also provided a definition of ‘legal discourse’ for the purposes of the Thesis.

² In the final section of Chapter 1, I formulated the research question of the Thesis as follows: what are the standing human needs that would make *sovereignty* (despite the risks inherently associated with it) necessary and desirable for a *state*, both externally and internally?

³ The identification of the needs that underpin external and internal sovereignty will begin in this Chapter (where I will identify the claims associated with the concepts of external and internal sovereignty); will be concluded in Chapters 4 and 5 (where I will analyse those claims, in the context of public international law and constitutional law discourse); and will be used to answer my research question in Chapter 6.

constitutional) history of a “model polity”, whose development will track the evolution of the sovereignty of the British Dominions⁴. By focusing attention on the most significant stages of this evolution, I will bring into view how the political and legal status of my “model Dominion” has changed, and developed, over time. An analysis of these incremental changes will allow me to identify which claims are commonly associated with the concepts of external and internal sovereignty. My analysis will demonstrate that these two concepts are employed, in relation to the development of a polity, to convey a number of different claims⁵. I will argue that it is possible to group these claims into two classes: the first class of claims – associated with external sovereignty – can be said to express a (meta-)claim to *state legal independence*; the second class of claims – associated with internal sovereignty – can be said to express a (meta-)claim to *state legal supremacy*.

In the first section of the Chapter, I will explain the choice of the British Dominions as a relevant case study for the purposes of my research⁶. I will consider the merits of other possible case studies; yet, I will argue that my choice is ultimately justified by the fact that the (international and constitutional) history of the British Dominions allows one to observe – almost in slow-motion, and through the categories of contemporary legal discourse – how the elements of external and internal (state) sovereignty organically aggregate over time (§1). I will, then, construct my “model

⁴ The use of the term ‘Dominion’, to distinguish colonies which enjoyed the fullest measure of responsible government from all the other British colonies, became common after the 1907 Colonial Conference. However, the legal use of ‘Dominion’ in legislation can be traced back to the *British North America Act 1867*. Article 3 (Declaration of Union) of the Act states that “the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One *Dominion* under the Name of Canada” (emphasis added). For the purposes of this Chapter, I will take into account the Dominions listed in the *Statute of Westminster 1931*: Canada, the Commonwealth of Australia, New Zealand, (the Union of) South Africa, the Irish Free State, and Newfoundland. This list is provided in Section 1 of the *Statute of Westminster 1931* (22 and 23 Geo 5; Ch. 4). It should be remembered that the expression ‘the Union of South Africa’ although present in the original text – dated 11th December 1931 – was subsequently removed, following the *South Africa Act 1962* (10 and 11 Eliz 2; Ch. 23, 5th Schedule).

⁵ Hence, the claims to external and internal (state) sovereignty work as “umbrella-claims”.

⁶ For a general methodological analysis of a “case study” in the social sciences, see: C.C. Ragin & H.S. Becker (eds.), *What is a Case? Exploring the Foundations of Social Inquiry*, Cambridge, Cambridge University Press, 1992.

Dominion”, focusing attention on the main stages of its development: from its formation as a colony to its recognition as an independent sovereign state (§2). In doing so, I will identify four diachronic stages of the evolution of such a model polity: British acquisition of the territory, installation of its administration, and formation of a colony (§2.1); the achievement of responsible government (§2.2); the acquisition, with the First World War, of international recognition (§2.3); the restriction of the legislative authority of the UK, as a result of the adoption of the *Statute of Westminster 1931* (§2.4). In the final section of the Chapter, I will focus attention on the *reason for* the development of my “model Dominion” towards full sovereignty, as manifested by the changes that characterise each stage of its (international and constitutional) evolution. I will suggest that the *legal* changes are more important than the *political* changes. This link will lead me to conclude that these changes, considered synchronically, show that the concepts of external and internal (state) sovereignty are used to express two meta-claims: a claim to state legal independence and a claim to state legal supremacy, respectively (§3)⁷.

1. The British Dominions as a case study

Before presenting, and analysing, some foundational moments in the (international and constitutional) history of my “model Dominion”, a few methodological considerations are in order. This is particularly necessary, I think, as the reader may wonder whether the nature of state sovereignty would not be better explained in light of a “model polity” constructed on the basis of a different case study. The reader may even think – perhaps more radically – that the nature of state sovereignty could be illuminated without analysing a case study. In my view, however, a case study is necessary; and the British

⁷ These two meta-claims will be analysed in Chapters 4 and 5 of the Thesis.

Dominions provide the best case study for the purposes of my research. This section explains my reasons for holding this view.

First of all, I think that an investigation into the nature of state sovereignty should be anchored to a case study because of a general methodological consideration: certain types of philosophical investigations, such as practical philosophy, cannot ignore the importance of *experience*⁸ – and the research presented in my Thesis is an exercise in practical philosophy. Secondly, there is a related, more specific reason to engage with my research question on the basis of a case study: the significance of (legal) history for legal theory⁹. In this regard, it should be remembered that this Chapter stems from the application of some of the results achieved by legal theory – both in terms of method (Chapter 1), and of theory (Chapter 2) – to the question: what is (the nature) of state sovereignty? Following the application of those results to the problem of the nature of state sovereignty, I submitted that the content of sovereignty claims can be illuminated by focusing on legal discourse¹⁰. Now, I think that the acknowledgment of those results from legal theory should entail an appreciation of the connection between legal

⁸ Aristotle, *Nicomachean Ethics* (translated by W.D. Ross), Book VI (1142a12-19): “...the objects of mathematics exist by abstraction, while the first principles of these other subjects [i.e. subjects of practical wisdom] come from experience...”. See also: S.G. Salkever, ‘Aristotle’s Social Science’, *Political Theory*, IX, 1981, pp. 479-508. Legal theory clearly shows how this principle may be ignored in favour of the opposite approach: that is to say, a top-down application of a general philosophy, which would often present itself as a *Weltanschauung*, to one or more legal problems. The tension between these two methodological approaches is identified, and discussed by Norberto Bobbio, who called them “philosophy-based” and “law-based” legal theory. On the explanatory power of “law-based” legal theory, see, in particular: N. Bobbio, *Giusnaturalismo e Positivismo Giuridico*, Milan, Edizioni di Comunità, 1965, pp. 40-46.

⁹ See J. Finnis, ‘On Hart’s ways: law as reason and as a fact’, in: J. Finnis, *Philosophy of Law. Collected Essays: Volume IV*, Oxford, Oxford University Press, 2011, p. 232. On this point, see, in particular, footnote 16, where Finnis quotes a passage from Collingwood. The passage is taken from: R.G. Collingwood, *The Principles of History and Other Writings in Philosophy of History*, Oxford, Oxford University Press, 1999. In Chapter 1, I suggested that the method fruitfully deployed by Finnis to the illuminate the nature of law should also be applied to the problem of the nature of state sovereignty. Hence, as Finnis’ methodology acknowledges the importance of history, my methodological approach should also take into account the historical development of state sovereignty. On the relationship between legal history and legal theory, see, most recently: M. Del Mar & M. Lobban (eds.), *Law, Theory and History – New Essays on a Neglected Dialogue*, Oxford, Hart Publishing, 2016 (forthcoming).

¹⁰ This argument is based on the correlation, established in Chapter 2, between (state) law and (state) sovereignty. In light of this correlation, I maintain that an analysis of the use of the concepts of external and internal (state) sovereignty in public international law and constitutional law discourse will help me answer my research question.

discourse and (legal) history. In particular, I think that (legal) history should be used to provide a relevant example of legal discourse; such legal discourse should, in turn, be examined, in order to illustrate what (external and internal) sovereignty claims amount to. Of course, it is possible for one to agree with the two methodological considerations offered above, and still affirm that, for the purposes of my research, the legal history of the British Dominions does not offer the most relevant example of legal discourse on (state) sovereignty. Arguably, this is the strongest objection to my choice. In the context of this Chapter, accepting this objection would imply the notion that my “model polity” should be constructed on the basis of a different, more relevant historical manifestation of (state) sovereignty. In the remaining part of this section, I will, therefore, consider five potential case studies that may seem to be more relevant for the purposes of an investigation into the nature of sovereignty.

- (i) Perhaps, the European Union should have been used as a case study, given that it exemplifies a contemporary, on-going political process which offers the opportunity to analyse state sovereignty “in action”. In particular, it may be argued, the European Union allows one to observe a gradual transfer of sovereignty from the Member States to new subjects (i.e. to European political and legal institutions, and to European law¹¹). Yet, I think that the European political and legal system is in such an embryonic stage that it would be very difficult to assess the development of state sovereignty. After all, not only is it almost impossible to maintain that European institutions – severally or altogether – enjoy full sovereignty; but, also, the European Union as a whole is not a

¹¹ Arguably, this process may have led to the formation of a new, sovereign, legal system. On the relationship between EU Law and “national” legal systems, from a theoretical perspective, see: J. Dickson, ‘How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union’, *Problema*, 2008. See also: J. Dickson & P. Eleftheriadis, *Philosophical Foundations of EU Law*, Oxford, Oxford University Press, 2012.

sovereign entity (nor a full subject of international law). Furthermore, if one considers how the sovereignty of the Member States has (supposedly) changed over the years, too many political and economic variables appear to be at play in any description of the “sovereignty in transition” process occurring within the European Union¹². On the contrary, the British Dominions show a finished process, in which historical distance makes it possible to consider the development of political and legal institutions (and norms, and concepts) almost as if it were part of a controlled experiment¹³.

- (ii) It may be possible for one to accept the principles of my response in (i), and to focus on the value of historical distance for the understanding of facts and texts, in a way that would call into question my choice of the British Dominions as the most relevant case study¹⁴. In particular, it may be suggested that a more “distant” example of the development of state sovereignty would be much more significant. The evolution of European Kingdoms of XVII century into absolute monarchies, for instance, may constitute a better example of the emergence of state sovereignty¹⁵. To this suggestion, I would reply that, although I recognise the importance of that historical period¹⁶, such a case study would generate a number

¹² The expression “sovereignty in transition” is taken from the title of a collection of essays on sovereignty and European law: N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003.

¹³ The historical distance of that process is such that its political, legal, economic and cultural aspects, as perceived in the interpretation of historical facts and written documents, have been extensively described and analysed – both separately and in their mutual interactions – for several decades. Also, the parallel development of state sovereignty in the Dominions was a process which moved in the opposite direction to that of the European Union, as it stem from the delegation of sovereignty from one State – qua head of an Empire – to different sub-state communities.

¹⁴ On the hermeneutical significance of temporal distance see H.G. Gadamer, *Truth and Method* (English translation), New York, Continuum International Publishing Group Ltd., 2004 (second edition), pp. 290 ff.

¹⁵ For a detailed overview of the history of the European monarchies in 17th century, see: C. Costantini, *Le Monarchie Assolute: Il Seicento*, Turin, UTET, 1984.

¹⁶ As shown by Chapter 1.

of difficulties, especially in relation to the availability of political and legal documents as well as to the “translation” of legal concepts into our legal conceptual framework¹⁷. On the contrary, in the case of the British Dominions both (written) primary and secondary sources share our contemporary terminology to such an extent that one can easily consider them to be part of our political and legal discourse¹⁸. Historicity aside, there is a substantive difference between the two examples. The European monarchies of the 17th century were absolute states, in which – at least, in theory – the sovereign was not limited by any positive law. Instead, the various degrees of (state) sovereignty enjoyed by the British Dominions were always circumscribed by English (positive) law.

- (iii) The first two objections refer to the historical dimension of my case study. Now, one could accept the value of a case study which presents a complete historical process relatively close to us, and still criticise the *type* of historical process exemplified by the British Dominions. In light of the considerations made in (i) and (ii), one may wonder whether it would be better to focus attention on the *creation* of a new State, alongside the creation of a new subject in international law¹⁹. For example, why not consider the case of state creation through secession?²⁰ This may reveal a number of elements of state sovereignty. From this

¹⁷ On this point see Q. Skinner, *Visions of Politics. Volume I – Regarding Method*, Cambridge, Cambridge University Press, 2002, pp. 158 ff.

¹⁸ I use the expression “legal discourse” in the sense explained in Chapter 1. As Chapter 2 drew attention to the correlation between (state) law and (state) sovereignty, it is crucial, for my research, to consider the development of Dominions’ legal rules and institutions. These rules and institutions can be understood through various means, but for the purposes of my research, written texts (legal documents and/or scholarly works) constitute the main source of information.

¹⁹ See, e.g.: J. Crawford, *The Creation of States in International Law*, Oxford, Oxford University Press, 2007 (second edition).

²⁰ Recent works on secession include: W.J. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State*, Oxford, Oxford University Press, 2006; M.G. Kohen, *Secession: International Law Perspectives*, Cambridge – New York, Cambridge University Press, 2006; C.H. Wellman, *A Theory of Secession: the Case for Political Self-Determination*, Cambridge,

point of view, my case study could be criticised for overlooking a crucial aspect of the formation of a sovereign entity. There are historical examples instead, like the Soviet Union (a federal state) or Czechoslovakia (a unitary state), which would allow one to study the whole trajectory of (state) sovereignty, from the creation to the dissolution of a sovereign state. My response to this suggestion is that considering the whole trajectory of state sovereignty, from its creation to its dissolution, albeit interesting per se, goes beyond the scope of my research. Given that my focus on (internal and external) sovereignty claims, I should limit my analysis to a situation in which the content of these claims can be clearly, and easily, ascertained.

- (iv) My case study may be criticised precisely in light of my research question. If my focus is on external and internal sovereignty claims – as my research question acknowledges, and makes use of, the distinction between internal and external sovereignty – it may be argued that I should consider each claim separately. In particular, my research should study cases in which, arguably, a change of internal sovereignty is not followed by a change in external sovereignty (for instance, the case of the Carnation Revolution), or, vice versa, a change of external sovereignty is not followed by a change in internal sovereignty (like the case of the Austro-Hungarian Empire). I think that such a criticism is off target, since it does not share my prima facie understanding of state sovereignty. For it interprets the distinction between external and internal sovereignty not simply as a distinction, but rather as a separation.

Cambridge University Press, 2005; S. Macedo & A. Buchanan, *Secession and Self-determination*, New York, New York University Press, 2003; B. Coppieters & R. Sakwa, *Contextualizing Secession: Normative Studies in Comparative Perspective*, Oxford, Oxford University Press, 2003.

(v) Finally, it may be argued that considering a case of absence, or disregard, of state sovereignty would help me answer my research question. One may argue that by the lack of external and/or internal sovereignty – for example, in the case of a failed state, or in the case of military intervention for humanitarian reasons – would be able to show, in an indirect way, some important moral requirements associated with (external and/or internal) state sovereignty²¹. My response is that a study of a failed state (e.g. Somalia), or an analysis of the justification for humanitarian intervention (e.g. Kosovo) would certainly be interesting in relation to state sovereignty. Yet, these are examples of non-paradigmatic cases of state sovereignty. Furthermore, these examples capture the moral deficiencies of peripheral cases of state sovereignty; and it would be fallacious to assume that these conditions would be sufficient to identify the (standing human) *needs* that underpin external and internal (state) sovereignty²².

Each of these five potential case studies raises an interesting question about state sovereignty: (i) Is state sovereignty transferable from one subject to another?; (ii) Does state sovereignty imply the absence of any (legal) limitations?; (iii) Does (state) sovereignty manifest itself in the creation or, rather, in the destruction of a state? (iv)

²¹ J.L. Holzgrefe & R.O. Keohane (eds.), *Humanitarian Intervention*, Cambridge, Cambridge University Press, 2003. The most up-to-date source of information about failed states is the *Fragile States Index* (formally *Failed States Index*) provided by the Fund for Peace: <http://fsi.fundforpeace.org/>, last accessed on 4 January 2016. On failed states also see: D.W. Potter, 'State responsibility, sovereignty and failed states', *Australasian Political Studies Association Conference*, 2004, (https://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf, last accessed on 4 January 2016).

²² How is it possible to link the absence of certain conditions – those conditions which generate a lack of sovereignty – to the existence of sovereignty? Premise 1: If conditions C (e.g. failed state/massive violation of human rights) exist in a given state S, then No internal/external sovereignty exists in S. The suggested case study would provide an example to identify C. One could introduce another premise, Premise 2: No conditions C in S, in order to reach the Conclusion: Then internal/external sovereignty exists in S. One could think that an analysis of the suggested case study could be helpful in identifying (some of) the conditions for the existence of state sovereignty. Of course, the conclusion cannot be accepted, since the reasoning outlined above is a clear example of formal fallacy (denying the antecedent).

Are the conditions for existence of internal sovereignty disjoined from the condition for existence of external sovereignty? (v) Does (state) sovereignty require a good state?

In my view, however, none of the potential case studies considered above is better than the British Dominions (at least, for the purposes of my research). There is, in fact, a third and concluding reason to focus on the British Dominions as an inspiration for my “model polity”. This reason is two-fold, and is rooted in the specific (international and constitutional) history of the Dominions. Because of their history, the British Dominions allow one to observe, basically in slow-motion, how the elements of external and internal (state) sovereignty can organically aggregate over time; furthermore, since this history is recent, the development of their sovereignty has been described and evaluated by means of the same categories that we are still using in our legal discourse. Despite being fully satisfied by this third reason, I do not believe that these five potential case studies are irrelevant for a study of state sovereignty. I think, however, that for the purposes of this Chapter – and, more generally, of the Thesis – the British Dominions provide the most archetypical case of aggregation of (state) sovereignty²³. And it is precisely such a process of aggregation that can reveal the content of (external and internal) state sovereignty claims,

2. The development of a “model Dominion”

In this section, I will construct my “model Dominion”, focusing attention on some main stages of its development: from its formation as a colony to its recognition as an independent sovereign state. In doing so, I will identify four diachronic stages of the evolution of such a model polity: British acquisition of the territory, installation of its

²³ The development of the autonomy of the Dominions is described as ‘archetypical’ by James Scott Brown in his ‘Preface’ to: J.S. Brown, *Autonomy and Federation within Empire. The British Self-Governing Dominions*, Washington, D.C., Carnegie Endowment for International Peace, 1921.

administration, and formation of a colony (§2.1); the achievement of responsible government (§2.2); the acquisition, with the First World War, of defence and treaty-making power (§2.3); and the restriction of the legislative authority and ministerial responsibility of the UK, as a result of the adoption of the Statute of Westminster 1931 (§2.4).

2.1 British acquisition of the territory

The British acquisition of a territory, and its incorporation into the British Empire, constitutes the moment of birth of our “model Dominion”. It should be noted, however, that not all Dominions were originally incorporated into the British Empire in the same way. This is important, because the method of acquisition of a colony had important consequences for the reception of English law, and for the recognition of the validity of the legal norms (possibly, of the legal systems) already existing in the territory of the colony²⁴. It is, therefore, necessary to distinguish between two ways in which our “model Dominion” may come into existence. First, it may be established as a settled colony – acquisition by settlement means the occupation of a “desert and uncultivated”, “uninhabited” territory. Secondly, it may be a conquered colony, or a colony ceded by treaty.

These two different ways of acquisition of a territory are most clearly exemplified by the incorporation into the British Empire of Australia and New Zealand. The first

²⁴ The importance of this distinction for the identification of the law in force in a given territory can be traced back to William Blackstone, according to whom: “...if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. [...] But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain...” For a lucid analysis of the reception (or imposition) of English law in the colonies (with special reference to Australia, Canada, and New Zealand, see: P. Oliver, *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada, and New Zealand*, Oxford, Oxford University Press, 2005, Chapter 2.

British settlement in New South Wales was established on 26 January 1788²⁵. Over the following decades the British progressively claimed the rest of Australia²⁶. On 1 January 1901 a federation of six states named the Commonwealth of Australia was formed under the *Commonwealth of Australia Constitution Act, 1900*²⁷. As in the case of the federal state, each state within the federation derived its first constitution from a British statute. As for ordinary legislation, according to a general principle, the common law and statutes of England applied as they were at the date of the formation of each colony acquired by settlement²⁸. In the case of New Zealand, although Captain James Cook proclaimed British sovereignty over that territory in 1796, this proclamation lapsed because it was not immediately followed by settlement. In fact, over the years before 1839 Britain's policy in New Zealand was one of "non-intervention": Imperial Statutes of 1817, 1823 and 1828 explicitly declared New Zealand not to be within His Majesty's dominions²⁹. By 1830 a number of circumstances forced Britain into more

²⁵ This date refers to the establishment of a settlement at Sydney Cove, which followed the arrival at Botany Bay of the "First Fleet" under the command of Captain Arthur Phillip who was appointed Governor-in-Chief over New South Wales, which was defined as extending along the east coast. It was Captain James Cook, in command of HMS Endeavour, who laid claim to the south-east coast of Australia in right of his Majesty King George III in 1770.

²⁶ New South Wales was constituted as a Crown Colony in 1824. Tasmania was declared a separate colony from New South Wales in 1825 (with the name of Van Diemen's Land). Western Australia was established in 1829 (with the name of Swan River Colony). The first settlement in South Australia was established in 1836. In 1851 Port Philip separated from New South Wales and became a new colony named Victoria. Queensland separated from New South Wales and became a separate colony in 1859.

²⁷ On the historical and social background of the drafting of the Constitution of the Commonwealth of Australia see: H. Irving, *To Constitute a Nation – A Cultural History of Australia's Constitution*, Cambridge, Cambridge University Press, 1999, pp. 46-61. For an overview of Australian constitutional history, see also: W. G. McMinn, *A Constitutional History of Australia*, Oxford, Oxford University Press, 1979. The High Court of Australia considered Australia's constitutional history in some detail in the landmark case: *Mabo v Queensland (No 2)* (1992) 175 CLR 1. On Australian constitutions – i.e. the Commonwealth constitution and the state constitutions – see: C. Saunders, *The Constitution of Australia*, Oxford, Hart Publishing, 2011, pp. 39-72.

²⁸ Section 24 of the *Australian Courts Act, 1928* (9 Geo IV; Ch. 83, s. 24) provided that all statutes and laws in force in England should apply to New South Wales and Van Diemen's Land (now known as Tasmania). Although this is not the source of (the application of) English law in Australia, it "has been interpreted as applying a cut off date to statutes." See B.H. McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007), pp. 336-7. On the reception of English law in Australia, one can also see: T. Blackshield & G. Williams, *Australian Constitutional Law and Theory* (4th edition, Sydney: The Federation Press, 2006), pp. 134-143.

²⁹ P.A. Joseph, *Constitutional & Administrative Law in New Zealand*, Thomson Brookers, Wellington, 2007 (third edition), p. 37.

official involvement with New Zealand³⁰. In 1836 the boundaries of the British colony of New South Wales were extended to include New Zealand, pending Britain's acquisition of sovereignty over New Zealand. The Treaty of Waitangi was signed on 6 February 1840 by Captain William Hobson – who signed on behalf of the British Government – and more than 500 Maori chiefs. The British saw the signing of this treaty as a cessation of sovereignty by the Maori³¹. On the other hand, the Maori 'probably saw it more as a commitment to an ongoing partnership and a guarantee of their property rights'³². In November 1840 letters patent were issued creating New Zealand as a Crown colony, separate from New South Wales. Hence, from an historical point of view, British acquisition of New Zealand might be said to rest 'partly on discovery, partly on cession, partly on occupation and settlement, and partly on assertion'³³.

Whether its history started with a settled, conquered, or ceded territory, our "model Dominion" begins its life as a colony under the unfettered authority of the British Crown and of the Imperial Parliament. As such, English law provides the rules and principles that regulate the exercise of legislative, executive, and judicial power in relation to our "model Dominion". Any other set of rules and/or principles in force in the territory of our "model Dominion" is valid only insofar as English law recognises it. Yet, the growth of the economy, of the population, and of the social complexity of our

³⁰ These included humanitarian concerns relating to the 'often debauched' behaviour of British sailors; the desire to exploit New Zealand's natural resources to ease the financial burden on the large Empire; colonial competition; and settlers' questionable purchases of Maori land (in particular the activities of the New Zealand Company which was acquiring large portion of New Zealand's land). See G. Morris, *Law Alive: The New Zealand Legal System in Context*, Oxford, Oxford University Press, pp. 48-49.

³¹ The Treaty has been incorporated into New Zealand law with the Treaty of Waitangi Act 1975 (NZ). See R.D. Mulholland, *Introduction to the New Zealand Legal System*, Butterworths, Wellington, 2001 (tenth edition), pp. 70-71. Over time the legal status of the Waitangi Treaty has been questions: the New Zealand court of Appeal defined the principles of the Treaty in *New Zealand Maori Council* [1987].

³² G. Morris, *Law Alive: The New Zealand Legal System in Context*, Oxford, Oxford University Press, pp. 19.

³³ P.A. Joseph, *Constitutional & Administrative Law in New Zealand*, Thomson Brookers, Wellington, 2007 (third edition), p. 41.

“model Dominion” creates, over the years, the circumstances for demanding autonomy in the government of internal affairs.

2.2 The achievement of Responsible Government

The achievement of responsible government constitutes a crucial step toward the development of the sovereignty of our “model Dominion”³⁴. Responsible government was intended to give more (internal) autonomy to our “model Dominion” without changing the nature of its relationship with the United Kingdom³⁵. The most important characteristic of responsible government is the fact that the executive power is accountable to the legislative assembly. Furthermore, the executive power (which originates from the Crown) is exercised for the well-being of our Dominion. This is assured through a cabinet that is answerable to (and removable by) the legislative assembly. The regime of responsible government, and the idea of autonomy entailed by it, has developed in parallel with some important changes in the regulatory capacity of our “model Dominion”.

Expenditure on local objects and commerce has provided the main motivations for our “model Dominion” to demand autonomy. Yet, demands of autonomy have slowly grown, and after trade issues they now include: customs regulations, postal services,

³⁴ The regime of responsible government was first put into effect in the Province of Nova Scotia and in the Province of Canada in 1848; it was then extended to the Province of New Brunswick (1854) and to Newfoundland (1855). Between 1855 and 1857 it became operative in the Colonies of New South Wales, Victoria, South Australia, Tasmania and New Zealand. Responsible government was later granted to Queensland, on its separation from New South Wales in 1859, and to Western Australia in 1890. In South Africa, the Cape of Good Hope received responsible government in 1872; Natal in 1893; Transvaal and the Orange River Colony in 1906 and 1907 respectively. Responsible Government was eventually extended to the federal governments of Canada (1867), Australia (1900), and South Africa (1909). Much later, Malta (1921), Southern Rhodesia (1923), and India (1947) were granted responsible government.

³⁵ Indeed, from a British perspective, the main purpose of responsible government was to maintain the paramount supremacy of the Imperial Parliament. On responsible government see: A.B. Keith, *Responsible Government in the Dominions*, London, Clarendon, 1928 (second edition). A.F. Madden & D.K. Fieldhouse (eds.), *Settler self-government (1840-1900): the development of representative and responsible government*, New York – London, Greenwood, 1990; A.H. Birch, *Representative and responsible government: an essay on the British constitution*, London, Allen and Unwin, 1966.

immigration control, copyright, constitutional change, internal defence.³⁶ Commerce has also been the main force behind the request of autonomy in the field of foreign affairs. Initially, the Imperial Government exercised authority over all commercial treaties for every part of the Empire. Most recently, our “model Dominion” has acquired the option of separate adherence to commercial treaties, followed by the recognition of the right of separate withdrawal. Eventually, the right of our “model Dominion” to have ‘special commercial treaties negotiated for it’³⁷, has been recognised. Yet, at the beginning of the 20th century, political treaties and naval defence are still under the authority of the Imperial Parliament and the Imperial Government.

2.3 The First World War

With the First World War, the adequacy of the political and legal status of our “model Dominion” is called into question. Before the War, the relationships of our “model Dominion” with, on the one hand, the United Kingdom, and, on the one hand, all the other sovereign states in the international society, were determined by the regime of responsible government. It is true – as indicated above – that this regime managed to control the increasing demands of autonomy expressed by our “model Dominion”. However, the First World War constitutes an important moment in the development of our Dominion, because it demonstrates the common recognition of an equality of status between the Governments of the members of the British Commonwealth. This is very clear when one considers the creation of a policy instrument such as the Imperial War Cabinet.

³⁶ A.B. Keith, *The Constitutional Law of the British Dominions*, London, Macmillan and Co., 1933, pp. 5-6.

³⁷ A.B. Keith, *The Constitutional Law of the British Dominions*, London, Macmillan and Co., 1933, p. 7: “...and in 1895 there was finally recognised the right of every to have special commercial treaties negotiated for it, subject to concurrence by the British Government in the action and to certain safeguards for the interests of other parts of the Empire”.

At the start of the War, the Dominions joined without reservations the United Kingdom: this choice, on the one hand, imposed a huge economic and social burden on the Dominions, on the other hand, increased their importance and strengthened their position within the Empire. The War was not, of course, the appropriate time for discussing changes in the constitutional structure of the Empire. However, the creation of the Imperial War Cabinet was a public recognition of the new status acquired by the Dominions. The most important feature of the War Cabinet was the nominal equality that characterised the discussion within the Cabinet. In this regard, it is worth mentioning the speech given by Sir Robert Borden to the Empire Parliamentary Association, on 21 June 1918). Sir Borden explicitly said that the participants in the War Cabinet attend the meeting “upon terms of perfect equality with the Prime Minister of the United Kingdom and his colleagues”³⁸. It should also be remembered that Imperial War Conferences were held in London, concurrently with the meetings of the Imperial War Cabinet, in 1917 and 1918: these conferences paved the way for the separate representation of the Dominions at the Peace Conference of Paris in 1919. At the Paris Conference the Dominions arguably obtained more representation than the minor Powers co-belligerent in the War. For the Dominions could express their voice as part of the British Empire Delegation, but also as “Powers with special interest”³⁹.

Hence, at the end of the War our “model Dominion” manages to have distinct representation at the Peace Conference of 1919. This political recognition is strengthened by individual membership to the League of Nations.⁴⁰ In the twenties the

³⁸ A.B. Keith, *Speeches and documents on the British Dominions*, p. 5. He also affirms that the War Cabinet should be conceived of as a Cabinet of Governments and that every Prime Minister is responsible to the relevant Parliament and people. Furthermore, he states that, because of these two elements – equality and parliamentary involvement – each Dominion retains its perfect autonomy.

³⁹ The Powers with special interests included the Dominions and India; the Powers with general interests were: the United States, the British Empire, France, Italy, and Japan. See Keith, *The Sovereignty of the British Dominions*, pp. 316-317.

⁴⁰ On the dominions and the league of nations see See Keith, *The Sovereignty of the British Dominions*, pp. 327-369.

international status of our model Dominion further develops, by achieving the capacity to negotiate international treaties without the approval of the British Government. In the assessment of the evolution of the political and legal status of our “model Dominion” the Imperial Conference of 1926 is particularly important. For this Conference established the doctrine of equality in status between Great Britain and the Dominions. This equality is based on the recognition that Great Britain and Dominions are:

...autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

The Imperial Conferences held in 1926 and 1930 constitute the political prelude to a crucial legal change in the development of our “model Dominion”: the enactment, and the adoption, of the *Statute of Westminster 1931*.

2.4 The Statute of Westminster 1931

In this sub-section I take the *Statute of Westminster 1931* as a privileged standpoint from which to consider the evolution of the sovereignty of the British Dominions⁴¹. In this respect, it is useful to consider the Statute not only as a written legal source, but also as a result of the political development of the British Commonwealth and of its constitutional structure – a structure that mirrors the British constitution, insofar as its most important norms have their sources in legal conventions and not simply in

⁴¹ Formally, the final stage of independence is a constitutional declaration, sometimes followed by the rejection of the jurisdiction of the Judicial Committee of the Privy Council. In Australia, for example, this jurisdiction has been slowly curtailed over time, and is now for all practical purposes completely terminated. The Privy Council (Limitations of Appeals) Act, 1968 (Cth) abolished appeals to the Privy Council in cases involving Federal legislation. The Privy Council (Appeals from the High Court) Act, 1975 (Cth) abolished all routes of appeal to the Privy Council from the High Court of Australia. Finally, section 11(1) of the Australia Act, 1986 (Cth) abolished the right to bring an appeal to the Privy Council from the state Supreme Courts.

statutory laws⁴². Hence, it should be remembered that the *Statute of Westminster 1931* can be interpreted as being, at least, two things: first, as a legal document (an important statute, part of the constitutional law of the British Commonwealth)⁴³; and, secondly, as a fact (an important event in British constitutional history)⁴⁴.

Before analysing their internal and external sovereignty, it is worth remembering the main sections of the Statute⁴⁵. Section 1 of the Statute provides an extensive definition of the term ‘Dominion’. Section 2 touches upon a very sensitive aspect of Dominion autonomy; that is the validity of the laws made by a Dominion Parliament. This section, which is the product of the works of the 1930 Imperial Conference, expands the legislative freedom of the Dominions by stating that the *Colonial Laws Validity Act, 1895* no longer applied to their future legislation⁴⁶. Section 3 grants the Parliament of a Dominion the “full power to make laws having extra-territorial operation”. Section 4 provides a limitation to the applicability of an Act passed by the Parliament of the United Kingdom, which can no longer be automatically extended to a Dominion as part of its law. Sections 5 and 6 contain a special enactment about previous restrictions on Dominion legislation about merchant shipping and the jurisdiction and procedure of Courts of Admiralty. Sections 7 and 8 have an important

⁴² A.B. Keith, *The Constitutional Law of the British Dominions*, p. 14: ‘The Statute is not a revolutionary measure. It represents the outcome of a long process of development [...], and its importance lies mainly in the fact that it establishes as law what had before rested on convention.’

⁴³ I will not consider the effects of the Statute of Westminster on the English constitutional principle of parliamentary sovereignty in detail. On this point see: K.C. Wheare, *The Statute of Westminster 1931*, p. 75: “The position, then, in regard to the sovereignty of the Imperial Parliament, is that the Statute does not abolish it; indeed the passage [section 4] of the Statute is a proof of its existence.”

⁴⁴ These two dimensions of the Statute of Westminster are carefully discussed in K.C. Wheare, *The Statute of Westminster 1931* (Oxford: Clarendon Press, 1933), pp. 9-40.

⁴⁵ For a precise comment of the wording of the Statute, see: R.P. Mahaffy, *The Statute of Westminster 1931. With an Introduction, Notes and Index* (London: Butterworth & Co., Ltd., 1932), pp. 5-15.

⁴⁶ The Act (28 and 29 Vict; Ch. 63), dated 29th June 1865, was entitled “An Act to remove doubts as to the Validity of Colonial Laws.” See Section 2, “Colonial law when void for repugnancy”, stated that: “Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate [...] shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.”

constitutional value, as they establish that nothing in the *Statute of Westminster, 1931* can repeal or alter the *British North America Acts* and the *Constitutions Acts* of the Commonwealth of Australia and of the Dominion of New Zealand. Section 9 explicitly separates the legislative authority of the Parliament of the Commonwealth of Australia from the legislative authority of the Parliament of each Australian State. Section 10 establishes that sections 2 to 6 of the Statute cannot extend to a Dominion “as part of the law of that Dominion” unless they are adopted through an Act passed by a Dominion Parliament. Section 11, by expressing an interpretative rule, recognises the constitutional development of the Dominions. In this section it is stated that in the future Acts of the UK Parliament the possible meanings of term ‘Colony’ do not include “a Dominion or any Province or State forming part of a Dominion”. Finally, section 12 provides a short title for the Statute: “This Act may be cited as the Statute of Westminster, 1931”.

I think that both realities (legal and political) should be taken into account when reflecting upon the function of the Statute. The Statute was intended to be a means ‘to promote the spirit of free co-operation amongst the members of the British Commonwealth of Nations’.⁴⁷ Now, the fact that this co-operation is said to be ‘free’ appears to be a clear recognition of the autonomy of each members of the British Commonwealth of Nations. On the other hand, the use of the verb “to promote” suggests that this “free co-operation” is a still work-in-progress, which makes the *Statute of Westminster 1931* simply part, and not the final point, of an on-going process of political and legal development. The Statute is explicitly defined as ‘an Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930’. The most notable result of the 1926 Imperial Conference (which was held in London from 19th October to 22nd November 1926) was the so-called Balfour

⁴⁷ King’s opening speech in Parliament, 10th November 1931.

Declaration⁴⁸, which stated that the self-governing communities of Great Britain and the Dominions were: autonomous Communities within the British Empire; equal in their status; in no way subordinate one to another in any aspect of their domestic or external affairs; united by a common allegiance to the Crown; and freely associated as members of the British Commonwealth of Nations. By 1926 the British Dominions had already reached a certain degree of constitutional autonomy: this is the reason why the Balfour Declaration could explicitly affirm that every self-governing member of the Empire was “the master of its destiny”. It is of particular importance that the 1926 Imperial Conference declared that the “root principle” governing the relations between Great Britain and the Dominions was the principle of “equality of status”. Nonetheless, some inequalities between the Dominions and the United Kingdom, especially in terms of their administrative, legislative and judicial powers, still existed. K.C. Wheare has identified six legal and conventional inequalities which both Conferences tried to address and, eventually, remove⁴⁹.

- (i) Inequalities of status which resulted from the title of His Majesty the King;

⁴⁸ The name “Balfour Declaration” comes from the fact that the Inter-Imperial Relations Committee, which passed the declaration, was chaired by Lord A. Balfour (1848–1930). This Declaration must not be confused with another, previous Balfour Declaration, dated 1917, about the establishment in Palestine of a national home for the Jewish people. It is worth noting that the relations addressed by the Committee were not inter-imperial, but rather intra-imperial or intra-Commonwealth relations, as they were not relations between Empires, but between communities within the British Empire/British Commonwealth of Nations. This terminological remark is made in K.C. Wheare, *The Statute of Westminster 1931*, Oxford, Clarendon Press, 1933, footnote 3, pp. 1-2.

⁴⁹ K.C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed., Oxford: Oxford University Press, 1953). The first step towards a *de jure* and *de facto* equality was made by the Inter-Imperial Relations Committee, which explicitly recommended changes, on the one hand, for the Royal style and titles, and on the other hand, for the status of the Governor-General in the Dominions. Further steps were made by the 1930 Imperial Conference, which put forward its proposals in light of a Report (dated January 1930) of the 1929 Conference on the Operation of Dominion Legislation. This Report identified some restrictions on Dominion legislative competence and advised their removal – in particular, it touched upon the powers of disallowance and reservation as limits to the autonomy of the Dominions. See also: K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960), pp. 20-57.

- (ii) Inequalities arising from the status of the Governor-General in relation to the ministers in the Dominion and to His Majesty's government in the United Kingdom;
- (iii) Inequalities arising from the extent of the power of disallowance;
- (iv) Inequalities arising from the existence and exercise of the power of reservation by the Governor-General;
- (v) Inequalities arising from the power of the Sovereign to assent or refuse assent;
- (vi) Inequalities arising from the existence of appeal to the Judicial Committee of the Privy Council.

It is very interesting that all the six points refer to (or depend upon) legal norms. This consideration brings us back to the end of Chapter 2, where I focused on the correlation between (state) law and (state) sovereignty.

3. State legal independence and state legal supremacy

In his book, *The Sovereignty of the British Dominions* (1929), Arthur Berriedale Keith used the internal-external dichotomy to analyse the extent of the sovereignty of the British Dominions, as recognised by the Imperial Conference Resolutions of 1926⁵⁰. Interestingly, Keith is sceptical about the distinction between internal and external sovereignty:

“The issue thus presented [the tension between Dominion autonomy and Empire unity] can be considered from the point of view either of external or internal sovereignty [...]. There is, it is clear, no essential connexion between the two questions. It might be held that the Dominions and the United Kingdom were connected by a union which made them a single

⁵⁰ Notably, the internal-external dichotomy provides the structure for the whole book. Part I: The development of internal sovereignty. Part II: The extent and limits of internal sovereignty. Part III: The development of external sovereignty. Part IV: The extent and limits of external sovereignty. See: A.B. Keith, *The Sovereignty of the British Dominions* (London: Macmillan and Co., 1929).

entity in international law, and yet that in all matters of internal affairs each possessed absolute autonomy and owed no subordination to another.”⁵¹

Keith nonetheless makes use of this distinction when he lists limits to external and internal sovereignty separately. In relation to external sovereignty, the history of the British Dominions demonstrates that my “model Dominion” expressed the desire to improve: its international recognition (e.g. individual membership to the League of Nations); its freedom from the UK in order to negotiate international treaties autonomously; its diplomatic representation; its capacity to declare war/peace (having the right to neutrality). In relation to internal sovereignty, Keith identifies the following deficiencies of sovereignty: the Dominions were part of the British Empire and had no power to terminate that membership without the legal intervention of the Imperial Parliament⁵²; the Dominions Parliaments were unable to exercise the unfettered constituent power belonging to the Parliament of the United Kingdom; disallowance and reservation of Dominions legislation; territorial restriction on Dominions legislation; supremacy of Imperial legislation; the position of the Governor-General⁵³; the right of the Privy Council to hear appeals from all Dominion Courts; and the prerogative of honour and laws about the flag.

In his book, *The Present Juridical Status of the British Dominions in International Law*, P.J. Noel Baker discusses two questions which are particularly relevant for the present study. First, he considers whether the British Dominions have become separate persons in International Law⁵⁴. Secondly, if this were the case, he asks

⁵¹ A.B. Keith, *The Sovereignty of the British Dominions*, pp. 182-3.

⁵² Ibid, p. 191: “...no Dominion can legislate [...] so as effectively terminate the connexion of the Dominion with the Empire.”

⁵³ As a result of the 1930 Imperial Conference, it was decided that the appointment of the Governor-General was a matter between the King and the Dominion Government. This was interpreted as recognition that the Dominions enjoyed “virtually unfettered freedom in selecting and removing the head of the executive”. A.B. Keith, *The Constitutional Law of the British Dominions*, p. 18.

⁵⁴ P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (London – New York – Toronto: Longmans, Green & Co., 1929), pp. 343-353. The status of the British Dominions

whether the international personality of the British Dominions would differ from the international personality of the so-called “independent sovereign states”⁵⁵. In relation to the first problem, Baker convincingly argues in favour of the conclusion that “within the scope of the wide international rights and duties which they are now entitled to exercise, the Dominions have become separate persons of International Law.”⁵⁶ In order to reach this conclusion, Baker discusses the thesis that neither the Dominions nor Great Britain as such can have an international legal personality, because the only subject of international law in the British Empire is the Monarch. One may argue that according to the doctrine of the unity and indivisibility of the Crown, the Monarch, as Head of the State, is the only legal person of international law within the Empire. Yet, Baker notes that the proposition that the Monarch, as Head of the British Empire, is a person of international law does not entail that the Monarch, as an individual, is a person of international law⁵⁷. Baker holds the view that personality is “the legal capacity for rights and duties.”⁵⁸ This means that “a ‘person’ in international law is not an individual, or a corporation; a legal person [...] *is the legal subject or substance of which rights and duties are attributes.*”⁵⁹ In relation to the second problem – which kind of subjects of international law the British Dominions are – Baker defends the thesis that the Dominions are not, in all respects, independent sovereign states and, therefore, they must be considered *sui generis* persons of international law. The reason why the

in their relation to the external world is also discussed in: F.S. Dunn, ‘The new international status of the British Dominions’, *Virginia Law Review*, 13 (1927), pp. 354-379.

⁵⁵ P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, pp. 354-359. According to Baker, Oppenheim was one of the first to suggest that the British Dominions had a separate status in international law. See: L. Oppenheim, *International Law* (3rd edition, London – New York; Longmans, Green & Co., 1920-21).

⁵⁶ P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, p. 353.

⁵⁷ P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, p. 347.

⁵⁸ *Ibid*, 348.

⁵⁹ *Ibid*, 347-8. The text in italics is in the original and refers to a quotation, incorporated in the text, by F. Pollock, *A First Book of Jurisprudence for Students of the Common Law* (6th edition, London: Macmillan, 1929), pp. 110-11.

Dominions cannot be considered identically equal to full independent sovereign states is their “juridical and organic connection with the British Empire.”⁶⁰ According to Baker, the limitations on Dominion independence which follow from this connection made the Dominions “part sovereign states.”⁶¹ It is worth noting that this thesis is linked to another position defended by Baker: a sceptical view about the conceptual distinction between internal and external state issues⁶².

The analyses of Keith and Baker are particularly relevant for the suggestion this Chapter is intended to make. The way in which they present the development of the sovereignty of the British Dominions allows one to observe that all the specific claims associated with demands of increasing (external and internal) sovereignty can be grouped in two sets. Both sets of claims focus on the legal status of our “model Dominion”. I would submit that the set of claims associated with the concept of external sovereignty can be said to express a (meta-) claim to state legal independence. I would also submit that submit that the set of claims associated with the concept of internal sovereignty can be said to express a (meta-) claim to state legal supremacy. The task of the next two Chapters is to analyse these two ideas – state legal independence and state legal supremacy – in the context of public international law and constitutional law discourse, respectively.

⁶⁰ P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, 356. This connection exists, according to Baker, insofar as the legal and constitutional bonds described in chapter VI exist. See, *ibid*, pp. 209-246.

⁶¹ *Ibid*, p. 356.

⁶² *Ibid*, p. 38: “The truth is that the external relations of a Government result in great measure from the facts and needs of its internal administration, and that the distinction often made between internal and external questions is largely false.”

Chapter 4

State legal independence and the need for self-determination

As a result of a case study analysis based upon the constitutional history of the British Dominions, Chapter III concluded that the concepts of external and internal sovereignty are used to express two umbrella-claims: a claim to state legal independence and state legal supremacy respectively. For the purposes of my Thesis, however, that conclusion provides only a temporary result, since it does not by itself yield a fully satisfying definition of state sovereignty¹.

Also, in light of the conclusion of Chapter 3, the meaning of the expression ‘state *legal* independence’ appears to oscillate between the following two possibilities:

- (i) the independence of a state/the State from one or more legal orders; and
- (ii) the independence of a state legal order from one or more authorities (external and/or internal to a given state).

Similarly, the meaning of the expression ‘state *legal* supremacy’ appears to oscillate between the following two possibilities:

- (iii) the supremacy of a state/the State over one or more legal orders; and
- (iv) the supremacy of a state legal order over one or more authorities (such as persons, institutions and/or norms).

It is interesting to note the parallelism between, on the one hand, (i) and (iii); and, on the other hand, (ii) and (iv)². Nonetheless, it should be noted that these two pairs of

¹ The criteria according to which I consider a definition of a general concept used in the social sciences – such as the concept of law, or the concept of sovereignty – to be “fully satisfying” are identified in Chapter 1. For an explanatory definition of state sovereignty, see Chapter 6.

² In relation to (ii) and (iv), it is worth noting that the properties of being independent and supreme are commonly considered to be characteristic features of a state legal system. See, e.g., H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), p. 24: “The legal system of a modern state is characterized by a certain kind of *supremacy* within its territory and *independence* of other systems...” I agree with Hart that: “These two notions [supremacy and independence] are not as

interpretations do not exhaust all the possible meanings of those two expressions. In fact, in order to understand better the concept of state sovereignty, I believe that it is necessary to focus attention on at least a third possible interpretation of ‘state *legal* independence’ and of ‘state *legal* supremacy’:

- (v) the independence of a state/the State from one or more authorities, *according to a given legal order* (usually the international legal order); and
- (vi) the supremacy of a state/the State over one or more authorities, *according to a given legal order* (usually the state legal order).

This Chapter will analyse (v), focusing attention on public international law discourse; whereas (vi) will be analysed, focusing attention on constitutional law discourse, in the next Chapter.

I will begin this Chapter by considering the definition of state independence provided by Judge Dionisio Anzilotti in the *Austro-German Customs Union* case (PICJ 1931)³:

Independence [...] is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.

Despite appearing in the minority judgment, this definition is particularly relevant for the purposes of my research, because it suggests a conceptual connection between (state) independence and (external) sovereignty⁴ – and Chapter 3 of the Thesis, the

simple as they may appear”. Ibid. The way in which Hart conceives of (state) sovereignty is discussed in Chapter 2.

³ (1931) P.C.I.J., Ser. A/B, No. 41.

⁴ In general, the significance of Anzilotti’s definition is demonstrated by the number and importance of legal scholars who have subsequently referred to it. See, e.g.: J. Crawford, ‘The criteria for statehood in international law’, *British Yearbook of International Law*, XLVIII, 1976-77, 48, p. 122: “[...] the definition of independence given by Judge Anzilotti has become the *locus classicus*.” See, also: J.L. Brierly, *The Law of Nations*, Oxford, Clarendon Press, 1963, p. 129; A. Verdoss & H.F. Koeck, ‘Natural Law: The tradition of universal reason and authority’, in: R. Macdonald & D.M. Johnston, *The Structure and Process of International Law*, Dordrecht, Martinus Nijhoff, 1983, p. 38; V. Lowe, *International Law*, Oxford, Oxford University Press, 2007, p. 159; M.N. Shaw, *International Law*, Cambridge, Cambridge University Press, 2008, p. 211.

reader will remember, established a connection between independence and external sovereignty. Furthermore, Anzilotti's definition implies a distinction between legal independence and *de facto* liberty⁵. By distinguishing independence from liberty, his definition appears to capture precisely the connection identified at the end of the previous Chapter: that between state *legal* independence and external sovereignty. Anzilotti describes legal independence as sole subjection to international law, which can be considered to be the standard way of understanding (v) above. This means, for Anzilotti, that the legal independence of a state from the authority of other states is consistent with the recognition of the authority of international law.

At the beginning of the Chapter, I will discuss, in particular, how the concepts of state independence, sovereignty, and personality (as subjection to international law) may be distinguished – without being separated – from the point of view of international law (§1). I will then discuss two legal doctrines which are considered to be entailed by the “standard view” on state independence: the principle of sovereign equality (§2); and the principle of non-intervention (§3). In light of these two principles, I will argue that state independence encompasses not only a dimension of *legality*, but also a dimension of *legitimacy*. Using Hohfeld's terminology, its legality can be best explained — as the (legal) *immunity* of a state vis-à-vis other (external) authorities. And its legitimacy can be best explained on the basis of the claim, made by a state political community, to self-determination. I will question the origin of this claim, and I will identify such origin in the community's *need for self-determination*. I will conclude the Chapter suggesting a connection between this need and the need for autonomy (§4).

⁵ (1931) P.C.I.J., Ser. A/B, No. 41: “...restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence.” Cf. the body of contemporary literature which treats state independence and sovereignty as a matter of fact – see, on this point, my discussion of Krasner in Chapter 1, and my discussion of Ross in Chapter 2.

1. State independence, personality and sovereignty

Three propositions can be extracted from Anzilotti's definition of state independence quoted above: (1) *according to* the international legal order, independence is the "normal condition" of states; (2) state independence can be described as (external) sovereignty; and (3) because of the link between state independence and state (external) sovereignty, independence entails that international law is the only authority above the state. This first subsection will discuss (1), whereas the second subsection will focus on (2) and (3). Considering (2) and (3) together is necessary in order to avoid the following misunderstanding of (2).

One may argue that, whereas Anzilotti's definition uses the concept of (external) sovereignty to describe, and explain, the concept of (legal) independence, my research in general, and this Chapter in particular, proceeds in the opposite direction, i.e. investigating the concept of independence in order to illuminate the concept of sovereignty. Would this mean (the objection goes) that what is taken to be the *explanans* in Anzilotti's definition is instead my *explanandum* (external sovereignty)? If this were true, my argumentative strategy would be flawed⁶. My rejoinder to this possible objection is that a contextual reading of (2) may show that, in Anzilotti's definition, the concept of external sovereignty is not really used as the *explanans* of legal independence; rather, it is used as a placeholder for the notion that the only authority above the state is the authority of international law. Hence, in order to shed some light on the concept of external sovereignty through an analysis of the concept of state independence, it is helpful to consider propositions (2) and (3) together.

⁶ I think, however, that even if this were true, it would still be possible to respond by arguing that the relationship between independence and sovereignty is better captured by the circular relationship between part and whole (in the hermeneutic circle), rather than by the linear relationship between *explanandum* and *explanans*. On the idea of hermeneutic circle, see, e.g., H-G. Gadamer, 'Hermeneutics and Social Science', *Philosophy Social Criticism / Cultural Hermeneutics*, II, 1975, pp. 307-316. Cf. C.G. Hempel & P. Oppenheim, 'Studies in the Logic of Explanation', *Philosophy of Science*, XV, 1948, pp. 135-137. A methodological justification for the present research is provided in Chapter 1.

1.1 State independence and the “normal condition” of states

Should one agree with Anzilotti’s (arguably descriptive⁷) proposition that independence is the “normal condition” of states *according to* international law? In answering this question, I submit, one must tackle the following problem: does international law *determine* what the “normal condition” of states is, or does it simply acknowledge that it is “normal” for a state to be in a given *prior* condition – for example, the condition of being independent?

In tackling this problem, the first step is to answer these two questions is to identify the features which a social group – paradigmatically a political community⁸ – must possess to be considered a state for the purposes of international law. According to the *Montevideo Convention on the Rights and Duties of States*, the elements of a state are: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states⁹. As indicated in Chapter II, the set of these four elements constitutes the traditional identification test for states in the international arena. Hence, it is more than plausible to assume that the expression ‘normal condition of states’ may be taken as describing the conjunction of (a), (b), (c), and (d) – i.e. the necessary and sufficient condition for statehood. Yet, in light of these elements, the proposition that independence is the normal condition of states would be inaccurate, since it would not capture the totality of states in their “normal condition”. This is because (a), (b), (c) and (d) can be found in cases of both dependent and independent

⁷ On this point, see: J.L. Brierly, *The Law of Nations*, Oxford, Clarendon Press, 1963, p. 129: “Independence is merely a descriptive term; it has no moral content.”

⁸ See Chapter 6. On the idea of the state as a group, see also: N. Barber, *The Constitutional State*, Oxford, Oxford University Press, 2010, Chapter IV.

⁹ *Montevideo Convention on the Rights and Duties of States* (1933). This Convention was signed at the International Conference of American States in Montevideo, Uruguay on 26 December 1933; and it entered into force on 26 December 1934. It is worth remembering that, in relation to statehood, there are two main theories: the declarative and the constitutive theory of statehood.

states¹⁰. From this perspective, therefore, one should disagree with Anzilotti's view, since independence would appear to be *something more* than the normal condition of state¹¹.

On the other hand, one may argue that in the case of a dependent state only (a), (b), and (c) can be found, the capacity to enter into state-to-state relations being a "clear mark of independence."¹² According to this argument, then, Anzilotti's first proposition would appear to be accurate. Yet, is this a correct understanding of element (d)? I think that, by accepting this argument, the descriptive accuracy of Anzilotti's proposition could be saved only at the cost of conflating the concepts of legal independence and legal personality. The rules of international law identify an actor as a legal person in international law by ascribing to that actor a set of *capacities*, and this is why the concept of legal personality can be interpreted as "a shorthand for the proposition that an entity is endowed by international law with legal capacity."¹³ Element (d) simply identifies state personality as one of the characteristic features of a state, but unfortunately it does not tell us anything about the concept of independence.

If one intends to distinguish between independence and personality – and I think that these two concepts should be distinguished¹⁴ – it would appear, once again, that the concept of independence is meant to add something to the test for statehood. If legal personality were considered a characteristic feature of a state, one should conclude that being subject of international law – together with elements (a), (b), and (c) – would

¹⁰ On this point, see, my discussion of the evolution of the British Dominions in Chapter 3.

¹¹ According to Anzilotti's definition, independence is "*really no more* than the normal condition of state". Emphasis added.

¹² V. Lowe, *International Law*, Oxford, Oxford University Press, 2007, p. 157.

¹³ D.P. O'Connell, *International Law*, London, Stevens & Sons, 1970 (second edition), p. 81. Here, O'Connell is simply stating, and not embracing, this positivistic definition of legal personality.

¹⁴ A state can have legal personality without having independence or sovereignty. Similarly, personality and statehood should be distinguished. Nonetheless, it is usually assumed that "sovereign independent states are the principle (although not the only) international persons". See R. Jennings & A. Watts, *Oppenheim's International Law*, Oxford, Oxford University Press, 1996, p. 120.

define a state for the purposes of international law. Nonetheless, according to Anzilotti's definition, independence does not simply imply subjection to international law (this would just be the mark of personality), but rather *sole* subjection to international law: that is, subjection to no other authority other than international law. This specific understanding of independence is clearly demonstrated by Anzilotti's connection between independence and (external) sovereignty; and, through this last concept, between independence and the authority of international law.

In the light of these connections, the problem mentioned at the beginning of this section may be rephrased as follows: is state independence prior or subsequent to the existence of international law? This question can, of course, be asked in relation to state personality and state sovereignty¹⁵. It is worth noting that, by conceptualizing (external) sovereignty as the product of international law rules, one would reach the conclusion that both the form and the content of state sovereignty depend upon the actual "rules of sovereignty"¹⁶. This is the positivist account of state sovereignty, and of state independence, offered by Anzilotti¹⁷.

¹⁵ J. Finnis, 'Natural Law Theories', *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/fall2014/entries/natural-law-theories/>: "Kelsen denied that persons were known either to law or to a proper legal theory or science of law, except insofar as they were made the subject of a posited legal rule. But against this restriction [...] it can be said that the fundamental equality and dignity of human beings should be defended as part of a rationally sound understanding (concept) of law. This defense requires an account of the difference between capacities which are activated here and now, or are more or less ready to be so actuated, and *radical* capacities..." Emphasis in the original.

¹⁶ J.M. Ramos, *Changing Norms through Actions. The Evolution of Sovereignty*, Oxford, Oxford University Press, 2013.

¹⁷ Anzilotti defends a positivistic theory of international law. On this point, see Gaja, 'Positivism and Dualism in Dionisio Anzilotti', *European Journal of International Law*, III, 1992, pp. 123-138. Anzilotti's understanding of international law is best expounded in his textbook *Corso di diritto internazionale: Volume I – Introduzione – Teorie generali*, Padova, CEDAM, 1955. The thesis that state sovereignty is ultimately defined by the (positive) rules of international law is also defended in Chapter X of *The Concept of Law*; Hart, however, disagrees with Anzilotti on whether the principle *pacta sunt servanda* can be identified as the basic norm of international law. See H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 2012 (third edition), pp. 233-234; and the relevant note at p. 306 (where Hart refers to Anzilotti).

1.2 External sovereignty and the authority of international law

In what sense should one understand the notion that state independence can be described as (external) sovereignty? It seems that, from a purely legal perspective, the independence of a state cannot amount to its political and/or economic independence. International law discourse has identified a number of *rights* which are connected with the legal concept of independence: for example, the “right of a state to exercise jurisdiction over its territory and permanent population, or the right to engage upon an act of self-defence in certain situations.”¹⁸ Article 1 of the *Draft Declaration on Rights and Duties of States* (1949) even suggests that independence itself is a right: “Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government”¹⁹. So, it appears that there is a set of claim-rights associated with legal independence. In a similar way, sovereignty has also been described in terms of rights; more precisely, as “an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states”²⁰.

In light of such a rights-based account, one may argue that the existence of a common set of rights would explain why independence can be described as (external) sovereignty. From this perspective, the best way to identify this common set is to consider the rights associated with the concept which lies at the intersection between

¹⁸ M. Shaw, *International Law*, Cambridge, Cambridge University Press, 2008, p. 212. These rights are accompanied by *duties*, such as “the duty not to intervene in the internal affairs of other sovereign states” *Ibid*.

¹⁹ *Draft Declaration on the Rights and Duties of States* (1949). The text of the Draft Declaration appeared in the annex to General Assembly resolution 375 (IV) of 6 December 1949. It is interesting to notice that the understanding of state independence in terms of an aggregate of rights would provide a normative dimension to the first three elements of statehood mentioned in the *Montevideo Convention*. Indeed, the right to exercise jurisdiction over the state’s territory and population explicitly refers to: (a) a permanent population, and (b) a defined territory; whereas the right to freely establish a form of government explicitly refers to (c).

²⁰ J.L. Brierly, *The Law of Nations*, Oxford, Clarendon Press, 1963, p. 47.

independence and sovereignty: the concept of jurisdiction, in the two senses of jurisdiction to enforce – which is inherently territorial²¹ – and jurisdiction to prescribe – which is inherently personal²².

Observed through the lenses of the concept of jurisdiction, both the independence and the sovereignty of states appear to denote a specific privilege: a state's exclusive competence in relation to (a) its permanent population, and (b) its defined territory. The conjunction of (a) and (b) circumscribes the specific area of competence proper to each state. Of course, despite the factual differences in (a) and (b), each state enjoys the same kind of privilege, relatively to its specific area of *exclusive* competence. This suggests that, from a legal point of view, all states are equal in their entitlement to a specific area of competence. Of course, it is important to underline that this is true only if the independence/sovereignty of a state S is not understood as referring principally to the degree of factual liberty enjoyed by S in relation to its exclusive area of competence.

Anzilotti thinks that the independence of a state is not equivalent to its de facto liberty. In his judgment in *Austro-German Customs Union*, Anzilotti distinguishes between a legal and a non-legal conception of independence. According to Anzilotti, a legal conception of independence should also be distinguished from, on the one hand, a state's subordination to international law, and on the other hand, from "the numerous

²¹ Here two categories of rights must be distinguished. On the one hand, rights which relate to territory; and on the other hand, rights which are beyond state territory, such as "the 'sovereign rights' a coastal state has over the resources of the continental shelf, or a prescriptive right of passage between the main territory and an enclave". See J. Crawford, *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2012, pp. 205-206. Piracy triggers a particular case of "universal jurisdiction" – see *Re Piracy Jure Gentium* [1934] A.C. 586: "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but "hostis humani generis" and as such he is justiciable by any State anywhere: Grotius (1583-1645) "De Jure Belli ac Pacis," vol. 2, cap. 20, § 40."

²² D.P. O'Connell, *International Law*, London, Stevens & Sons, 1970 (second edition), pp. 602-603. See also Oppenheim's view that, despite their close relationship, "jurisdiction is not coextensive with state sovereignty". See R. Jennings & A. Watts, *Oppenheim's International Law*, Oxford, Oxford University Press, 1996, p. 457.

and constantly increasing states of de facto dependence which characterize the relation of one country to other countries.”²³ The identification of a legal conception of independence allows Anzilotti to argue that “...restrictions upon a State’s liberty [...] do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.”²⁴ The distinction between independence and de facto liberty clearly supports a “negative” understanding of state *legal* independence: a state is independent if its area of exclusive competence is not subject to the authority of any other state. The independence thus defined is *legal*, because it is independence *according to* international law. Anzilotti thinks that it is possible for a state to exclude all other states from its area of competence, while recognising the authority of international law. A reason to hold this view is that the claim of a state to territorial and personal jurisdiction is recognised and protected by international law rules, as demonstrated by the development, in legal doctrine and practice, of a ‘principle of sovereign equality’, and of a ‘principle of non-intervention’.

The following two sections will discuss these two legal doctrines, with a view to corroborating the notion that the concept of state independence cannot be explained as a mere description of the legal condition of states. It will be shown that any attempt to describe – as Anzilotti does – state independence as sole subjection to international law (in his case, like in Kelsen, through the concept of sovereignty), implicitly presupposes some normative considerations about the *legitimacy* of state independence.

²³ For an overview of Anzilotti’s judgments, see: Jose Maria Ruda, ‘The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice’, *European Journal of International Law*, III, 1992, pp. 100-122.

²⁴ (1931) P.C.I.J., Ser. A/B, No. 41.

2. The principle of sovereign equality

In the previous section I considered how the concepts of state personality, independence and sovereignty can be distinguished. I argued that both independence and sovereignty, presuppose state personality; they also add something to the “normal condition” of states (understood in light of the elements of statehood). I showed how Anzilotti uses the concept of independence – supposedly in a descriptive sense – as applicable to each and every legal authority whose (territorial and personal) jurisdiction is able to exclude other competing legal authorities. I also demonstrated that this use of concept of independence works only if the concept of (external) sovereignty is understood as a placeholder for the notion that a state is subject solely to the authority of international law. Does the principle of sovereign equality – a principle expressly recognised by the UN Charter²⁵ – follow from this understanding of (external) sovereignty?²⁶

At least two lines of argument have been offered to support the thesis that states are equal (in relation to their sovereignty) because each of them is subject solely to the authority of international law²⁷. The first argument, which focuses on the condition of states before the emergence of an international legal order, is the one developed by the modern natural law tradition. This tradition – Pufendorf and Vattel in particular – applied the natural equality of individuals in the “state of nature” to the international

²⁵ See Article 2: “The Organization is based on the principle of the sovereign equality of all its Members.”

²⁶ It may be possible that sovereign equality is one of the elements of the normal condition of a state. P.C. Jessup, ‘The Equality of States as Dogma and Reality’, *Political Science Quarterly*, LX, 1945, p. 527: “Equality ranks traditionally with sovereignty and independence as an inherent and unimpeachable attribute of the state”.

²⁷ See my discussion of Kelsen’s conception of state sovereignty in Chapter 2. In the vast literature on the topic of state equality, it is worth remembering: E. Dickinson, *The Equality of States in International Law*, Cambridge (Mass.), Harvard University Press, 1920; J. Goebel, *The equality of states: a study in the history of law*, New York, Columbia University Press, 1923; P.H. Kooijmans, *The doctrine of the legal equality of states: an inquiry into the foundations of international law*, Leyden, A.W. Sythoff, 1964; R.A. Klein, *Sovereign equality among states: the history of an idea*, Toronto, University of Toronto Press, 1974; S. Yee, *Sovereign equality of states and the legitimacy of “leader states”*, Leiden, Martinus Nijhoff, 2005.

context, arguing that states have, by nature, equal rights and duties²⁸. Yet, as a matter of law, states do not have the same rights and duties; if anything, they have equal capacity for rights and duties (i.e. equality of their personality). The second argument suggests that, if states do not accept any superior authority but the authority of international law, as guarantor of their claim to exclusive jurisdiction, the relationship between any two given states can only be defined by international law rules (and these rules happen to consider all states as equal). At a first sight, this second argument seems to be more promising, but in the end it simply reaches the same conclusion of the first argument: equality of state personality²⁹.

My working hypothesis is that *sovereign equality* of states follows from state independence, understood as the *right* of a state to exclude other authorities (paradigmatically states) from its exclusive area of competence³⁰. Is this one of the rights that international law discourse associates with the principle of sovereign equality? According to the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, sovereign equality is enjoyed by all states “notwithstanding differences on economic, social, political or other nature”³¹. In particular, sovereign equality is meant to imply the following situations: (a) states are judicially equal; (b) each state enjoys the rights inherent in full

²⁸ It is generally accepted that the natural law tradition has been crucial for the development of international law. Already Maine, for example, held the view that: “The grandest function of the Law of Nature was discharged in giving birth to modern International Law...” See: H.S. Maine, *Ancient Law*, London, John Murray, 1906, Chapter IV, p. 99.

²⁹ M. Shaw, *International Law*, Cambridge, Cambridge University Press, 2008, p. 215: “the notion of equality before the law is accepted by states in the sense of equality of legal personality and capacity”.

³⁰ This can be interpreted as a theoretical or as an historical hypothesis. For the purposes of my research, I am interested in the former more than the latter. H. Weinschel, ‘The doctrine of equality of states and its recent modifications’, *The American Journal of International Law*, XLV, 1951, p. 417: “The rise of national states and the Protestant revolution undermined, and the Thirty years’ War destroyed, the dies of the universal community. The notion of the community or family of states gradually took its place: the states were independent from of the Empire and of each other. They were sovereign states: equality was a result of sovereignty.”

³¹ R. Jennings & A. Watts, *Oppenheim’s International Law*, Oxford, Oxford University Press, 1996, p. 339: “...as members of the community of nations [states] are, in principle, equal, whatever differences between them may otherwise exist.”

sovereignty; (c) each state has the duty to respect the personality of other states; (d) the territorial integrity and political independence of the state are inviolable; (e) each state has the right freely to choose and develop its political, social, economic and cultural systems; (f) each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.³² In addition, the principle of sovereign equality may entail a right to vote in international fora, according to the principle one state, one vote. This last element of sovereign equality, however, is not universally accepted. Lowe, for example, thinks that the principle of sovereign equality has more importance in theory – as “a prominent element of the catechism of international lawyers”³³ – than in practice. Lowe’s sceptical view on the sovereign equality to vote is supported by the following argument: equality really matters only within a democratic legislature working under the principle of majority rule; the international community is not regulated by a democratic legislature (one state, one vote) working under the principle of majority rule³⁴; therefore, equality does not really matter within the international community. Whether or not an equal right to vote is implied by the principle of sovereign equality, I think that it is necessary to separate the importance of sovereign equality *qua* political principle (well captured by Lowe’s criticism) from its importance as a *legal doctrine*. The best way to explain sovereign equality as a legal doctrine, I submit, is to consider the legal principles which are

³² Ibid., p. 341. The last element can be expanded by saying that the principle of sovereign equality as a doctrine which entails that each state: may participate in the law-making process of international law; may make the initial determination about whether their rights have been violated; all States will bear international responsibility for failure to comply with their international obligations. On this point, see C. Warbrick, ‘States and recognition in international law’, in: M. Evans (ed.), *International Law*, Oxford, Oxford University Press, p. 223. Cf. the argument that “it would not be strictly accurate to talk in terms of the equality of states in creating law”. See Shaw, *International Law*, Cambridge, Cambridge University Press, 2008, p. 215.

³³ Lowe, *International law*, Oxford, Oxford University Press, 2007, p. 114. On the departure from sovereign equality and the relationship between voting techniques and composition of organs and the representation of the non-legal inequalities between states: D.W. Bowett, *The Law of International Institutions*, London, Stevens&Sons, 1975, pp. 356-362.

³⁴ R. Dahl, ‘Can International Organizations Be Democratic? A Skeptic’s View’, in: I. Shapiro & C. Hacker-Cordon (eds.), *Democracy’s Edges*, Cambridge, Cambridge, Cambridge University Press, 1999, pp. 19-36.

commonly associated with it. Even Lowe argues that sovereign equality is a way to “articulate a principle that meshes with, and is arguably implicit in, the other principles set out in the resolution 2625 Declaration.”³⁵ Amongst these legal principles, two appear to be particularly useful in order to prove my working hypothesis. One is the principle of equal rights and self-determination of peoples; and the other is the principle of non-intervention. In the next section, I will consider the latter principle – a principle commonly presented in terms of a *duty* of a state not to intervene in matters within the domestic jurisdiction of another state.

3. The principle of non-intervention

As a matter of political practice, the life of the principle of non-intervention really begins in the 20th Century; as a *legal* principle, however, this principle is older, receiving one of its first formulations in Vattel’s *The Law of Nations* (1758). In legal scholarship, the principle of non-intervention has often been presented as a corollary of the principle of sovereign equality of states. The ICJ has considered non-intervention to be a principle of customary international law, and has described it as a prohibition to intervene – with the method of coercion, and especially with the use of force – in the area of exclusive competence of a state. According to the ICJ, that is the area within which a state is free to make the “choice of a political, economic, social and cultural system, and the formulation of foreign policy”³⁶. As indicated in the first section of this

³⁵ Lowe, *International Law*, Oxford, Oxford University Press, 2007, p. 115. Furthermore, Lowe argues that the principle of sovereign equality is linked to the notion that (international) laws should apply to all States alike. Cf. the doctrine of the “duality of norms”: “the idea that in some fields it is unfair and unrealistic to impose the same legal obligations on every State”. Ibid. p. 116.

³⁶ See “Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)”, 1986, paragraph 205.

Chapter, the concept of jurisdiction, and, in particular, the concept of domestic jurisdiction is commonly used to describe that area of exclusive competence³⁷.

In the last few decades the idea of intervention has been expanded beyond the use of force, in order to include different kinds of intervention carried out by means of economic and political pressure³⁸. An intervention in the jurisdiction of another state can be carried out, for instance, through military operations, subversive activities, economic coercion, or diplomatic interference. It is important to notice, however, that despite this expansion in the applicability of the principle beyond the use of (military) force, contemporary legal doctrine and practice have also developed a number of justifications for state intervention.

The first justification is the existence of an explicit request to intervene within the jurisdiction of a given state – an explicit request made by the lawful government of that state. Secondly, state intervention may be justified if constitutes a reaction to an unlawful use of force (a reaction modelled on the idea of self-defence); in this case, the reaction must always be immediate and limited by the principle of proportionality. A third justification is given by a collective intervention for reasons of international security: such an intervention is usually co-ordinated by the UN Security Council³⁹. A fourth case is intervention in the form of assistance given to insurgents within the jurisdiction of another state. Finally, intervention may be justified as a response to a humanitarian catastrophe.

Amongst these justifications, the last two are the most relevant for the purposes of my research. They capture cases in which a state S has the authority to interfere with the

³⁷ Article 2 of the UN Charter: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...”

³⁸ On this development of the interpretation of the principle of non-intervention, see the 1965 United Nations General Assembly Declaration on Intervention – UN General Assembly Resolution 2131 (XX).

³⁹ According to UN Charter, the Security Council has the power to take collective actions if the following circumstances occur: a threat to the peace; a breach of the peace; an act of aggression.

legitimate power of another state T, within T's domestic jurisdiction, without the authorisation of a supposedly superior subject (like in the third justification), or the existence of specific interactions between S and T (like in the first and second justifications). In the last two cases, therefore, the reasons that justify intervention fully depend upon a normative understanding of the situation occurring within T's jurisdiction.

Interestingly, the last two justifications for a violation of T's exclusive competence share a common feature: the reference, at a deeper justificatory level, to self-determination⁴⁰. Insurgents within a given state T may be a section of the T's population trying to exercise its right to self-determination. Indeed, whereas civil wars are usually treated by international law discourse as internal matters, self-determination conflicts have a specific status. Hence, the right to self-determination can be said to fully belong to the set of reasons which may justify humanitarian intervention. Not only is this right mentioned in a number of international documents, but both legal practice and doctrine recognise that it is permissible for a people struggling to exercise its right to self-determination to receive external support (even if this may amount to armed intervention in the jurisdiction where that people lives)⁴¹.

According to Henry Shue, the principle of non-intervention has a two-fold function: on the one hand, it protects state sovereignty, and on the other hand, it limits it⁴². This follows, according to Shue, from a rights-based idea of sovereignty: "...if

⁴⁰ The literature on self-determination is vast. See, at least: A. Cassese, *Self-Determination of Peoples*, Cambridge, Cambridge University Press, 1995; H.S. Johnson, *Self-Self-Determination within the Community of Nations*, Leiden, Sitjhoff, 1967; A. Cobban, *The Nation State and National Self-Determination*, London, Collins, 1969 (second edition); R. Emerson, 'Self-Determination', *American Journal of International Law*, LXV, 1971, pp. 459–75; D. Clark & R. Williamson (eds.), *Self-Determination: International Perspectives*, Basingstoke, Macmillan, 1996; R. McCorquodale (ed.), *Self-Determination in International Law*, Dartmouth, Aldershot, 2000.

⁴¹ Article 1 (2) states that the purpose of the UN Charter is: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". See, also, UN General Assembly Resolution 3314 (XXIX), with an annex on the Definition of Aggression (1974).

⁴² Shue, 'Limiting Sovereignty', in: J.M. Welsh, *Humanitarian Intervention and International Relations*, Oxford, Oxford University Press, 2004, pp. 14.

sovereignty is a right, sovereignty is limited”⁴³. Furthermore, Shue argues that, at a conceptual level, “the form of sovereignty imposes limits on its content”⁴⁴. This thesis is based upon a conception of sovereignty as “a constrained right to do wrong: a right to commit some wrongs but not others”⁴⁵. The nature and content of fundamental individual rights provide, for Shue, the criteria for distinguishing between acceptable and unacceptable wrongs⁴⁶. In the next section I will suggest that the principle of self-determination may have a similar two-fold function (i.e. protecting and limiting) in relation to state independence.

4. State independence and the right to self-determination

The idea behind the principles of sovereign equality and non-intervention was already known in the late medieval period, when legal scholars began to use the maxim *par in parem non habet imperium*. This maxim is still in use, and its corresponding idea “is frequently invoked as a basis for state immunity”⁴⁷. In Hohfeld’s terminology, A has an immunity from B, if B lacks the power to change A’s Hohfeldian incidents. Indeed, it is this conception of immunity which international law discourse assumes when affirming that: “No State has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any other state”⁴⁸. Hohfeld’s conception of immunity appropriately captures the *legal* dimension of state independence. State

⁴³ Ibid, p. 15.

⁴⁴ Ibid, p. 16.

⁴⁵ Ibid. Cf. T. Endicott, ‘Comity among Authorities’, *Current Legal Problems*, LXVIII, 2015, pp. 1-26.

⁴⁶ On the relationship between human rights and limitations of state sovereignty, see J. Raz, ‘Human Rights Without Foundations’, in: S. Besson & J. Tasioulas (eds.), *The Philosophy of International Law*, Oxford, Oxford University Press, 2010. Cf. J. Tasioulas, ‘Human Rights, Legitimacy, and International Law’, *American Journal of Jurisprudence*, LVIII, 2013, pp. 1-25.

⁴⁷ See J. Crawford, *Brownlie’s Principles of Public International Law*, Oxford, Oxford University Press, 2012, p. 449.

⁴⁸ See UN General Assembly Resolution 2131 (XX).

independence also has a dimension of *legitimacy*, which can be explained, I submit, in light of the principle of self-determination. On the basis of the previous section, however, I think that the principle of self-determination both limits and protects state independence⁴⁹.

Until World War II self-determination was a political rather than a legal principle⁵⁰. Yet, after the UN Charter entered into force (1945) legal discourse began to develop the legal dimension of self-determination⁵¹. Inspired by the UN Charter, other international documents explicitly referred to the concept of self-determination. Amongst these, the most important are: the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960), which established that all peoples have a right to self-determination; the *International Covenant on Economic, Social and Cultural Rights* (1966) and the *International Covenant on Civil and Political Rights* (1966), which described self-determination as a condition for the flourishing of individual human rights within a given community. The *Declaration on Principles of International Law* (1970) is particularly significant: it not only linked the principle of self-determination to the right of all peoples “to determine, without external interference, their political status and to pursue their economic, social and cultural development”⁵², but also affirmed that “the establishment of a sovereign and

⁴⁹ The principle of self-determination has been interpreted as a crucial principle in the evolution of international law; and self-determination has been invoked, especially in developing countries, as a foundation for the right to economic development and to full exercise of their sovereignty.

⁵⁰ In the first part of the 20th Century, the most important document mentioning the principle of (national) self-determination is the statement by President Wilson known as “The Fourteen Points” (1918). More generally, see: A. Rigo Sureda, *The Evolution of the Right of Self-Determination*, Leyden, Sijthoff, 1973; D. Ronen, *The Quest for Self-Determination*, New Haven, Yale University Press, 1979; C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, Nijhoff 1993.

⁵¹ See Articles 1(2) and 55 of the UN Charter. See, also: L.C. Chen, ‘Self-Determination as a Human Right’, in: W.M. Reisman & B.H. Weston (eds.), *Toward World Order and Human Dignity*, New York, Free Press, 1976, pp. 198–261.

⁵² 1970 UN General Assembly Resolution 2625 (VVV) – Declaration on Principles of International Law concerning friendly relations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Available at: <http://www.un-documents.net/a25r2625.htm> (last visited 10 January 2016).

independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination”⁵³.

Nowadays, the principle of self-determination is recognised as a legal principle binding for the members of the international community, and in particular for states. In fact, the ICJ has stated that the principle is applicable, beyond the state, to non-self-governing territories, trust territories and mandates⁵⁴. It is also worth remembering that the *right to self-determination* belongs to peoples rather than to states. For the purposes of my research, it is extremely interesting to see that international law discourse connects the right to self-determination with the concept of a people, whether or not organised in the form of a state.

Of course, the idea that peoples have a right to self-determination may be problematic. It may be difficult to identify a people, i.e. the bearer of the right to self-determination⁵⁵. At a more fundamental level, one may ask whether it is even possible for groups to have rights⁵⁶. In my opinion, however, this last doubt can be removed, at least in this case, by explaining the internal connection between the “collective” right to self-determination and the individual (human) rights of the members of the community. It may also be difficult to define the way in which the right to self-determination can be actually exercised. The exercise of the right to self-determination by means of secession is

⁵³ Ibid.

⁵⁴ See Advisory Opinions in the South West Africa/Namibia case and in the Western Sahara case. On the applicability to cases of uncertain territorial sovereignty, see Commission of Rapporteurs in the Aland Islands case (1921). Clearly, these developments in the practice and doctrine of international law were supported by the specific circumstances of the process of decolonisation.

⁵⁵ For example, the ICJ has affirmed that the existence of a Palestinian people is no longer in issue, but without providing a general test for the identification of a people. Paragraph 118; Israeli Wall Advisory Opinion “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”.

⁵⁶ D. Newman, *Community and Collective Rights*, Oxford, Hart Publishing, 2011. See, also, P. Alston (ed.), *Peoples’ Rights*, Oxford, Oxford University Press, 2005.

particularly problematic⁵⁷. Secession is an interesting case because it shows the relationship between the external and the internal dimension of self-determination. In *Reference re Secession of Quebec*, the Supreme Court of Canada stated that “[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination”⁵⁸. In fact, the exercise of the right to self-determination by means of secession from a unified sovereign state (as distinct from an empire⁵⁹) is allowed only when the fundamental rights of the members of the community have been massively violated.

This last point corroborates the significance of the connection between the collective right to self-determination and the individual (human) rights of the members of the community. As indicated in the previous Chapters, the language of individual human rights can be used to translate a philosophical discourse about standing human needs within a political community into a legal discourse. I would suggest that this is also true for the language of collective rights. I think, therefore, that the legal discourse on the right to self-determination is a way to articulate a community’s standing human need: the need for autonomy. This proposition, I submit, captures the external dimension of self-determination. It is also relevant, however, in the context of internal self-determination, which has been interpreted by international lawyers as a people’s ‘right to be taken seriously’ in internal affairs⁶⁰. I will consider the internal dimension of

⁵⁷ I. Primoratz & A. Pavkovic (eds.), *Identity, Self-Determination and Secession*, Aldershot, Ashgate, 2006; M. Moore (ed.), *National Self-Determination and Secession*, Oxford, Oxford University Press, 1998.

⁵⁸ Paragraph 126.

⁵⁹ See R. Ekins, ‘Constitutional Principle in the Laws of the Commonwealth’, in: J. Keown & R.P. George (eds.), *Reason, Morality, and Law: the Philosophy of John Finnis*, Oxford, Oxford University Press, 2013, especially pp. 403-404; and cf. Finnis’s response at pp. 556-563.

⁶⁰ See J. Klabbers, ‘The Right to be Taken Seriously: Self-Determination in International Law’, *Human Rights Quarterly*, XXVIII, 2006, pp. 186–206. See also H. Hannum, *Autonomy, Sovereignty, and Self-Determination*, Philadelphia, University of Pennsylvania Press, 1996.

self-determination in the next Chapter, where I will discuss this dimension from the standpoint of constitutional law discourse.

Before doing that, I would like to summarise the main contributions offered by this Chapter. On the basis of a critical analysis of Anzilotti's definition of independence, I distinguished between the concepts of independence, sovereignty and personality of state. I then focussed on the relationship between state independence and sovereignty, paying particular attention to the legal principles of sovereign equality and of non-intervention. A discussion of these two principles allowed me to identify a legality-based and a legitimacy-based aspect of state independence. I described the legality of state independence in terms of a Hohfeldian *immunity* enjoyed by a state vis-à-vis other states; and explained the legitimacy of state independence in terms of a collective *right* to self-determination. For the purposes of my research, the legitimacy of state independence is particularly important, because it points to *autonomy* as the collective standing need underpinning (external) sovereignty.

Chapter 5

State supremacy and the need for self-governance and autonomy

As indicated in the previous two Chapters, the various meanings of the term ‘legal’, when occurring in the expression ‘state legal supremacy’, appear to generate four possible interpretations of this expression. In a first sense, it may mean that the state is supreme in relation to one or more legal orders (for example, in relation to national and/or international law)¹. Secondly, the state legal order – rather than the state itself – may be said to be supreme in relation to any other legal order (for example, in relation to canon law and/or international law).

Thirdly, the state legal order may be said to be supreme also in relation to any other normative order (for example, in relation to political, moral and/or religious orders)². Finally, it is possible to understand the expression ‘state legal supremacy’ in the sense that the supremacy of the state – over normative orders and/or other public authorities³ – is a matter of law, rather than of fact. A proper discussion of these four interpretations, when approached individually, would require one to consider the following questions:

¹ As shown in Chapter 1, the notion that the state has supremacy over the national and/or international law has been the object of harsh criticism in the political philosophy of the 20th century (see e.g. Jacques Maritain’s *Man and the State*, published in 1951). This notion has also been criticised from the perspective of analytical jurisprudence, especially in the second half of the 20th century. Austin’s imperative theory of law provided a very clear example of a theory which endorses the view that the state (understandable, in Austin’s terms, as either the sovereign or the sovereign’s independent political community) has supremacy over law. For a discussion of Austin’s view, and of the related criticism by H.L.A. Hart, see Chapter 2.

² Both the second and the third interpretations concern the supremacy of the state legal order over other normative (legal or non-legal) orders. For a clear analysis of the possible relationships between legal orders, see N. Bobbio, *Teoria dell’ordinamento giuridico*, Turin, Giappichelli, 1960, Chapter 6. On this Chapter, see R. Guastini, ‘Insieme strutturati di norme – Contributi di Bobbio alla teoria dei sistemi normativi’, in: *Analisi e Diritto 2004*, Turin, Giappichelli, 2005, pp. 103-117. On the idea of ‘legal order’, see also R. Guastini, ‘On legal order: some criticism of the received view’, *Ethical Theory and Moral Practice*, III, 2000, pp. 263-272.

³ For an analysis of the relationship between the authority of the state and the authority of other public organisations, see Chapter 6.

- (1) What is the relationship between law and state?⁴
- (2) Does state law claim supremacy over all the other types of law?⁵
- (3) Does law claim supremacy over all the other types of normative orders?⁶
- (4) What is the legal basis for the supremacy of the state?

The first three questions will be tackled in the next Chapter – not in a comprehensive way, but insofar as they can help one to better understand the point of state sovereignty. In particular, I will answer these questions in light of the role played by (state) law in promoting certain crucial aspects of the common good of a state political community. The present Chapter will focus on question (4), with a view to clarifying what I listed above as the fourth meaning of ‘state legal supremacy’: the supremacy of the state *according to law*. Questioning the legal basis for this supremacy, it will be argued in the next sections, is a fundamental question which eventually leads one to consider the relationship between the *legality* and the *legitimacy* of state supremacy. Yet, before exploring the legal dimension of state supremacy, it is necessary to acknowledge two different, but equally crucial, ways in which one may cast doubt on the soundness of question (4). First, one may argue that it is not possible to answer the question ‘what is the legal basis for the supremacy of the state?’ without a precise definition of ‘state’. Secondly, one may argue that, if the state is actually supreme over *all* legal orders and authorities, then its supremacy cannot be a matter of law, but only of fact.

In order to assess the significance of these two criticisms, the Chapter is structured in the following way. I begin by considering the role played by the idea of state supremacy in

⁴ For a critical discussion of Kelsen’s defence of the identity of (state) law and state, see Chapter 2.

⁵ An interesting analysis of the significance of non-state law is offered in: W. Twining, *General Jurisprudence*, Cambridge, CUP, 2009, Chapter 12.

⁶ According to Raz, the claim to supremacy is one of the characteristic features of a legal system. See J. Raz, *Practical Reason and Norms*, Oxford, Oxford University Press, (2nd edition), 1999, p. 152: “...all legal systems claim to be supreme with respect to their subject-community...” For a discussion of the notion that law makes (moral) claims, see J. Gardner, *Law as a Leap of Faith*, Oxford, Oxford University Press, 2012, Chapter 5.

the context of constitutional law discourse. This allows me to identify a number of possible holders of “state” supremacy, such as the Government as a whole; one of the organs of Government (in particular, the Crown or the Parliament); or the people (§1). I, then, focus attention on the debate about the doctrine of parliamentary sovereignty, in order to explain the nature and the origin of the powers associated with the principle of legislative supremacy (§2). My analysis of this principle will lead me to the idea of constituent power, which is commonly understood not as a legal, but rather as a *de facto* power (§3). I will suggest that state supremacy should be understood not only in connection with the idea of constituent power, but also in connection with the idea of constituent authority. In light of the idea of constituent authority, I will argue that state supremacy encompasses not only a dimension of legality, but also a dimension of legitimacy. Furthermore, I will argue that if the legality of state supremacy can be best explained – using Hohfeld’s terminology – as a power vis-à-vis other (internal) legal authorities, its legitimacy can be best explained on the basis of the claim, made by a state political community, to self-governance (§4). This argumentative structure will allow me to demonstrate that the two criticisms identified above simply require one to reformulate question (4) in a more precise manner, rather than to dismiss an inquiry into the *legal* basis for state supremacy. Nonetheless, the following sections demonstrate how my research can, in fact, benefit from taking those two criticisms seriously. Indeed, by addressing those criticisms, two important aspects of the idea at the heart of this Chapter – i.e. the supremacy of the state according to law – will be illuminated. The first aspect captures the problem of the *subject* of state supremacy. I will submit that, by urging the identification of the holder of state supremacy, the first criticism leads one to identify a state political community as the main subject in relation to which internal sovereignty should be explained⁷.

⁷ Through an analysis of the idea of state independence, Chapter IV showed that a state political community is the main subject in relation to which external sovereignty should be explained. This means that, at least in relation to their subjects, external and internal sovereignty are necessarily connected. The proposition that external and internal sovereignty are (i) not separate, despite being distinguishable as different concepts; and (ii)

The second aspect captures the problem of the *origin* of state supremacy. I will submit that, by challenging the possibility of grounding state supremacy in positive law, the second criticism indirectly demonstrates that internal sovereignty should be properly understood from the perspective of natural law (*ius naturale*)⁸.

1. The identification of the constitutional holder of “state” supremacy

I have suggested that the meaning of ‘state legal supremacy’ depends upon the meaning of ‘legal’. However, in order to properly understand *state* legal supremacy, it is necessary to identify which meaning of ‘state’ is entailed by the idea of state legal supremacy. As indicated in Chapter I, the word ‘state’ is often used to denote either an independent political community (i.e. a state in the international arena) or the whole of the “centralised” legislative, judicial and executive institutions (i.e. the union of the three branches of government) of a given independent political community⁹. In general, international law discourse tends to use ‘state’ in the former sense, whereas in the context of constitutional law discourse it is more common to find the latter meaning of ‘state’ – as in the expression “*the State* of a given state political community”¹⁰. Yet, even interpreting ‘state’ in the constitutional context does not seem to be enough to clarify the idea of state (legal) supremacy. Indeed, the problematic

united, being both connected with the same crucial elements of the common good of a state political community, will be fully discussed in the next and final Chapter.

⁸ Some commentators distinguish between *ius* and *lex*, associating the former with natural law and the latter with positive law. See, for example, J. Gardner, *Law as a Leap of Faith*, Oxford, Oxford University Press, 2012, Chapter 3. Cf. Finnis’ comment on Aquinas’ use of ‘ius’ and ‘lex’ as interchangeable terms in J. Finnis, *Aquinas*, Oxford, Oxford University Press, 1998, p. 134. I think that the view offered by Finnis should be preferred.

⁹ See, e.g., Maritain’s distinction between the State and the body politic, and Finnis’ distinction between State and state. J. Finnis, *Aquinas*, Oxford, Oxford University Press, 1998, pp. 219 ff.

¹⁰ See, for instance, Art. 114 of the Constitution of the Italian Republic: “The Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State.” However, the (constitutional) concept of the State may also be present in international law discourse. See, for example, Art. 16(3) of the Universal Declaration of Human Rights: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

nature of the constitutional interpretation of ‘state’ – i.e. the constitutional concept of the State – has been acknowledged and discussed by Geoffrey Marshall (1929-2003), whose clear analysis will provide the starting point of this section.

On the basis of a linguistic survey in the context of British constitutional law discourse, Marshall begins his analysis by distinguishing between three main meanings of the word ‘state’¹¹. This word may be used, in a first sense, to denote an estate or order in a given political community¹²; in a second sense, to denote “the nation or people considered as a unit”¹³; and, in a third sense, to denote “either the whole or a part of the machinery of government”¹⁴. The third sense of ‘state’ appears to capture what I have called the constitutional concept of the State. This last sense of ‘state’, however, is still open to a number of different interpretations. For Marshall, *Chandler v. DPP* provides a good example of the difficulties associated with the attempt to formulate a legal definition of the (constitutional) concept of the State¹⁵. In this case, the constitutional concept of the State was discussed in the light of s. 1 of the *Official Secrets Act 1911*, which includes a reference to ‘the safety or interests of the State’¹⁶. In the judgment, two main possible understandings of the concept of the State are discussed: on the one hand, ‘the organized community’ (in the words of Lord Reid, who excluded that ‘State’ may mean ‘the government’, ‘the executive’, or ‘the majority of the people’); on the other hand, ‘the organs of government of a national

¹¹ G. Marshall, *Constitutional Theory*, Oxford, Oxford University Press, 1980, p. 15 ff.

¹² In order to illustrate this use, Marshall refers to chapters 12 and 13 of the first book of Blackstone’s Commentaries, where ‘The Civil State’ is contrasted with the ‘Military and Maritime States’.

¹³ G. Marshall, *Constitutional Theory*, Oxford, Oxford University Press, 1980, p. 16.

¹⁴ Ibid. Marshall specifies that “...neither Burke’s nor Blackstone’s ‘state’ seems to be unambiguously thought of as the legal personality of the executive government, or as the collective name for all agencies of governmental power standing over and against the members of the community in their private capacity.” Ibid.

¹⁵ For an example of this kind of definition, see D.M. Walker, ‘The Legal Theory of the State’, *Juridical Review*, LXV, 1955, pp. 288 ff.

¹⁶ *Chandler v. Director of Public Prosecutions* [1964] A.C. 763.

community’ (in the word of Lord Devlin, who argued that the relevant organ of government for the correct construction of the provision of the Act was the Crown)¹⁷.

In light of Marshall’s analysis it is, therefore, possible to identify four main interpretations of the word ‘state’: (i) the people (as a majority or as a unit); (ii) the organised community; (iii) the government as a whole (i.e. the State); and (iv) one of the organs of the State (e.g. the Crown). I have listed these interpretations in order of generality, starting with the interpretation with the broadest meaning – the people – and finishing with the narrowest – one organ of the State. Meanings (i) and (ii) relate to the concept of state; whereas, meanings (iii) and (iv) relate to the concept of the State.

The main assumption of this Chapter is that a sound understanding of *state (legal) supremacy* will advance an understanding of *state sovereignty*. Amongst the four meanings of ‘state’ just identified, which one would promote a sound understanding of state (legal) supremacy? Since the idea of state supremacy emerged in relation to the idea of *internal sovereignty*, the constitutional concept of the State appears to provide the most appropriate meaning of ‘state’. Nonetheless, the State can be conceptualised in at least two ways: meaning (iii) and (iv) above. I would suggest focusing attention on meaning (iv), as this provides the most circumscribed meaning between the two available possibilities. Furthermore, in constitutional law discourse, the idea of *supremacy* is commonly associated with organs of

¹⁷ According to Marshall, the Crown has to be distinguished from the Monarch as well as from the Public. Despite their interactions, the Crown and the Monarch can be distinguished in light of their status and their legal capacities. Legal scholars have also suggested that, whereas the Monarch should be seen as a natural person, the Crown should be conceptualised as a corporation. On this idea, see F.W. Maitland, ‘The Crown as Corporation’, in: Hazeltine, Lapsley, and Winfield (eds.), *Selected Essays*, 1936, p. 104; see also, Pollock and Maitland, ‘The King and the Crown’, in: Milsom (ed.), *The History of English Law*, 1968, vol. 1, p. 525. The distinction between Crown and Public seems to be less clear-cut, due to the number of different definitions of ‘Public’. On the basis of the *Public Authorities Protection Act 1893* and of the *Public Bodies (Admission to Meetings) Act 1960* Marshall identifies the following possible definitions of ‘Public’: a body with public or statutory duties to perform and which carried them out for the benefit of the public; anybody acting in pursuance or execution of an Act of Parliament; a local authority (or an executive board, or a committee) having an association with the Crown, or exercising ‘governmental’ or national responsibilities.

Government such as the Crown or the Parliament¹⁸. Hence, in light of meaning (iv), the central question of this Chapter may be rephrased as follows: what is the legal basis for the supremacy of the Crown, as one of the organs of the State?

Arguably, this new formulation of question (4) should help one to better understand the internal aspect of state sovereignty. Yet, at least *prima facie*, questioning the legal basis for the supremacy of the Crown may be misleading in this regard. This sceptical observation is supported by three main reasons. First, the main purpose of my Thesis is to provide an explanatory definition of state sovereignty, as a general concept. On the contrary, because the idea of the supremacy of the Crown is unknown to the majority of state political communities, focusing on this specific holder of (state) supremacy may simply lead to a particular – rather than a general – understanding of internal sovereignty. Secondly, even in the particular context of British constitutional law, the Crown, as a specific holder of supremacy may not provide the key for an explanation of the idea of supremacy. In fact, within the British context, supremacy is also associated with another organ of the State: the Parliament¹⁹. Thirdly, it seems that in either case (whether Crown or Parliament), the new formulation of question (4) necessarily presupposes the absence of a codified, rigid constitution – again, a characteristic feature of the British constitutional structure²⁰.

The third and the first reason offer different arguments to support the same criticism: the new formulation of question (4) may be able to explain a British idea of state supremacy, which cannot be generalised for the purposes of an explanatory definition of state sovereignty (through an understanding of internal sovereignty in general). The second reason, however, by considering the relationship between the Crown and the Parliament may offer a new, and

¹⁸ Sometimes, it is also associated with the people. See, for examples, the Italian, the French or the Spanish Constitutions.

¹⁹ How is it possible – one may then ask – to have two holders of state supremacy? The very idea of supremacy appears to require the existence of only one holder of supremacy (either as a person or as a body of people).

²⁰ See my discussion of MacCormick in Chapter 2.

more promising perspective on the constitutional concept of state supremacy. It may also provide a way to respond to the criticism supported by the first and the third reason.

In the next sub-section (§1.1), I will consider the relationship between the Crown and the Parliament in the context of British constitutional law. This allows me to show that, for the purposes of my research, the two main issues to explain are: first, the nature of legislative supremacy; and, second, the source of supreme legislative power. Furthermore, it helps me to demonstrate – this will be particularly clear in the next section (§2) – that an explanation of the idea of state supremacy in the context of British constitutional law discourse is, in fact, useful for understanding state supremacy and, in turn, for understanding the internal aspect of state sovereignty, in general.

1.1. State supremacy and the ‘Crown versus Parliament’ thesis

Even a superficial study of British constitutional law reveals that both the Crown and the Parliament have powers recognised by the UK constitution. For the purposes of my research, however, the interesting question is not whether the Crown and Parliament can both have powers, but rather whether it is possible for them both to have supreme powers. If the answer to this question is in the affirmative, then an analysis of the relationship between the Crown and the Parliament will shed some light on the supremacy of the State. If the answer is in the negative, then the next question to ask would be which one, of the Crown and Parliament, provides the locus for the (constitutional) idea of state supremacy. It has been argued that “English public law is based on a separation of power not between legislature, executive, and judiciary, but between the Crown and Parliament”²¹. Adam Tomkins has named this view the ‘Crown versus Parliament’ thesis. In this sub-section I will consider the relationship between

²¹ A. Tomkins, *Public Law*, Oxford, Oxford University Press, 2003, p. 47.

the Crown and the Parliament in the light of this thesis. In constitutional law usage, the legal concept of the Crown may mean either the Crown-as-monarch, or the Crown-as-executive. The powers enjoyed by the Crown-as-monarch are the powers directly entailed by the Royal Prerogative, such as the granting of royal assent to legislation or the dissolution of Parliament²². The powers enjoyed by the Crown-as-executive emerged when the ruling powers historically associated with the monarch were transferred to the Prime Minister and the other Ministers of the Crown²³. From an historical point of view, it seems that both the prerogative and the executive powers owe their origin to the inherent power of the monarch. This is the reason that some of the (residual) governmental powers of the executive are not conferred by (constitutional) laws, but pre-exist the constitution – at least, the constitution in a legal sense. In fact, the legal basis for the powers of the executive is two-fold: (directly) statute law and (indirectly) prerogative²⁴. According to Tomkins’ historical interpretation, “[a]t the centre of everything – the social, the religious, the legal, and the political – was the Crown. [The Tudor period] was an age when the Crown did not merely reign: it ruled.”²⁵ Yet, although it is correct to say that, in the Tudor period, the Crown-as-Monarch had *supreme* powers, it is important to acknowledge that those powers were not *absolute*. The granting of the Magna Carta by King John of England in 1215 had already transformed the nature of the powers enjoyed by the Crown, from being (potentially) absolute to be (at least partially) limited. It is true, of course, that when the *Magna Carta* was granted, neither the Crown-as-executive nor the Parliament existed: the struggle for power was between the Monarch and the Barons. In the subsequent centuries, however, the role of the Barons would be vested in

²² On the history and the extent of the Royal Prerogative see e.g.: A.W. Bradley – K.D. Ewing – C.J.S. Knight, *Constitutional and Administrative Law* (16th edition), Harlow, Pearson Education Limited, 2015, pp. 250-259.

²³ On the Civil Service see *ibid* pp. 282-288.

²⁴ For example, the power to ratify international law treaties, or the power to issue passports, is enjoyed by the executive under the prerogative power of the Crown. See *ibid* p. 255.

²⁵ A. Tomkins, *Public Law*, Oxford, OUP, 2003, pp. 39-40.

the Parliament – where the higher house would represent the greater barons and the lower house would represent the lesser barons²⁶. The relationship between the Crown and the Parliament was completely transformed by the English Civil War (1642-1651). After the execution of Charles I of England in 1649, which ended the war between Parliamentarians and Royalists, England was re-organised as a Commonwealth and, later, as Cromwell’s Protectorate²⁷. Because of the change of power relations during this period of interregnum, the restoration of the Crown with Charles II of England was accompanied by a different conception of the nature and of the limits of the monarch’s powers. This is demonstrated by the enactment of two documents of constitutional significance: the *Bill of Rights 1689* and the *Act of Settlement 1701*. The former Act established certain rights of Parliament and limitations of the Crown; whereas the latter Act regulated the succession to the English throne. The enactment of these statutes crystallised in legal form something that was already, and still remains, a political reality: that power “...started with the Crown, but it continues to vest in the Crown only because, and for only as long as, Parliament continues to wish it.”²⁸ This brief historical description of the relationship between the Crown and Parliament seems to suggest that the current powers enjoyed by the Crown could be further reduced, and potentially extinguished, by an Act of Parliament. Indeed the Royal Prerogative is commonly understood as a residual (set of) power(s). In the light of his account of the historical development of the relationship between Crown and Parliament, Tomkins reaches the following two conclusions. First, any Act of Parliament should be seen as the “legal moment when the *two sovereign authorities of England* come together and agree: Parliament on the

²⁶ Interestingly, one of the main disagreements between the Monarch and the Barons (and later the Parliament) was about the limits of the Crown’s powers to raise revenues. From this perspective, it is clear why it has been suggested that the relationship between Crown and Parliament was such that “the Crown ruled, but Parliament held the purse strings”. Ibid, p. 41.

²⁷ A. Tomkins, *Public Law*, Oxford, Oxford University Press, 2003, pp. 39-40.

²⁸ Ibid, 44.

one hand, and the Crown on the other”²⁹. Secondly, the doctrine of the legislative supremacy of Parliament “is a contemporary manifestation of the ‘Crown versus Parliament’ thesis”³⁰. These two conclusions are particularly interesting for the purposes of this Chapter. The first proposition defended by Tomkins suggests that it possible – at least, in the context of British constitutional law discourse – for two organs of the State, in this case the Crown and the Parliament, to be sovereign at the same time. The second proposition suggests that it is possible the doctrine of Parliamentary supremacy – which is meant to capture, in fact, the supremacy of the Crown-in-Parliament – is the key to understanding the idea of supremacy in relation to the constitutional concept of the State. I will now turn to consider the legislative supremacy of the Crown-in-Parliament, with an eye to developing an understanding of the internal aspect of state sovereignty (in general) as expressed in the idea of state legal supremacy.

2. The debate about the (legislative) supremacy of the Crown-in-Parliament

There are, within British constitutional law discourse, two families of doctrines about the supremacy of the Crown-in-Parliament. The clearest examples of the first family – often labelled “the traditional view” on parliamentary sovereignty – are the doctrines developed by Dicey and Wade³¹. The second family – often called “the new view” – includes, as the most eminent examples, the doctrines developed by Jennings, Heuston, and Marshall³². The main

²⁹ Ibid, p 48. Emphasis added.

³⁰ Ibid, p. 49.

³¹ See, in particular: A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, London, Macmillan (8th Ed.), 1915; H.W.R. Wade, ‘The Basis of Legal Sovereignty’, *Cambridge Law Journal*, XIII, 1955, pp. 172-197.

³² See, in particular: I. Jennings, *The Law and the Constitution*, London, University of London Press (5th ed.), 1959; R.F.V. Heuston, *Essays in Constitutional Law*, London, Stevens & Sons, 1964; G. Marshall, *Constitutional Theory*, Oxford, Clarendon Press, 1980.

disagreement between the two views concerns the limits of the supreme (legislative) powers of the Crown-in-Parliament. In particular, the supporters of these competing doctrines disagree on the correct interpretation of the principle that any present Parliament cannot bind its successors – a principle which is implied by the traditional doctrine of parliamentary sovereignty. The disagreement focuses on *procedural* regulations of future legislative enactment: this is because both the traditional and the new view agree that, from a legal standpoint, the supreme (legislative) power of Crown-in-Parliament does not, and cannot, have any substantive limitations³³. Nonetheless, it is debated whether “manner and form” requirements included in an Act of Parliament can be legally binding on future Parliaments.

For the purposes of this Chapter, the suitability of either view on the limits of the supreme legislative power of Crown-in-Parliament as a descriptive, or a normative model, for the current British constitutional structure is irrelevant. I would submit, however, that a consideration of the disagreement between those two families of doctrines will reveal some crucial aspects of the nature of the (legislative) supremacy of the Crown-in-Parliament, especially in relation to its *exercise* (§2.1) and *origin*. (§2.2). Of course, revealing these aspects will not be enough to answer the central question of the Chapter: what is the legal basis for the supremacy of the State? The most important task for the current section of the Chapter, therefore, will be to demonstrate how those crucial aspects of the (legislative) supremacy of the Crown-in-Parliament can help one illuminate some aspects of the nature of supremacy in general (§2.3).

³³ From a *Realpolitik* perspective, it is of course true that any given (legally supreme) power has factual limitations which follow from the specific socio-economic structure of the group within which that power is exercised, combined with the desire of the powerful subject(s) to preserve their position of power.

2.1. The exercise of the (legislative) supremacy of the Crown-in-Parliament

It is common to begin any investigation of the nature of the (legislative) supremacy of the Crown-in-Parliament by considering the position defended by Dicey. Dicey's doctrine of Parliamentary sovereignty – where 'Parliament' has to be understood as meaning the Crown-in-Parliament³⁴ – is characterised by a positive and a negative element. The former is that the Parliament has "the *right* to make or unmake any law whatever"³⁵; whereas the latter is that "no person or body is recognised by the law of England as having a *right* to override or set aside the legislation of Parliament"³⁶. The negative element is particularly interesting for the idea examined in this Chapter, as it explicitly states that the supremacy of the Crown-in-Parliament enjoys some forms of legal recognition. In other words, this is a clear example of a power which is supreme *according to law*³⁷. According to Dicey's theory, however, there are two limitations to the exercise of the supreme legislative power of Parliament.

The first limitation is external and "consists in the possibility or certainty that [the] subjects, or a large number of them, will disobey or resist [the sovereign's] laws"³⁸. This means that the exercise of legal sovereignty – whether a despotic power, the authority of a constituent assembly, or indeed the sovereignty of Parliament – is always limited by "the possibility of popular resistance"³⁹. The second limitation is internal: for Dicey, the "internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself"⁴⁰.

³⁴ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, p. 39.

³⁵ *Ibid*, p. 40. Emphasis added.

³⁶ *Ibid*, p. 40. Emphasis added.

³⁷ The reader should remember that this is the point of the Chapter

³⁸ Dicey, *An Introduction to the Study of the Law of the Constitution*, pp. 76-77.

³⁹ *Ibid*, p. 79.

⁴⁰ *Ibid*, p. 80.

Dicey argues that even the most despotic power is exercised in accordance with some norms which are recognised as valid, and binding, by the holder of that power. What types of norms influence the exercise of a supreme power? It is suggested that they belong to the social morality accepted by the sovereign: in Dicey's words, these norms would result from "the circumstances under which [the sovereign] lives, including under that head the moral feelings of the time and the society to which [the sovereign] belong"⁴¹. This is an interesting observation about the actual exercise of power amongst humans; yet, it not evident how this internal limitation follows from the nature of the sovereign power itself. If anything, it would appear to follow from the nature of any form of power exercised by a human agent, without being directly related to the idea of supremacy. Should one conclude that Dicey's argument about the two kinds of limitations on the exercise of the sovereign power of Parliament is not relevant for the purposes of this Chapter?

I would answer this question in the negative. In fact, Dicey's view of the external and the internal limits to parliamentary sovereignty becomes particularly significant for my investigation of (state) supremacy when the relationship between those two limits is analysed in relation to the idea of representative government. Dicey argues that the aim of representative government is "to produce a coincidence, or at any rate diminish the divergence, between the external and the internal limitations on the exercise of sovereign power"⁴². This argument acknowledges that it is possible for the internal and the external limits to diverge. Indeed, that possible mismatch – which may sometimes become a tension, or even a conflict⁴³ – is explained by Dicey as a divergence between "the permanent wishes of the sovereign, or rather of the King [...] and the permanent wishes of the nation"⁴⁴. The

⁴¹ Ibid, p.80.

⁴² Ibid, p. 82.

⁴³ Dicey uses the example of the period between the accession of James I and the 1688 Revolution. 83

⁴⁴ Ibid, p. 83.

establishment of a representative government is meant to bring the internal limit (i.e. the wishes of the sovereign) and the external limit (i.e. the wishes of the nation) to a point of coincidence. For the purposes of this Chapter, it is not necessary to engage with the normative premise of Dicey's understanding of representative government: whether or not the internal and the external limitations of sovereignty should coincide is not relevant for the present research. It is significant, instead, to consider the descriptive premise: both limitations can be described in terms of wishes (of either the sovereign or the nation). Now, if these wishes are explained – as I think they should be – as manifestations of the *social rules* accepted by the sovereign and the nation, then Dicey's doctrine of Parliamentary supremacy would identify two characteristic features of the power enjoyed by Parliament, *qua* supreme (legislative) power. First, Parliamentary supremacy, by its nature, is not unlimited. Secondly, Parliamentary supremacy is limited only by social, not by legal, rules.

This second point calls to mind the second criticism identified at the beginning of the Chapter. What does it mean, one may ask, that the supreme (legislative) power of the Crown-in-Parliament is legally unlimited? In particular, if this characteristic stemmed from the very nature of a supreme power, would it follow that state supremacy (and, in turn, internal sovereignty) is also characterised by the property of being legally unlimited?

In order to answer this question it is necessary to consider the merits of a different doctrine, which provides for legal limitations to (legislative) supreme power. According to Marshall, the supreme power enjoyed by the Parliament entails the possibility of enacting one or more *legal rules* which can regulate the validity of a future Act of Parliament. This “new view” on Parliamentary sovereignty affects the proposition – implied by Dicey's doctrine – that the current Parliament cannot bind its successors. Indeed, Marshall's “new view” allows for the possibility that current Parliament may bind a future Parliament as to the *manner and*

form of legislation. The difference between the two views can be fully appreciated, from the point of view of future Parliaments, by considering the rules they entail.

The new view on parliamentary sovereignty results from the conjunction of the following two propositions:

- (a) If a legislature has the power to make any law, this power also includes the power to make a procedural law PL which regulates the way in which (some or all) future laws must be made;
- (b) If future legislatures intend to legislate (in the area covered by PL) by using a different procedure, they have to amend PL first.

The traditional view on parliamentary sovereignty accepts (a) without accepting (b). Theorists such as Dicey argued for a doctrine which upholds the conjunction of the following two propositions:

- (a) If a legislature has the power to make any law, this power also includes the power to make a procedural law PL which regulates the way in which (some or all) future laws must be made;
- (c) If future legislatures intend to legislate (in the area covered by PL) by using a different procedure, they do not have to amend PL first.

In light of the previous analysis of Dicey's doctrine of Parliamentary supremacy it is clear that proposition (a) is true only if one interprets 'power' as 'legal power', because as a matter of fact both the traditional and the new view would accept that there are factual limitations to that power. In this respect, it is possible to affirm that the actual exercise of supreme power can be delimited by social norms. For a proper understanding of the idea of supreme power, however, propositions (b) and (c) are even more interesting, as they reveal a crucial feature of

parliamentary sovereignty qua supreme (legislative) power. They show, in different ways, that the actual exercise of a supreme power is rule-dependent.

In order to clarify this last point, it is worth recalling Marshall's explanation of proposition (c), as interpreted in the context of English law: "[a] basic rule (and one which according to the traditional theory is the one we actually have) [according to which] legislation by a simple majority of legislators, assented to by the Crown and passed through both Houses, will always make valid law notwithstanding any previous attempt to alter the law about what shall constitute legislation." This definition of the rule at issue shows the assumption which lies behind the acceptance as well as the rejection of proposition (c): that Parliament exercises its supreme (legislative) power according to rules. Those who reject proposition (c) implicitly accept the validity of the rule, entailed by (a), regulating the enactment of legislation in the first place. As acknowledged by Marshall, in the context of British constitutional law discourse, that rule prescribes that an Act of Parliament is valid if, and only if, it is passed by a simple majority vote in both Houses of Parliament and receives the Royal Assent. According to those supporting (b) this is the rule which can be modified by the enactment of a procedural rule PL.

This brief comparison of the traditional with the new view on Parliamentary sovereignty already reveals something interesting about the nature of the (legislative) supreme power of the Crown-in-Parliament, that is, that this power does not exist in isolation from social rules. Firstly, both views accept that the area within which the supreme power of Parliament is exercised is delimited by social rules. According to Dicey's theory, the limitations are triggered by the acceptance of a set of social norms and values which are characteristic of the society at issue. Something that Dicey does not explore – but that the rest of this Chapter will consider – is whether behind these social norms lie other norms, which constitute part of what is usually called "critical morality", which may guide the behaviour of either (or both) the

sovereign or the nation. Secondly, by endorsing proposition (a), both views explain the supreme power of Parliament as a normative power. In fact, the two elements of Dicey's definition of Parliamentary sovereignty are consistent with the "new view"; and both elements include the concept of a *right*. Now, a right can only exist within a normative framework: in order to claim to have a right, one must invoke the existence of a norm⁴⁵. From this consideration, does it follow that the origin of the (legislative) supremacy of the Crown-in-Parliament lies in a norm? If so, can that (kind of) norm tell us something about the nature of state supremacy?

2.2 The origin of the (legislative) supremacy of the Crown-in-Parliament

In Chapter I of his *Introduction to the Study of the Law of the Constitution*, Dicey identifies two potential difficulties which accompany the traditional doctrine of parliamentary sovereignty⁴⁶. The first difficulty is that this doctrine "sounds like a mere application to the British constitution of Austin's theory of sovereignty", but according to Austin's doctrine, sovereignty is not vested in the Crown-in-Parliament⁴⁷. The second difficulty is that, notwithstanding the absence of legal limitations, "as a matter of common sense [...] the sovereign power of Parliament is not unlimited"⁴⁸. The first difficulty is particularly interesting, as it leads Dicey to distinguish between a legal and a political concept of sovereignty. The former refers to "the power of law-making unrestricted by any legal limit";

⁴⁵ In this case, Dicey uses the term 'right' in the context of both the positive and the negative element of parliamentary sovereignty. It is possible to rephrase Dicey's definition saying that whereas the Parliament has a power to, all other bodies (and individuals too) have a disability.

⁴⁶ The title of the Chapter is *The nature of Parliamentary Sovereignty*.

⁴⁷ For Austin, sovereignty is vested in the electoral body and therefore, indirectly, in the House of Commons.

⁴⁸ According to Dicey, since there are a number of laws which Parliament would, and could never enact, "if the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament..."

whereas the latter refers to the power enjoyed by “that body [...] the will of which is ultimately obeyed by the citizens of the state”.

In light of this distinction, Dicey argues that the legal sovereign under the English constitution is the Parliament (i.e. the Crown-in-Parliament), whereas the political sovereign is the electoral body of Great Britain. According to Dicey this argument is supported by the truth of the following proposition: that the constitution allows the electorate to see their will prevail in the long run. Yet, Dicey very carefully explains that, despite being true in a constitutional context, this proposition only refers to a political fact. That the sovereignty of the electoral body is a political, and not a legal, fact is demonstrated, for Dicey, by the fact that the Courts do not consider the will of the electorate to be a legal source. Dicey concludes his argument by saying that the legal and the political concept of sovereignty “though intimately connected together, are essentially different”⁴⁹.

Dicey placed more weight on the separation, rather than on the connection between those concepts. I would submit, instead, that it is the connection between the separate concepts of legal and political sovereignty that may aid one to developing an understanding of what state sovereignty amounts to. In order to test this submission it is useful to briefly consider an argument, developed by H.W.R. Wade, which relies upon two distinctions drawn by Dicey: these are the distinctions between legal and political sovereignty, and between a sovereign and a subordinate legislature⁵⁰. Wade employs these two distinctions in order to criticise Jennings’ position on manner and form limitations on Parliamentary sovereignty. In particular, Wade identifies two different lines of argument rejecting the manner and form view on parliamentary sovereignty.

⁴⁹ In light of this thesis, Dicey criticises Austin’s idea of sovereignty as confused. In particular, Dicey criticises Austin’s argument that the Crown-in-Parliament is a tripartite body which works as a trustee for the electoral body. For a discussion of Austin’s idea of sovereignty, see Chapter 2.

⁵⁰ The distinction between sovereign and subordinate legislatures is discussed in Chapter II (Parliament and non-sovereign law-making bodies) of Dicey’s *Introduction*.

First, from a doctrinal point of view, Wade argues that the new doctrine of state sovereignty is not supported by legal authorities. In addition, he affirms that *Ellen Street Estates* clearly supports the orthodox view on sovereignty. Consequently, Wade argues that whereas subordinate legislatures can be limited as to the manner and form of legislation, a sovereign legislature, like Westminster Parliament, cannot be so limited.

Second, from a theoretical point of view, Wade asks whether the supposition that a sovereign legislature may be limited is even possible in abstract terms. In discussing this possibility, he acknowledges the possibility of considering the point as a matter of theory, independently from particular doctrinal views: “that the supposition is contrary to all available English authority may [...] be forgotten while its logical implications are explored.⁵¹”

On the basis of his reading of Jennings’ argument, Wade reconstructs the argument supporting the logical possibility of manner and form limitations on the (legislative) supremacy of Parliament in the following way. First premise: the authority of Acts of Parliament depends on the common law. Second premise: Parliament can change the common law in any way whatever. Conclusion: therefore, Parliament can change the legal rules on which the authority of Acts of Parliament rests⁵². According to Wade, the disagreement between the traditional and the new view on parliamentary sovereignty can be explained in terms of the rejection by the former view, or the acceptance by the latter view, of the second premise: “at the heart of the matter lies the question whether the rule of common law which says that the courts will enforce statutes can itself be altered by a statute”⁵³. Wade’s argument for rejecting that premise is based upon the identification of a specific characteristic, which would distinguish the common law rule defining the relationship between the Courts and Parliament from all the other common law rules.

⁵¹ H.W.R. Wade, ‘The Basis of Legal Sovereignty’, *Cambridge Law Journal*, XIII, 1955, p. 185.

⁵² H.W.R. Wade, ‘The Basis of Legal Sovereignty’, *Cambridge Law Journal*, XIII, 1955, p. 186.

⁵³ H.W.R. Wade, ‘The Basis of Legal Sovereignty’, *Cambridge Law Journal*, XIII, 1955 p. 186.

Being the source of the authority of Acts of Parliament, this basic rule of the common law appears to be able to stand against a statute. According to Wade, the reason for this quite surprising exception to the general understanding of the relationship between common law and statute law is that the rule at issue is beyond the reach of legislation. Indeed, the basic rule according to which the Courts ought to apply (valid) Acts of Parliament is a rule which has not been – and cannot be – established by statute. Hence, Wade concludes his reasoning by affirming that this unique rule of common law cannot be changed (or abolished) by an Act of Parliament.

In a sense, Wade's position is a development on Dicey's understanding of political sovereignty, insofar it puts more weight on the connection, rather than on the separation, between the political and the legal aspect of (legislative) supreme power: "the rule of judicial obedience is in one sense a rule of common law, but in another sense – which applies to no other rule of common law – it is the ultimate *political* fact upon which the whole system of legislation hangs.⁵⁴" Wade sees the relationship between the Courts and Parliament as a political, not a legal, reality: the fact that the Courts recognise an Act of Parliament as valid legislation is "a political fact from which legal consequences [flow].⁵⁵" This political reality is captured by a rule of common law which is "one of the fundamental rules upon which the legal system depends", because "legislation owes its authority to the rule: the rule does not owe its authority to legislation"⁵⁶. Following Salmond, Wade conceived of this rule as an "ultimate legal principle". This concept is key to Wade's understanding of the distinction between sovereign and subordinate legislation: "sovereign legislation depends for its authority on an "ultimate legal principle", i.e., a political fact for which no purely legal explanation can

⁵⁴ H.W.R. Wade, 'The Basis of Legal Sovereignty', *Cambridge Law Journal*, XIII, 1955, p. 188.

⁵⁵ *Ibid*, p. 188.

⁵⁶ *Ibid*, pp. 187-188. *Ibid*, 189.

be given; subordinate legislation depends for its authority on some ulterior legal power for which a legal explanation can be given.”

The most remarkable theses in Wade’s argument are the following: first, that the authority of a supreme legislature is ultimately based upon a political fact, which cannot be affected by legislative enactments; and, second, that the authority of a supreme legislature originates from a unique rule of common law/ultimate legal principle. The possible inconsistency that arises in the combination of the two theses should will be left aside, for the moment⁵⁷. Before discussing that inconsistency, it is convenient to consider these theses separately. The first thesis constitutes, for Wade, the reason for disagreement between the tradition and the new view on sovereignty. The second thesis provides the common ground within which that disagreement can take place. Indeed, this second thesis is shared not only by Wade, but also by a representative of the “new view” such as Heuston, whose summary of the new view on Parliamentary sovereignty includes the following four propositions:

- (1) Sovereignty is a legal concept: the rules which identify the sovereign and prescribe its composition and functions are logically prior to it.
- (2) There is a distinction between rules which govern, on the one hand, (a) the composition, and (b) the procedure, and, on the other hand, (c) the area of power, of a sovereign legislature.
- (3) The courts have jurisdiction to question the validity of an alleged Act of Parliament on grounds 2 (a) and 2 (b), but not on ground 2 (c).
- (4) This jurisdiction is exercisable either before or after the Royal Assent has been signified – in the former case by way of injunction, in the latter by way of declaratory judgment.⁵⁸

⁵⁷ I will consider this inconsistency later in the Chapter.

⁵⁸ R.F.V. Heuston, ‘Sovereignty’ in R.F.V. Heuston, *Essays in Constitutional Law*, London, Stevens & Sons, 1964, pp. 6-7.

Both Wade and Heuston understand the idea of the supremacy of Parliament in relation to the idea of supreme legislative power; furthermore, they connect these ideas with the authority enjoyed by the Parliament as a (supreme) legislature. Consequently, despite the differences in their theories of parliamentary sovereignty, they both explain the supremacy of Parliament in light of the rules/principles which confer the legislative power to Parliament - i.e. the rules/principles justifying its prima facie authority.

The theories developed by Wade and Heuston appear to capture, within the idea of Parliamentary sovereignty, the authority of Parliament as an institution and, also, the authority of an Act of Parliament. According to Wade, the authority of sovereign legislation depends upon an ultimate legal principle; nonetheless, this basic rule of the common law is also the source of the authority of the Acts of Parliament. In Heuston's summary of the new view of sovereignty, the rules under 2(a), 2 (b) and 2(c) are used to assess the authority of an Act of Parliament, but they can also be used to assess the authority of the Parliament itself. The interesting aspect of both theories is that the authority of Parliament, as a supreme legislature, and of Acts of Parliament, as supreme legislative enactments, is considered vis-à-vis the Courts. Marshall's theory of parliamentary supremacy demonstrates that this understanding of the authority of Parliament provides the common ground within which the disagreement between the traditional and the new view on sovereignty can take place. Following Hart, Marshall sees parliamentary supremacy as a manifestation of the rule of recognition of a given legal system⁵⁹. This allows Marshall to affirm, on the one hand, that at the basis of the supreme authority of Parliament there is a political fact (like Wade), and, on the other hand, that today's Parliament may be limited by past Acts of Parliament about the manner and form of legislative enactments (like Heuston). Furthermore, the reference to the rule of recognition makes the behaviour of the Courts particularly significant. According to Marshall, therefore,

⁵⁹ See G. Marshall, *Constitutional Theory*, Oxford, Oxford University Press, 1980, pp. 45-46.

it is possible to recast the debate about the “manner and form” limitations of supreme legislative authority as a choice between two alternative rules of recognition⁶⁰.

In order to understand the nature of Parliamentary supremacy – and, consequently, the nature of state supremacy – I think it would be useful to consider the reasons which justify the authority associated with the supreme law-making power in a given state, with special reference to the notion that the rule(s) of recognition of that state legal system may include a self-referential element⁶¹. In particular, for the purposes of this research, the following two questions should to be asked. First, what is the (justifying) reason for the conferral of the constitutional power to amend the constitution⁶²? Secondly, what is the (justifying) reason for the conferral of the power to establish a constitution (i.e. the so-called *pouvoir constituant*)?

3. State supremacy and *pouvoir constituant*

I concluded the previous section with two questions which, from different perspectives, focus attention on what I would call the “constitutional authority” associated with two forms of

⁶⁰ In either case, the doctrine of Parliamentary sovereignty would be understood as implying “that no object of policy is outside the reach of Parliament, but that to achieve its purposes Parliament must be properly constituted, and the constitution and procedure of Parliament may be altered in such a way as to prevent certain objects from being attained by any except a specified procedure.”

⁶¹ In this respect, Marshall affirms that whereas someone like Wade could acknowledge the logical possibility of manner and form limitations, and still dismiss this possibility as a matter of English law, other authors may have rejected even the theoretical possibility of self-limitations on a sovereign power. Marshall discusses the possibility that ‘Self-embracing sovereignty’ cannot be conceived of as a rule of recognition. This view can be defended on the basis of the argument, offered by Alf Ross, that a basic constitutional rule cannot contain the conditions relating to its own amendment. According to Ross the manner in which a rule may be amended must be set out in a higher rule: therefore, it is impossible for the rule of recognition itself (which is the highest rule of the system) to specify the way in which it may be legally amended. Such an amendment is a matter of political ideology. See my discussion of Hart and Ross in Chapter 2.

⁶² A power which, in the context of British constitutional law, is enjoyed by the Parliament in a formally limited (according to the manner and form view on parliamentary sovereignty) or unlimited (according to the traditional view on parliamentary sovereignty) fashion. It is worth noticing, however, that if the supremacy of Parliament is understood in relation to an ultimate legal principle or rule of recognition, the “traditional view” would appear to entail a limit which is not entailed by the “new view”.

supreme law-making power within a given state political community⁶³. Before engaging with those questions, however, it will be useful to remember the role of this Chapter in the Thesis. In the introductory section, I stated that the point of the Chapter is to clarify the idea of state supremacy according to law. I also suggested that, in order to do so, one should search for the legal basis for state supremacy. My analysis of Parliamentary supremacy, as an instance of ‘state supremacy’ in the context of constitutional law discourse, has demonstrated that the conferral of supreme law-making power on a given agent – in this case, the Parliament – depends upon a normative framework (which, in the case of Parliament, is summarised by the ideas of an ultimate legal principle or a rule of recognition). Is this normative framework the “legal basis” (for state supremacy) that I was looking for? Unfortunately, the answer has to be in the negative. Whilst this normative framework can be used to explain the supreme authority of Parliament in relation to ordinary legislation (and therefore the authority of the Acts of Parliament vis-à-vis other sources of norms); its explanatory power in relation to the “constitutional authority” of Parliamentary appears to be insufficient. In order to appreciate the significance of this last proposition for the purposes of this Chapter, the expression ‘constitutional authority’ must be defined and its connection with the two questions in conclusion of Section 2 must be shown.

Commonly, the term ‘constitutional’ is used in relation to the following three meanings of ‘constitution’: (i) the set of “political facts” which define the political regime of a given state political community; (ii) the set of legal rules and principles which determine the institutional structure of a given state (and, often, the set of legal rules and principles which regulate the relationship between the State and the members of that state political community); and (iii) a specific document in which most of the rules and principles under (ii) are codified. Furthermore, in the context of constitutional law discourse, scholars refer to the

⁶³ These two forms are the power to amend and the power to establish a “constitution”.

distinction between “formal” and “substantive” conceptions of the constitution. In the literature, there are three main interpretations of this distinction⁶⁴. First, when the concept of formal constitution is used to denote (ii) above, the concept of substantive constitution is used in relation to (i). Secondly, when the concept of formal constitution is used to denote (iii) above, the concept of substantive constitution is used in relation to (ii). Thirdly, the concept of formal constitution may be used to denote a sub-set of (ii), i.e. the sub-set of legal rules and principles which can only be modified by means of a special procedure; in this case, the concept of substantive constitution is used in relation to a sub-set of (ii), i.e. the sub-set of legal rules and principles which regulate the ordinary legislative process. This third interpretation of the distinction between “formal” and “substantive” conceptions of the constitution presupposes the idea of a rigid constitution: that is, a constitution which includes a special procedure for constitutional amendments – a procedure (for example, a special majority) different from the ordinary legislative process.

With the expression ‘constitutional authority’ I mean authority in relation to the constitution, in its meaning (ii): the set of legal rules and principles which determine the institutional structure of a given state (and, often, the set of legal rules and principles which regulate the relationship between the State and the members of that state political community)⁶⁵. Now, since Parliamentary supremacy entails the power to legislate as well as the power to amend the constitution, it appears that (ii) is the object – and not the reason for – of these two powers. The normative framework provided by the ultimate legal principle (or by the rule of recognition) of a given legal system belongs to the constitution in its meaning (ii). Yet, this normative framework can provide reasons to explain the authority of Parliament as an ordinary legislature; it cannot provide an explanation of the authority of Parliament as a

⁶⁴ R. Guastini, *Il diritto come linguaggio*, Turin, Giappichelli, 2006.

⁶⁵ And consequently in relation to the constitution in its meaning (iii).

constituent assembly – i.e. as an assembly with the power to establish (ii). This is why a study of the reasons for the supremacy of Parliament cannot answer the question at the heart of this Chapter. Nonetheless, an analysis of the legal basis for Parliamentary supremacy leads one closer to that answer. More precisely, my argument is that an acknowledgment of the insufficient explanatory power of the normative framework underpinning the supremacy of Parliament leads one to engage with a different kind of authority, associated with the power to establish a constitution. I submit that it is in the light of this authority that the idea of state supremacy can be illuminated.

In the literature, the *locus classicus* for starting an analysis of what I called “constitutional authority” is the Schmitt-Kelsen debate. Two different conceptions of the constitution lie at the core of the debate. These two different conceptions mirror two different views on the nature of constituent power. Schmitt held the view that the constituent power is a manifestation of the “fundamental political decision”. On the other hand, Kelsen held the view that the establishment of the historically first constitution is a fact, which can be interpreted by a jurist as the source of legal consequences only if said jurist presupposes the validity of a *Grundnorm*. In both cases, however, the relationship between the constitution in senses (ii) and (iii), and the constitution in sense (i) is key to the understanding of constituent power. How can the “political facts” which define the political regime of a given state political community be relevant for the question asked by this Chapter? In other words, how can the disagreement between Schmitt and Kelsen help one to identify and explain the legal basis for state supremacy?

Schmitt’s main criticism of Kelsen’s understanding of the concept of constituent power is that Kelsen denies that the individuals who belong to a given state may exist as a people/community prior to the establishment of that state’s legal order. Because of this, Schmitt argues that Kelsen’s theory is unable to explain constituent and constituted power as

separate concepts. Kelsen, on his part, argues that, from a legal perspective, the acts of a group (for example, the acts of a legislature) can only be identified and explained through the acts of the individual members of the group (for example, the acts of the individual members of a Parliament qua legislators). Kelsen concludes that the collective agency associated with law making powers can only be explained as a matter of constituted power, because the existence of positive legal norms is necessary to identify the relevant legal officials as “authorised” by the relevant legal order. For Schmitt this is problematic because it does not allow for a proper explanation of constituent power – Schmitt’s explanation, for Kelsen, belongs to sociology and not to legal theory. According to Kelsen, those who establish the historically first constitution are not authorised by any legal norm: this means that their actions acquire legal significance only retrospectively, when interpreted in the light of the Basic Norm. Yet, for Kelsen, the “self-empowerment” which accompanies the establishment of a constitution is, at that time, a contradiction in terms.

Furthermore, Kelsen rejects the notion that a political community may establish a constitution as a collective agent. This is because, according to Kelsen, only a legal order can provide a given community with a unifying feature: “...only in a normative sense can one speak of a unity [...] the unity of the state’s legal order, which rules the behaviour of the human beings subject to its norms”. This point is extremely important for the purposes of the argument developed in my Thesis.

In Lindahl’s words: “If one follows Kelsen, then a strong notion of collective agency—the first-person plural perspective of a ‘We’ acting as a constituent power—is elided from a theory of democratic constitution-making. [...] If one follows Schmitt, then the first-person plural perspective is rendered synonymous to a substantive equality between the members of a polity.” Lindahl argues that, on the one hand, Kelsen’s position can be criticised in light of Searle’s thesis that the ‘We’ behind the self-rule of a group cannot be reduced to an

aggregation of 'I's'; on the other hand, Schmitt's position seems to overlook Kelsen's observation that it is impossible to identify the unifying feature which makes a given group become a state political community. Lindahl concludes that "...neither Kelsen nor Schmitt are able to explain the first-person plural stance of a 'We' as a unity in constituent action. [...] they cannot adequately address the question concerning the mode of being of a polity, as implied by collective self-rule."

This problem will be fully discussed in the next Chapter. For the moment, it is sufficient to notice how both Kelsen and Schmitt feel the need to ascribe a legal meaning to a set of political facts which lie at the basis of a given legal system - i.e. the constitution in sense (i). In order to do so, they try to read those facts in light of political or legal rules. Are these attempts to interpret the power to establish a constitution successful? Can they help one to explain the idea of state supremacy? Certainly, they demonstrate that the power to establish a constitution cannot just be accepted as a *de facto* power; rather, it ought to be interpreted as a normative power. This requirement makes one link the identification of an ultimate *de facto* power to the recognition of claim to (supreme) authority. Despite their different strategies, both Kelsen and Schmitt try to develop that link. In particular, they disagree on the nature of the link and on the nature of the claim to supreme authority. The key problem, however, is to identify the subject of this claim. Is it an organ of the State (most probably, the Parliament)? Is it the State itself? Is, against both Kelsen and Schmitt, the state political community as a whole? I think that this problem can be solved by looking at the *reason* for that claim.

4. The legality and the legitimacy of state supremacy

From my analysis of Parliamentary supremacy, it follows that the legal base for the supremacy of Parliament must be provided by a set of rules or principles. Only within this

normative framework, Parliament can be said to have a supreme law-making *power*. In this context, power must be understood in the Hohfeldian sense: A has a power, if, and only if, A has the ability, *within a set of rules*, to alter their own or another's Hohfeldian incidents.

The debate between Schmitt and Kelsen shows that, when one considers the ultimate law-making power (i.e. the constituent power), that normative framework is no longer present. Yet, it is important to acknowledge that at the upper limit of supreme law-making power, questions of power and legality generate questions of authority and legitimacy. In particular, the acceptance of the constituent power as a fact which entails legal consequences depends upon the recognition of a legitimate authority associated with that power.

This recognition is triggered by an element identified in Chapter III: the need for self-governance and autonomy. As demonstrated by my analysis of the constitutional history of the British Dominions, that need manifests itself in a claim to constitutional autochthony. Whether the establishment of a new constitution, or the interpretation of a past event as the starting point of a new constitutional regime, the claim to constitutional autochthony emanates from within the political community, not necessary from the whole community. On the contrary, the need for self-governance and autonomy is a need of a state political community as a whole. The connection between the claim to constitutional autochthony and its underpinning needs is the key to illuminate the idea of state supremacy and, consequently, the concept of internal sovereignty. The whole state political community is supreme, insofar as the claim to constitutional autochthony generates an authority which is capable of establishing an autochthonous constitution. That authority is legitimate as far as it originates from an appropriate response to the need for self-governance and autonomy. And the concept of internal sovereignty is meant to capture precisely that appropriate response. The conclusion of this Chapter generates two problems, which will be addressed in the next Chapter. (1) Is it possible to identify a state political community prior to the establishment of its constitution?

(2) Is it possible for a state political community to have needs which are not the aggregation of the specific needs of the individual members of that community? The concept of a state political community's common good will help me to answer these two questions.

CHAPTER 6

An explanatory definition of state sovereignty

This final Chapter brings the study begun in Chapter 1 to a conclusion. It should be remembered that the trajectory of the Thesis has been impelled by the following question: what are the standing human needs that would make *sovereignty* (despite the risks inherently associated with it) necessary and desirable for a *state*, both externally and internally?¹ This formulation of the Thesis' research question has stemmed from an appreciation of: (i) the possible overlap between state sovereignty and state absolutism; (ii) the conceptual distinction between external and internal sovereignty; (iii) the connection, both externally and internally, between the concept of sovereignty and legal discourse; and (iv) the methodological debate about the definition of general concepts – such as law, or sovereignty – in the social sciences². In light of (i), I have asked whether there are good reasons not to discard state sovereignty as unnecessary and undesirable, while recognising the potential dangers – especially, in terms of (external) expansionism and (internal) totalitarianism – associated with a defence of state sovereignty. My research question, as formulated in Chapter 1, is meant to capture those reasons. Throughout the subsequent Chapters, I have explored (ii) and (iii) aiming to develop an explanatory definition of state sovereignty, i.e. a definition that would satisfy the requirements of (iv)³.

¹ The task of formulating the research question of the Thesis was undertaken in Chapter 1.

² The appreciation of these four points resulted from a discussion of Jacques Maritain's arguments against state sovereignty. For this discussion, see Chapter 1.

³ On the importance of explanatory definitions in the social sciences, see final section of Chapter 1.

In Chapter 2, I discussed how external and internal sovereignty have been conceptualised within the theories developed by five influential legal philosophers⁴. In Chapter 3, I analysed a significant example of international, and constitutional, law discourse on sovereignty, in order to identify the main *capacities* commonly associated with external and internal sovereignty⁵. Both Chapter 2 and Chapter 3 suggested that references to the concepts of external and internal sovereignty may be used as a proxy to support the notion that states are legally independent and legally supreme, within the limits of their (exclusive) jurisdiction. Hence, in Chapter 4 and in Chapter 5, I focused attention on this notion, analysing the function performed by the claims to legal independence and legal supremacy, in the context of a state political community.

The results of the analysis carried out in Chapters 4 and 5 led me to conclude – at least, provisionally – that the function performed by the claims to legal independence and legal supremacy is to respond to some needs of the state political community as a whole. More precisely, I demonstrated that two needs in combination, the *need for self-determination* and the *need for autonomy*, underpin the claims to legal independence and legal supremacy (and, therefore, underpin external and internal sovereignty). On the basis of this conclusion, one may now be inclined to hypothesise that my research question could be answered by pointing directly to the needs for self-determination and autonomy. However, before concluding that those two needs do provide the answer I have been searching for, it is worth reconsidering two key elements of my research question: first, the idea of standing human needs; and, second, the distinction between external and

⁴ From the standpoint of analytical jurisprudence, the idea of (state) sovereignty has been conceptualised in relation to a general theory of law and/or a general theory of the state. In Chapter 2, I discussed how Austin, Kelsen, Ross, Hart, and MacCormick engaged with the idea of sovereignty in relation to their conception of law.

⁵ This was provided by a case study of the historical process through which the British Dominions acquired the status of sovereign states.

internal sovereignty. Indeed, two concerns arise when the potential validity of the hypothesis above is considered in light of these two elements.

In relation to the first element, it is not clear whether the needs for self-determination and autonomy, as needs of a state political community as a whole, are indeed the standing human needs capable of explaining why state sovereignty would be necessary and desirable. In relation to the second element, it is not clear whether the provisional conclusion of Chapters 4 and 5 could be applied to state sovereignty *tout court*. In fact, the last two Chapters simply established that the needs for self-determination and autonomy justify, on the one hand, a claim to legal independence; and, on the other hand, a claim to legal supremacy. It is true – as demonstrated in the previous Chapters – that the concepts of legal independence and legal supremacy are linked to external and internal sovereignty, respectively. Yet, since the concepts of independence and supremacy appear to be *separate* concepts, it might be suggested that the necessity and desirability of state sovereignty should be approached as two separate problems: one concerning external sovereignty; and the other, internal sovereignty⁶.

Accepting this “separatist” approach would require one to split the research question identified in Chapter I into two separate questions. More importantly, it would require one to accept that external and internal sovereignty, when examined separately, may have different (even incompatible) justifications⁷. In other words, from the acceptance of the “separatist” approach it would follow that the provisional conclusion of

⁶ The view that external and internal sovereignty are separate, as they capture the two separate concepts of independence and supremacy (respectively) is held, for example, by: R. Guastini, *Lezioni di teoria del diritto e dello Stato*, Torino, Giappichelli, 2006, pp. 212-219.

⁷ The notion that external and internal sovereignty should be tackled as separate problems is ingrained in the critical analysis provided by Neil MacCormick. His analysis is particularly significant in this regard, because it demonstrates how, by presupposing a “separatist approach” to external and internal sovereignty, it is possible to accept one – in MacCormick’s case, external sovereignty – and, at the same time, reject the other. MacCormick’s rejection of internal sovereignty vis-à-vis the idea of *Rechtsstaat* has been discussed in Chapter II, §5. Another example is provided, for instance, by the way in which Luigi Ferrajoli critically engages with the idea of sovereignty in: L. Ferrajoli, *La sovranità nel mondo moderno*, Roma-Bari, Laterza, 2004. In this book, Ferrajoli discussed three aporias of (state) sovereignty.

Chapters 4 and 5 should be tested in relation to the necessity and desirability of external sovereignty, and, separately, of internal sovereignty. This would also mean that one should be open to the possibility that that provisional conclusion could provide an answer to the question about external, but not to the one about internal sovereignty; or vice versa.

In this final Chapter, however, I will reject the “separatist” approach. In particular, I will defend the proposition that the concepts of external and internal sovereignty, albeit distinguishable, should not be conceived of as separate concepts – because they do not capture two separate aspects of state sovereignty. This proposition is based upon the following consideration: in order to decide whether external and internal sovereignty are actually separate concepts, one should first clarify what ‘external’ and ‘internal’ are predicated of. In doing so, it is useful to consider what the concepts of legal independence and legal supremacy refer to. Now, the analysis carried out in Chapters 4 and 5 has shown that both these concepts ultimately refer to a *state political community*⁸. This suggests, therefore, that it should be possible to conceive of external sovereignty as the sovereignty of a state political community, vis-à-vis its external affairs; and internal sovereignty as the sovereignty of a state political community, vis-à-vis its internal affairs. In the final section of the Chapter, I will therefore use the idea of a state political community as my main frame of reference, arguing that the concepts of external and internal sovereignty capture two connected aspects of one characteristic: the characteristic, proper to those human communities that we call ‘states’, to be *complete communities*.

Nevertheless, it should be noted that the use of the idea of a state political community as a frame of reference for understanding external and internal sovereignty

⁸ On the difference between the idea of a state, as the whole of a state political community, and the idea of the State, qua unity of the governmental institutions (including legislative, judicial and executive powers) of a state political community, see Chapter 1.

can only resolve the first of the two concerns expressed above. For even within this frame of reference, the issue of whether the needs for self-determination and autonomy, as needs of a state political community, are *standing human needs* capable of explaining the paradigmatic case of state sovereignty, would still be open. In order to deal with this crucial issue, it will be necessary to focus attention on the relationship between (general) standing human needs and the (specific) needs of a state political community. By explaining this relationship, I would submit, it is possible to show why the provisional conclusion of Chapters 4 and 5 can answer my research question. Furthermore, I would argue that the two concerns identified above cannot be solved without a proper understanding of what a state political community is (in its paradigmatic case).

For this reason, I will begin the Chapter by tackling the problem of how state political communities can be identified in the context of our complex social reality. In particular, I will consider how such communities can be isolated from other human groups, and what kind of inquiry would allow one to distinguish between state political communities and other types of human communities. I will suggest that this identification problem can only be solved by introducing the ideas of the common good and of a complete community (§1). In the second section of the Chapter, I will study the implications of a state political community's claim to be a complete community. In particular, I will consider how this claim is linked to a proper understanding of the common good (and, therefore, to the solution to the identification problem that I discussed in the first section of the Chapter). I will also consider how the idea of the common good and of a complete community can be explained as a response to the *standing human needs* of the members of a political community. I will then explain how a state political community's claim to be a complete community would require that community's (state) legal system to have two characteristics – it must be limited to the public good, and it must be able to provide adequate protection of the human rights of the

members of that political community (§2). In the final section of the Chapter, I will focus attention on the *prima facie* difference between a state political community and a *sovereign* state political community. I will argue that a state political community's claim to be a complete community is successful only when the state legal system (characterised by the features identified in §2) is both supreme and independent. For only under these conditions, I will submit, can the life plans of the members of the political community, qua complete community, be appropriately protected. This argument will also allow me to explain the distinction between external and internal sovereignty in light of the relationship between the common goods of different states. I will conclude by showing that state sovereignty, both externally and internally, is made necessary and desirable (despite the risks inherently associated with the exercise of sovereignty) by the state political community's needs for self-determination and autonomy, which are rooted in the necessity and desirability of protecting the exercise of a person's freedom in practical reasonableness (§3).

1. State political communities as complete human communities?

As indicated in the introductory section, the main argument offered in this Chapter comprises two key moves⁹. The first move is to explain how a state political community's needs for self-determination and autonomy are linked to the standing human needs that underpin a state's claim to be a complete community. The second move is to defend the conceptual distinction between external and internal sovereignty as a distinction and not a separation. In particular, I will argue that the concepts of external and internal sovereignty allow one to distinguish (not to separate) two aspects of a status

⁹ These moves are not possible without explaining the connection between standing human needs (which express the basic goods) and the idea of the common good of a complete community. This explanation is provided in §2.

– i.e. the status of being sovereign – enjoyed by a state political community, qua complete community¹⁰. Yet, both moves cannot be successfully made without first establishing how state political communities can be identified in the context of our complex social reality. In fact, only when such an identification problem is solved, and the two key moves of my final argument are made, will it be possible to assess whether the provisional conclusion of Chapters 4 and 5 can provide a convincing answer to my research question.

It should be noted that the problem of *how* state political communities can be *identified* in the context of our complex social reality incorporates two sub-problems. The first sub-problem can be expressed in the following terms: *how* should we engage with our social reality, in order to identify state political communities for what they are? The second sub-problem can be expressed in the following terms: how can we *identify* state political communities amongst the variety of human groups that can be isolated within our social reality? The next two sub-sections will discuss these two sub-problems, respectively.

1.1 State political communities and the importance of practical reasoning

Our social reality, like our world in general, is characterised by a multi-dimensional complexity. This complexity can be approached by asking different types of questions. From one angle, it is possible to see our world as something that is independent from us: this is the main presupposition shared by the type of questions asked by the natural sciences¹¹. From another angle, it is possible to see our world as something that we can

¹⁰ See *infra* §3. These two moves will also alleviate the two concerns identified in the introductory section.

¹¹ The divide between “natural” and “social” sciences is based on an appreciation of the relationship that exists between their method and their object. For an historical reconstruction of the divide between these

apprehend into our understanding: this is the main presupposition shared by the type of questions asked by logic and epistemology. From a third angle, it is possible to see our world as something upon which we can impose some order: this is the main presupposition shared by the type of questions asked by the applied sciences and the arts. From a fourth angle, it is possible to explain our world as something that we can shape as a result of our *practical reasoning*: this is the main presupposition shared by the types of questions asked by ethics – including political and legal philosophy. These different angles (and dimensions of explanation) capture four different types, or orders, of inquiry¹².

Although our social reality can be approached through one or more of these types of inquiry, it is important to remember that, in the domain of human affairs, the *why-questions* have the strongest explanatory power¹³. Attention to the why-type question is at the heart of the fourth order of inquiry, i.e. the inquiry directed by an appreciation of our practical reasoning¹⁴. Indeed, it is my view that, in order to identify state political communities for what they are, it is necessary to engage with our social reality from the standpoint of the fourth order of inquiry. This does not mean – and it is worth underlining this point – that social constructions, such as state political communities, should only be studied from that angle. It is of course possible to study any social construction by asking the types of questions that characterise the other three orders of inquiry; yet, the research projects directed by those questions would not be able to capture state political communities for what they *really* are. In fact, despite being able to

two types of scientific inquiry see, e.g.: D. Sparti, *Epistemologia delle scienze sociali*, Bologna, Il Mulino, 2002, Chapter 1.

¹² On these four types, or orders, of inquiry, see: J. Finnis, *Aquinas*, Oxford, Oxford University Press, 1998, pp. 20-23.

¹³ On the importance of the why-type question, see Chapter I, §4. See also, most recently: G. Webber, ‘Asking Why in the Study of Human Affairs’, *American Journal of Jurisprudence*, LX, 2015, pp. 51-78.

¹⁴ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 138.

explain some natural, logical, or material conditions of human communities, those research projects would be blind, *ab initio*, towards the internal point of view of the persons who intentionally participate in the social construction(s) under scrutiny¹⁵. The main reason why state political communities should be primarily studied from the standpoint of the fourth order of inquiry – viz. in light of our (capacity for) practical reasoning – is that “human actions and societies cannot be adequately described, explained, justified, or criticized unless they are understood as [...] the carrying out of free choices¹⁶.” As correctly pointed out by John Finnis, the rationale behind the existence of a human community can only be understood in light of “the unity or order which we bring into our own actions and dispositions by intelligently deliberating and choosing”¹⁷. And state political communities are, at least in a large part, the product of deliberations and free choices¹⁸. The clarification offered in the next sub-section will corroborate this last point.

1.2 State political communities as a type of human community

This second sub-section answers the following question: how can we *identify* state political communities amongst the variety of human groups that can be isolated within our social reality? In order to answer this question, I would submit, it is necessary to

¹⁵ The internal point of view of those who intentionally participate in a social practice makes it possible for an observer to understand that practice from a “cognitive” internal point of view – i.e. without necessarily participating themselves in the practice under scrutiny. On the distinction between the ‘cognitively internal’ and the ‘volitionally internal’ point of view; and, in particular, on the idea that the former ‘is parasitic on – because it presupposes’ the latter, see: N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978, p 292. On the importance of intentions for understanding human actions, see e.g.: G. H. von Wright, *Explanation and Understanding* (1971), Ithaca, Cornell University Press, 2004.

¹⁶ J. Finnis, *Aquinas*, Oxford, Oxford University Press, 1998, p. 22.

¹⁷ See J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, pp. 137-138.

¹⁸ Chapter 3 provided examples of deliberations and free choices, expressed in terms of legal and political claims.

identify the characteristic feature(s) of a state political community, vis-à-vis other types of human groups. This way of approaching the question – as well as the formulation of the question itself – appears to presuppose the truth of the following two propositions: (a) state political communities are human groups; and (b) different types of human groups can be isolated within our social reality. In the next two paragraphs, I will consider the extent to which propositions (a) and (b) should be accepted as true – at least, for the purposes of this Chapter. In doing so, I will introduce some distinctions that will allow me to reformulate (a) and (b) in a more precise way. I will call the new formulations of (a) and (b), (a*) and (b*), respectively.

As indicated in the previous Chapters, states are commonly defined as social formations in which an apparatus of government wields power in relation to a given territory, and a given population¹⁹. However, for the purposes of my argument, the most important element of this definition is the relationship between the state apparatus of government and the population of that state – a relationship that can only be fully understood by referring to the concepts of authority and obligation. Now, these two concepts capture the existence of an appropriate response to the co-ordination problems (including problems of justice) that are caused by the interactions between the members of the state’s population²⁰. This means that one cannot think of a state without thinking of its relevant population: without that set of individuals and their interactions, the social

¹⁹ See Chapter 4. See, also, Chapter 2 (and, in particular, my analysis of Kelsen’s distinction between “legal” and “sociological” definitions of a state). Despite being the “standard view” on states, one important element of this definition, i.e. the existence of a defined territory, has been questioned. See, e.g.: L. Green, *The Authority of the State* (1988), Oxford, Oxford University Press, 2008; cf. N. Barber, *The Constitutional State*, Oxford, Oxford University Press, 2010.

²⁰ On authority and obligation, and their relationship with the existence of co-ordination problems (not in the sense of ‘co-ordination’ used by game theory), see: J. Finnis, *Natural Law and Natural Rights*, Oxford University Press, 2011. See, also: J. Finnis, ‘Law as Co-ordination’, *Ratio Juris*, II, 1989, pp. 97-104.

formation that we call state would cease to exist. Hence, I will begin my reasoning by accepting the notion that state political communities are human groups²¹.

Generally speaking, a *human group* can be thought of a mere aggregation of humans, all sharing the same characteristic: for example, the group that comprises all the individuals who accessed a given University Library in a given calendar year²². Within the class of human groups, the sub-class of human communities should be distinguished. I consider a *human community* to be a group of (inter-)acting individuals that is also considered to be capable of acting together as a unit: for example, the community that comprises all the librarians working for a given University Library. In my view, state political communities belong to this last sub-class of groups²³. I would therefore reformulate (a) as follows: (a*) state political communities are human communities.

In light of the previous paragraph, it would appear possible to argue that, if different types of human groups can be isolated from other groups, and if human communities are a sub-class of human groups, it should also be possible to isolate different types of human communities within our social reality. Now, it has been suggested that a group can be identified on a *quantitative basis*, e.g. on the basis of the number of interactions occurring between the (supposed) members of that group. My view is that although quantitative methods can be applied to human groups, they can

²¹ State political communities, qua social formations, may be thought of as including not only humans, but also other types of animals (such as domesticated animals) and other types of intelligences (such as robots) that usually *interact* with humans, and make human life possible. The irrelevance of this consideration for the argument offered in this Chapter will be explained (in light of the connection between the idea of the common good and the idea of a complete community) in §2. On the importance of non-human animals for political theory, see, e.g.: S. Donaldson and W. Kymlicka, *Zoopolis: A Political Theory of Animal Rights*, OUP, 2011. On the impact of robots on society see, e.g.: S. Sabanovic, 'Robots in Society, Society in Robots', *International Journal of Social Robotics*, IV, 2010, pp. 439-450.

²² This is how, I would argue, Kelsen characterises the population of a given state: "a number of individuals form a community only because a normative order regulates their mutual behavior. [...] The statement that individuals are members of a community is only a metaphorical expression, a figurative description of specific relations between the individuals, relations constituted by a normative order". See H. Kelsen, *General Theory of Law and State*, Cambridge (Mass.), Harvard University Press, 1945, p. 182.

²³ This does not mean that only state political communities fall into this sub-class. Teams, clubs, societies, associations, corporations, federations, and enterprises may well fit my definition of 'human community'.

never be fruitfully applied to human communities²⁴. Instead, I would suggest that human communities can be identified as discrete elements of our social reality only on a *qualitative basis*. In particular, I would submit that a human community is identifiable in light of the *purpose* of the (inter-)actions of its members, as well as of the purpose of the community as a whole²⁵. Here, the connection between the parts and the whole is crucial, because the nature of the (inter-)actions of the members of a given community can be understood as relevant only in connection to the purpose of that community as a whole²⁶. I would therefore reformulate (b) as follows: (b*) different types of human communities can be isolated within our social reality, and this can be done on the basis of their purpose.

Despite being more precise than (a) and (b), propositions (a*) and (b*) cannot yet provide a final answer to the question tackled in this sub-section. They are nonetheless revealing. It is worth recalling that the aim of this sub-section is to show how state political communities can be identified amongst the variety of human groups that can be isolated within our social reality. In light of (a*) and (b*), one can now say that state political communities can be identified as human communities. However, this proposition appears to simply push the problem to another level. In particular, since there are different types of human communities, the answer provided by this proposition

²⁴ The reason for this is elucidated by the following example. Could we identify the community that comprises all the librarians working for a given University Library through the same quantitative method that we may employ to identify the group that comprises all the individuals who accessed that University Library in a given calendar year?

²⁵ See J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 152: "...sharing of aim rather than multiplicity of interaction is constitutive of human [...] communities [...]". Finnis does not differentiate between human groups and communities in the same way in which I differentiate them in this Chapter. See, also, pp. 151-152, where Finnis uses the example of an employee who minds a factory gate. It is worth thinking about the key question generated by that example: despite the fact that the employee may only interact with independent lorry drivers, why do we recognise that the employee is a member of the factory?

²⁶ Here one may think, for instance, of the way in which the nature of the (inter-)actions of a member of a family are made intelligent by their relationship with the purpose of a family qua human community. Of course, the relationship between the parts and the whole is not univocal. What I mean by this is that the purpose of a human community cannot be fully understood regardless of the nature of the (inter-)actions of its members.

simply generates another question: how can we isolate state political communities from other human communities, such as teams, clubs, societies, associations, corporations, federations, and enterprises?

From the proposition that all human communities are purposive enterprises, it does not follow that all human communities (must) have the same purpose. In fact, if different human communities have different purposes, then it might be possible to solve the problem of how state political *communities* can be identified in the context of our complex society by identifying the *purpose* that is proper to this type of human community. The next sub-sub-section will attempt to identify such a purpose.

1.2.1 The common good of a complete community

In the previous sub-section I have highlighted the importance of acknowledging that human communities are purposive enterprises. Once accepted, this view yields the following two claims. The first claim is *methodological*: the main modality of existence of a human community should be captured by the fourth order of inquiry. For only an appreciation of the role of our practical reasoning – being the kind of reasoning that directs the (inter-)actions of the members of a given human community – would allow one to understand the purpose of that community. The second claim is *theoretical*: the persistence of a human community depends upon the presence of “...some shared conception of the point of continuing co-operation. This point we can call the common good”²⁷. By combining these two claims, it is possible to argue that, in order to identify the specific purpose of state political communities – and, in turn, isolate them from other human communities – it is necessary to explain how the common good of a state political community differs from the common good of other human communities, such as,

²⁷ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 153.

families, universities, clubs, trade unions or churches²⁸. Yet, when focusing attention on the practical reasoning of the persons that participate in the life of a given state political community, it is important to remember that the idea of the common good has a wide explanatory power. As convincingly demonstrated by John Finnis, this idea explains not only the existence, and the persistence, of a human community, but also of law and authority²⁹. Furthermore, it is possible to “speak of the common good on different explanatory levels”³⁰. The common good of a human community can be defined as follows: ‘

a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.³¹

This meaning of ‘common good’, however, can be fully understood only in relation to the notion that “...there is a ‘common good’ for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness are good for any and every person”³². In other words, the common good of a human community can be conceived of as the set of conditions that would allow the co-operation and/or co-ordination of the members of that community to achieve a given

²⁸ Each of these human communities has its own common good, and each community can help one to realise one or more specific basic goods. On the idea of basic goods: J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011

²⁹ The key argument to reach this conclusion is based on the importance of solving co-ordination problems in relation to the common good of a human community (or human group, in Finnis’ terminology). On this point, see: J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011.

³⁰ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 156.

³¹ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 155.

³² J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 155. Finnis also introduces another sense of ‘common good’, when he argues that each basic good “is itself a ‘common good’ inasmuch as it can be participated in by an inexhaustible number of persons in an exhaustible variety of ways or on an inexhaustible variety of occasions.” *Ibid.*

objective; and this objective, in turn would help the flourishing of the individual persons who have engaged in the relevant co-operation and/or co-ordination.

Our social reality includes a number of different human communities, which are different communities because they have a different common good. In other words, the joint enterprises that constitute those communities have a different *type* of objective. Again, a quantitative analysis would not be of much help in this case. Some joint enterprises aim at an objective that can be achieved once and forever – and is not a matter of numbers; think, for example, of the Manhattan Project, which employed more than 120,000 people³³. Other classes of joint enterprises, instead, aim at objectives that cannot be attained in a complete way, despite involving only a few people (think, for example, of a small family). The second type of objective is intrinsically linked to the basic aspects of human flourishing, i.e. “values in which we participate but which we do not exhaust”³⁴. Hence, when searching for the specific purpose of a state political community, it is crucial to consider whether the objective of such a community belongs to the former or to the latter type.

Furthermore, the objectives of human communities can be distinguished on the basis of their comprehensiveness. Almost all human communities aim at realising one or more of the two types of objectives indicated in the previous paragraph (imagine a family on a holiday trip to a country house). Nonetheless, all these joint enterprises would be impossible without certain basic conditions, such as basic conditions of justice. It is then possible to envisage the existence of a human community whose (meta-) purpose is to secure those basic conditions. So, when searching for the specific purpose of a state

³³ See, e.g. R. Jungk, *Brighter than a Thousand Suns – a Personal History of the Atomic Scientists*, Harcourt Publishers, 1970.

³⁴ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 155.

political community, one should also consider that this specific objective might be that (meta-) purpose.

Three types of human communities can be distinguished on the basis of the characteristic features of their objectives. The first type is a *specialised* community: that is a human community created to pursue a specific goal that can be attained in a complete and definitive way – for example, a team created for the purposes of winning a given tournament³⁵. The second type is a *partial* community: that is a human community created to pursue a goal that cannot be attained in a complete and definitive way (that is, to participate in one or more basic goods) – for example, a family³⁶. The third type is a *complete* community: that is, an all-round association in which not only the activities of individuals, but also of intermediate human communities – such as families, universities or clubs – would be co-ordinated³⁷.

Now, contemporary (sovereign) states claim to be complete communities, as they interpret themselves as being – at least, in principle – self-sufficient communities³⁸. In light of the reasoning conducted so far, this claim can be accepted as true only if it is possible to demonstrate the following proposition: that, given a set of interacting human communities, the complete community that will allow these communities to flourish is a *state political* community. If this claim is verified, then the problem of how state political communities can be identified in the context of our complex social reality will be solved.

³⁵ The objective of a *specific* community is not one of the basic goods (and therefore can be attained in a complete way). The existence of a specific community often presupposes the existence of one or more partial communities.

³⁶ The objective of a *partial* community is one or more of the basic goods (and therefore cannot be attained in a complete way), but this objective never includes the condition that allows a number of interacting human communities to pursue their objectives. The existence of a partial community often presupposes the existence of a complete community.

³⁷ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 147. The objective of a *complete* community is a meta-objective, i.e. the objective of securing the conditions under which specific and partial communities can attain their objectives.

³⁸ See J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 149. See, also, my analysis in Chapter 3.

2. Do we *need* state political communities?

The problem that the first section of this Chapter was meant to solve is the problem of how state political communities can be identified in the context of our complex social reality. The analysis carried out so far has shown that this problem can be solved by testing the validity of the claim that state political communities are *complete* communities. For, if that claim is verified, then state political communities can be identified in light of their specific purpose, qua complete communities. More precisely, if that claim is verified, the characteristic feature that allows one to isolate state political communities, as a type, from other types of human communities can be found in their being intended (by those whose choices bring them into being and maintain them) to secure *the* common good – according to a comprehensive meaning of ‘common good’³⁹. Before proceeding to test that claim, however, it is worth remembering the reason why solving the problem of how state political communities can be identified is crucial for the main argument that I intend to offer in this final Chapter. The importance of solving that problem depends upon the necessity of alleviating the two concerns arose in the introductory section of the Chapter: first, the issue of whether the needs for self-determination and autonomy, as needs of a state political community, are indeed the standing human needs that make state sovereignty necessary and desirable; and, secondly, the issue of whether the provisional conclusion of Chapters IV and V can be applied to state sovereignty *tout court*. Successfully explaining how state political communities can be identified would mean anchoring the concepts of external and internal (state) sovereignty to a reference point. Following the methodology of this Thesis, such a reference point can be identified by considering whether the standing human needs of the members of a state political community would require that

³⁹ See above §1.2.1.

community to be a complete community⁴⁰. And it is precisely in relation to the standing human needs of the members of a state political community that the third, and final, section of this Chapter will discuss the difference between a state (political community) and a *sovereign* state (political community). In doing so, it will be possible to alleviate the concerns mentioned above; and, more importantly, to demonstrate the extent to which the conclusion reached in Chapters IV and V can provide an answer to my research question. In a nutshell, this is why solving the problem of how state political communities can be identified in the context of our complex social reality is crucial for the purposes of this Chapter's argument.

Contemporary state political communities claim to be complete communities. As indicated in the last paragraph of the first section, the acceptance of that claim rests upon the acceptance of the following proposition as true: given a set of (potentially subordinate or intermediate) human communities, (A) the complete community that allows those communities to flourish is a *state political* community. At a closer look, it appears that this proposition comprise two limbs. First, proposition (A1): the complete community that allows the (potentially subordinate and intermediate) human communities under consideration to flourish is a *political* community. Second, proposition (A2): the complete community that allows the (potentially subordinate and intermediate) human communities under consideration to flourish is a particular type of political community, viz. a *state* political community.

In order to accept proposition (A) as true, I would argue, both limbs must be discussed and, eventually, accepted as true. Therefore, the next two sub-sections will discuss (A1) and (A2), respectively; and consider to what extent these two propositions can be accepted as true.

⁴⁰ The methodology of the Thesis was discussed and defended in Chapter 1.

2.1 Are *political* communities complete communities?

In order to decide whether the flourishing of a given group of individuals and human communities can only be realised in the context of a *political* community, it is necessary to reflect on the way in which this type of human community can respond to the standing human needs of the (individual and collective) members of that group⁴¹. Any proper response to these needs is intrinsically connected to one's participation in the basic goods, which, in turn, can be realised by promoting the common good of the relevant human communities⁴². Now, the (individual or collective) members of a human group cannot participate in the basic goods without participating in one or more human communities; more importantly, they cannot participate in the basic goods without interacting with other individuals and/or human communities. Hence, I would suggest that, in order to consider how a political community can respond to the standing human needs of the (individual or collective) members of a human group, it is necessary to focus attention on those interactions – namely, the interactions between individual persons, between individual persons and human communities, and between two or more human communities, as occur within a given human group. For the appropriateness of that response can be evaluated in relation to the *authoritative* solution that a political community can provide to the co-ordination problems generated by those interactions⁴³.

⁴¹ According to my definitions of 'human group' and 'human communities' it is possible to have a group of individuals, but also a group of human communities. For example – provided that a family is a human community – it is possible to isolate the group that comprises all the families in which at least one member of the family has a university degree. Of course, it is also possible to have a community of human communities. For example – provided that an academic faculty is a human community – a university would be a community of human communities.

⁴² Think, for example, about the way in which one can participate in the basic goods of life and friendship within the human community we call 'family'.

⁴³ On the relationship between authority and co-ordination problems, see fn. 21.

In other words, proposition (A1) – i.e. the complete community that allows the (potentially subordinate and intermediate) human communities under consideration to flourish is a *political* community – can be verified by showing that the way in which a political community can solve the co-ordination problems that occur within a given group of individuals and human communities is the most appropriate way to promote the common good of those human communities. In doing so, political authority would turn that *group* of individuals and of human communities into a *community* of individuals and of (subordinate and intermediate) human communities. Such a community of human communities would be a complete community.

In tackling the question ‘are *political* communities complete communities?’, it is useful to consider the other type of human community that, historically, has claimed to be a complete community; very often, in direct conflict with political communities. I refer, of course, to religious communities. Two observations can be made in light of a comparison between the way in which political and religious communities deal with the co-ordination problems that occur within a given human group. First, both political and religious communities tend to deal with these co-ordination problems by developing a system of rules, viz. a normative system that includes secondary rules of recognition, change and adjudication. Despite this similarity, however, there is a crucial difference in the way in which those two types of community conceive of the *limits* of that system of rules. Hence, the second observation that can be made is that a religious and a political community, qua (at least, potential) complete communities, are different because they bring about two different *schemes for promotion* of the common good.

When solving co-ordination problems within a human group, a religious community tends to order human interactions towards the realisation of the basic good of

religion⁴⁴. In doing so, a religious community does not dismiss the realisation of the other basic goods; rather, it establishes a hierarchical structure amongst the basic goods – a hierarchical structure that informs the way in which a religious authority understands and promotes the “common good”. On the other hand, a political community tends to develop and secure the set of conditions that, given the characteristics of the individuals and of the human communities it includes, would allow those individuals and communities to flourish, *without* establishing a hierarchical structure amongst the basic goods. A political community establishes an order in the interactions between its individual and collective members by performing a two-fold function: positively, it helps the (subordinate and intermediate) human communities it includes to promote their common good; negatively, it ensures that the participation in the basic goods is not enjoyed by a part of the community at the expense of the remaining part. This two-fold function characterises a political community’s scheme of promotion of the common good vis-à-vis a religious community.

The importance of this two-fold function and the significance of the distinction, drawn in the previous paragraph, between a religious and a political community can be fully appreciated by considering the key role played by our “freedom in practical reasonableness” in participating in the basic goods⁴⁵. For only a proper use of this freedom allows one to develop a meaningful, and coherent, plan of life, instead of being caught in a completely instrumental life – i.e. a life at the disposal of the interests of other individuals or groups. Now, a meaningful, and coherent, plan of life is required if one intends to participate in the basic goods. It is true that being trapped in a completely instrumental life might be, in some circumstance, outside one’s control – think, for

⁴⁴ Of course, in the necessarily confined way that defines that religious community.

⁴⁵ On the idea of freedom in practical reasonableness, see: J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011.

example, about a person born a slave in a slave society⁴⁶. Nonetheless, developing a meaningful, and coherent, plan of life that is the result of a deliberative act – i.e. that is the result of the exercise of one’s capacity for practical reasoning⁴⁷ – can only happen under certain conditions. A political community, in its paradigmatic case, aims at developing and securing these conditions, without also establishing a once-and-forever defined purpose for the complete community it claims to be⁴⁸. In other words, a political community does not respond to the standing human needs of its members by imposing a pre-defined way to participate in the basic goods; instead, it promotes the common good of the complete community it claims to be by limiting its ordering function to what Aquinas called the *public good*⁴⁹.

It is now possible to fully understand the difference in the way in which religious and political communities implement their claim to be a complete community. Both offer a *solution* to the co-ordination problems that occur within a relevant human group, but a religious community offers an *answer* to the problems (an answer based upon a hierarchical relationship between the basic goods), whereas a political community offers a *process* by which an answer to those problems can be attained (a process based on limiting its ordering function to the public good). In light of the way in which religious and political communities that claim to be a complete community for a group of

⁴⁶ Deviant cases of political communities, such as totalitarian states and dictatorships, tend to order the interactions between their individual and collective members in the same way. For, despite selecting different specific values to realise, they similarly impose a pre-defined “coherent” plan of life on their members. In doing so, they clearly affect, in a negative way, the freedom of one’s practical reasonableness. Furthermore, in doing so, they do not respond in an appropriate way to the standing human needs of the members of the relevant society.

⁴⁷ This is why the existence of interactions between humans and other kinds of animals or between humans and other forms of rational thinking (such as robots) are not relevant for the purposes of the argument offered in this Chapter. This consideration responds to the worry expressed in fn. 22.

⁴⁸ The metaphor of the ship – a metaphor that, at least since Plato, has become commonly used in relation to a polity – is in fact more fitting for a religious community than for a political community. On the inapplicability of this metaphor to a state political community see J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, pp. 154-155.

⁴⁹ *Ibid.*, p. 459. See also J. Finnis, *Aquinas*, Oxford, Oxford University Press, 1998.

individuals and human communities, I would answer the question asked in this sub-section by saying that political communities are complete communities, insofar as they limit their legal system to the public good. Hence, I would submit that this is the extent to which proposition (A1) should be accepted as true.

2.2 Are *state* political communities complete communities?

In the previous sub-section I explained in what sense a political community's claim to be a complete community should be considered justified. In doing so, I identified the condition that would allow one to accept proposition (A1) as true. In order to verify (A), however, proposition (A2) should also be accepted as true⁵⁰. Yet, it seems that accepting (A2) as true might be problematic, for at least two reasons.

First, one may argue that the existence of *state* political communities is just a contingent phenomenon. For even a cursory survey of the history of political institutions, or a quick glance at the academic literature on the history of international relations, would be sufficient to support the view that the organisation of political communities in states – despite being the dominant feature of our current political landscape – is only one of the many ways in which a political community can be organised. Indeed, throughout the centuries a number of political communities, not organised in the form of state political communities, have co-existed: one may recall, amongst many possible examples, empires, kingdoms, communi, or sultanates. Similarly, in the (possibly near)

⁵⁰ Proposition (A2), it is worth recalling, affirms that: the complete community that allows the (potentially subordinate and intermediate) human communities under consideration to flourish is a particular type of political community, viz. a state political community.

future, the current multitude of (sovereign) states might be superseded by new ways of organising political communities⁵¹.

Secondly, one may argue that the existence of state political communities does not necessarily help people to participate in the basic goods. In fact, it appears that not all standing human needs of a person can be realised within the boundaries of a state political community – here, again, religion may provide a good example. This observation may lead one to conclude that: “[if] the good of individuals can only be fully secured and realized in the context of international community, we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers would call a ‘legal fiction’.”⁵²

Yet, despite these two arguments, whose significance I will fully discuss in the next paragraph, my view is that (A2) should be accepted as true. A state political community is commonly described as a type of polity that presents the following features: a stable people inhabiting a territory defined by precise boundaries; and a central unitary power which has a monopoly on the legitimate use of force within those boundaries⁵³. A state’s monopoly on the legitimate use of force is usually displayed in the way in which the state legal system regulates human activities within the state territory. In the previous subsection I referred to the importance of a legal system for the purposes of both religious and political communities. There is, in particular, a strong relationship between a state

⁵¹ The EU, or associations such as BRICS, may provide examples of possible changes in our international landscape. The idea of a World State has also been discussed by a number of commentators as either a necessary evolution or a desirable development of our current international structure.

⁵² J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011, p. 458.

⁵³ The *locus classicus* is Weber’s definition of ‘state’ in his *Politik als Beruf* (1919). See M. Weber, *The vocation lectures: ‘Science as a vocation’; ‘Politics as a vocation’*, Indianapolis, Hackett Publishing, 2004: “Today [...] we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”

political community and a state legal system – a relationship explicitly acknowledged by the second argument above. It is true that the *legal claims* of a state “...are founded [...] on its self-interpretation as a complete and self-sufficient community”⁵⁴. However, it is also true that a state political community can be isolated from other political communities on the basis of some main features of its legal system⁵⁵. In particular, *state legal systems* are characterised by three main features: a hierarchy of legal sources, with legislation as the highest source; a constitutional regime regulating the powers enjoyed by the organs of the state; and exclusive jurisdiction within the state territory⁵⁶. However, I would submit that, in order to evaluate a state political community’s claim to be a complete community, it is necessary to focus attention on the way in which the central case of a *state legal system* is able to respond to the standing human needs of the members of the relevant (state) political community⁵⁷. Now, state legal systems (in their central case) provide the most appropriate protection of the human (i.e. natural) rights of the members of a political community – where these natural rights constitute a way to express a person’s standing human needs in terms of demands of justice vis-à-vis the needs of other people⁵⁸. I would therefore argue that a state political community’s claim to be a complete community is justified insofar as the state legal system provides the best protection for the human rights of the members of that community – protection so much superior to alternatives that none of these could be said to meet our needs⁵⁹.

⁵⁴ J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011 p. 149.

⁵⁵ Even when one considers different types of state political communities, the difference between, for example, a unitary and a federal state can be best explained in light of the difference between the legal systems of said state political communities.

⁵⁶ G. Tarello, *Storia della cultura giuridica moderna*, Bologna, Il Mulino, 1998.

⁵⁷ See Chapter 2.

⁵⁸ N. Bobbio, *L’età dei diritti*, Torino, Einaudi, 1990. See, also: P. Dobner & M. Loughlin, *The Twilight of Constitutionalism*, Oxford, Oxford University Press, 2011, Chapter 1.

⁵⁹ It is worth noting that my argument in support of (A2) has a two-fold link to my argument in support of (A1). First, both arguments rely on the relationship between a political community and its legal system;

From this standpoint, it is now useful to re-consider the arguments, identified above, against (A2). Because the conclusion of my argument is conditional – i.e. if the protection of human rights is secured by the legal system of a state political community, then that state’s claim to be a complete community is justified – the first argument above does not affect my argument. In fact, it can be used to support my conclusion. For, on the basis of a comparison between modern state legal systems and other forms of authoritative solutions to co-ordination problems, it appears that modern state political communities have been more successful than other types of political community in protecting the human rights of their members. Similarly, the possibility that the common good of a human community may be realised in a context different from a state political community does not require me to modify my argument. For this possibility can be easily incorporated as a corollary of my conclusion (as I will show in the next section). Nonetheless, our legal and political world order does not suggest that the international context would provide the best protection of the human rights of the members of a political community. In fact, even a major international document such as the Universal Declaration of Human Rights clearly presupposes that our state political communities constitute the best framework within which human rights can be best respected and protected.

3. The sovereignty of a state political community

The previous section identified the conditions under which one should accept the notion that, given a set of (potentially subordinate or intermediate) human communities, (A) the complete community that allows those communities to flourish is a *state political*

secondly, the better human rights are protected, the better our freedom in practical reasonableness can be exercised.

community. In light of my analysis of the two limbs of this proposition – the two limbs that I called (A1) and (A2)⁶⁰ – I argued that a state political community’s claim to be a complete community is justified insofar as the state legal system limits its regulatory function to the public good and protects the human rights of the members of the community. As indicated above, and this is the most important part of my argument, the presence of both conditions facilitates the exercise of one’s freedom in practical reasonableness. In light of my argument, it is possible to conclude that if a state political community is conceived of as a complete community, then it is distinguishable from other human communities because its purpose is the promotion of the common good of the (individual and collective) members of that political community⁶¹. However, when one considers the current legal and political landscape, it appears that a number of *sovereign* state political communities co-exist, and that each of them claims to be a complete community. This consideration triggers the following question: is there a difference between a state political community and a *sovereign* state political community in relation to their claim to be a complete community?

In the previous section I argued that a state political community’s response to the standing human needs of its members is appropriate if the state legal systems respect two conditions: first, the state legal system limits its regulative power to the public good; and, second, the state legal system provides adequate protection of the human rights of the members of the political community. These two conditions, I suggested, capture the link that exists between the common good of a complete community and the standing human needs of the members of that community. The standing human needs of a person are

⁶⁰ Proposition (A1): the complete community that allows the (potentially subordinate and intermediate) human communities under consideration to flourish is a political community. Proposition (A2): the complete community that allows the (potentially subordinate and intermediate) human communities under consideration to flourish is a particular type of political community, viz. a state political community.

⁶¹ This provides a solution to the problem identified in the first section of the Chapter.

multiple, as the basic goods they express are multiple. For this reason, one person's participation in the basic goods will be expressed through a commitment in the life of a number of human communities that are able to respond to those needs. This commitment will be realised in the form of a (sufficiently) stable plan of life. The purpose of a state political community (qua complete community) is to protect the realisation of such a plan of life by co-ordinating the way in which the intermediate communities respond to individual standing human needs, in light of the common good. In order to promote the common good of the state political community as a whole, and to protect the plan of life its members – a plan of life that expresses a sound exercise of one's freedom in practical reasonableness – the state legal system must be *supreme* and *independent*.⁶² It must be supreme over other authorities and independent from other authorities; for the co-ordinating function of a state legal system in light of the common good cannot be subordinated to any other authoritative solution of the co-ordination problems that occur within the state political community. From this perspective it is possible to better understand the claims, of a state political community, to *legal* supremacy and *legal* independence⁶³. In order to be a complete community, a state political community (in its paradigmatic case) must promote the common good with an eye to its members' freedom in practical reasonableness. And such freedom can only be protected and nourished by a supreme and independent state legal system.

The co-existence of a number of state political communities forces one to think about the co-existence of a number of state "common goods"; in the sense that there should be a common good for each state claiming to be a complete community. When one focuses attention on a given state political community, it appears that the common

⁶² This is a characteristic of a state legal system that H.L.A. Hart identified, without explaining the reason for its existence. See H.L.A. Hart, *The Concept of Law* (1961), Oxford, Oxford University Press, 2011. I discussed Hart's observation in Chapter II.

⁶³ See Chapter 4 and 5, respectively.

good of that community provides the only context for the final solution of the co-ordination problems that occur within the community. Yet, it might be possible to argue that those problems should be solved in a different context – for example, in the context of what we often call ‘the international community’. Furthermore, because of the scarcity of resources available in the world, and because of the lack of hierarchical structure between the basic goods, a state political community has to face co-ordination problems that are beyond it. For when two or more communities pursue their own understanding of the common good, their (inter-)actions will generate co-ordination problems⁶⁴. Do these observations call the conclusion of the previous sub-section into doubt? I would answer this question in the negative, because doing so would be to exaggerate the truths captured by those observations.

The co-existence of a number of different state political communities, each claiming to be a complete community does not mean, *per se*, that a state political community is not the appropriate context in which a response to the standing human needs of the members of that community should be provided. Instead, it means that, as there are different ways to participate in the basic goods, and different plans of life available to each of us, so there are different ways to respond to the standing human needs incorporated in those plans. From the perspective of a state political community claiming to be a complete community, the awareness of such a multiplicity of options requires the capacity to define the contours of the common good in a free way⁶⁵. Indeed, a state political community’s claims to legal supremacy and independence precisely express the necessity of being free to define those contours. And the necessity of this freedom – in both a positive, and a negative, sense of freedom – is the root of a state

⁶⁴ This mirrors the situation within a state political community, where a number of different human communities pursue their specific common good.

⁶⁵ It is light of this proposition that I would interpret Carl Schmitt’s notion that the constitution of a state captures the fundamental political decision about the existence of the state.

political community's *needs* for self-determination and autonomy. There is a link, I would submit, between the freedom of a state political community, qua complete community, and the freedom in practical reasonableness enjoyed by the members of that community. And I would suggest that it is by understanding the significance of this link that the first concern expressed in the introductory section of the Chapter can be alleviated.

The freedom in practical reasonableness that underpins the plan of life of the members of a state political community can be properly exercised only in the context of a complete community. As long as a state political community is committed to promote the common good (qua human community), it will have a need for self-determination and a need for autonomy. It is in light of this commitment that a state political community has the authority to establish a system of norms and institutions that will determine the way in which the life of its (individual and collective) members should be co-ordinated. Hence, a state political community's claims to supremacy and independence constitute, in the first instance, a response to the needs for self-determination and autonomy. Yet, at a deeper level, those two claims –that, in turn, underpin a state political community's claims to external and internal sovereignty – constitute a response to a standing human (meta-)need, viz. the need to exercise one's freedom in practical reasonableness.

Now, in light of this link, between the state political community's needs for self-determination and autonomy and the standing human (meta-)need of the members of that (allegedly) complete community, it is also possible to consider the second concern expressed in the introductory part of the Chapter. I would argue that, in order to alleviate this second concern, it is necessary to show that a state political community claiming to be a complete community cannot succeed in this endeavour without enjoying both external and internal sovereignty. In particular, I would argue that a state community's needs for self-determination and autonomy, expressed as claims to supremacy and

independence – claims that, in turn, underpin a state political community’s claims to external and internal sovereignty – captures two inseparable (but analytically distinguishable) aspects of the common good of a state political community, qua complete community. One aspect is the relationship between the common good of a complete community and the common good of its intermediate communities; whereas the other aspect is the relationship between the common good of a complete community and the common good of other complete communities. This means that external and internal sovereignty should be conceived of as properties of a state political community; more precisely, as the external and the internal aspect of the capacity (of a state political community) to define the common good⁶⁶.

A final observation is now in order. The common good of a state political community is not, in real life, disconnected from the common good of other (self-interpreting) complete communities. Of course, in order to be complete, a human community must be supreme vis-à-vis its intermediate communities and also independent from other authorities – as long as it claims to be the provider for *the* ultimate authoritative solution of its internal co-ordination problems. Nonetheless, I have shown that the way in which this ultimate authoritative solution is attained (in light of the common good) must have some features: in particular, it must be limited to the public good and it must protect the human rights of the members of the community. Yet, there are many possible interpretations of the common good – both diachronically and synchronically – that are able to display those two features. There are, therefore, two main dangers associated with the exercise of sovereignty. First, a state political

⁶⁶ Whereas external sovereignty is usually conceptualised as a property of a political community as a whole; internal sovereignty is often conceptualised as a property of a subject, or an institution, that is “internal” to the state political community. As indicated by the analysis carried out in Chapter 4, international law discourse appears to understand (external) sovereignty as a property of a state political community. Constitutional law discourse, instead, tends to locate sovereignty inside a state political community – see, for example, Chapter 5. See, also, Chapter 2. Let us imagine a sphere: according to my view external sovereignty should be conceived of as the external surface of the sphere; and internal sovereignty should be conceived of as the internal surface of the sphere.

community that claims to be a complete community may determine a common good in a way that does not respect the two conditions indicated above. In doing so, a state political community would express a totalitarian attitude. Secondly, a state political community that claims to be a complete community may determine a common good in a way that does not respect the existence of other interpretations of the common good. In doing so, a state political community would express an expansionist attitude⁶⁷.

This final observation, and this third section in general, have shown how the conclusion reached by Chapters IV and V can indeed answer the research question formulated in Chapter 1. This result has been achieved by showing how the two concerns expressed in the introductory section of the Chapter can be alleviated. State sovereignty – understood as the sovereignty of a political community – is therefore *necessary* as long as state political communities are committed to be complete communities⁶⁸. There is, however, an even more significant connection between state sovereignty and the standing human needs of the members of a political (complete) community. A proper response to these needs requires one to be able to exercise their freedom in practical reasonableness. And in order to protect and nourish such a freedom it is desirable to have a supreme and independent state legal system. This is why the sovereignty of a state political community is not only necessary, but also *desirable*.

⁶⁷ These two attitudes express an unreasonable choice – unreasonable in the sense of an arbitrary preference of one basic goods over the others.

⁶⁸ I. The fact that political complete human communities have organised themselves as state political communities is of course an historical contingent fact. As such, it does not constitute a necessary evolution, and – pace Hegel – it is not necessarily superior to other social organisation. The point that I want to make here is that if a political community organises itself as a state political community, because it claims to be a complete community, then it is necessary and desirable, for that state political community, to be (internally and externally) sovereign. This would mean, for that state political community, to claim supremacy and independence. Sovereignty, therefore, is a property of a state political community, qua complete community.

BIBLIOGRAPHY

Agazzi, E., 'La filosofia come invenzione del perché', *Bollettino della Società Filosofica Italiana*, CXXVII, 1986, pp. 15-22

Allan, T.R.S., *The Sovereignty of Law – Freedom, Constitution and Common Law*, Oxford, Oxford University Press, 2013

Anzilotti, *Corso di diritto internazionale: Volume 1 – Introduzione – Teorie generali*, Padova, CEDAM, 1955.

Aristotle, *Nicomachean Ethics* (translated by W.D. Ross)

Austin, J., *The Province of Jurisprudence Determined* (1832), edited by W.E. Rumble, Cambridge, Cambridge University Press, 1995

Austin, J.L., 'A Plea for Excuses: The Presidential Address', *Proceedings of the Aristotelian Society*, LVII, 1956

Barber, N., *The Constitutional State*, Oxford, Oxford University Press, 2010,

Bassan, F., *The Law of Sovereign Wealth Funds*, Cheltenham, Edward Elgar, 2011

Baylis, J., Smith, S., Owens, P., *The Globalization of World Politics: An Introduction to International Relations*, Oxford, Oxford University Press, 2014

Beaulac, S., *The power of language in the making of international law. The word sovereignty in Bodin and Vattel and the myth of Westphalia*, Leiden-Boston, Martinus Nijhoff Publishers, 2004

Beltran, J.F., Ratti, G.B., *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford, OUP, 2012

Benvenisti, E., 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', *American Journal of International Law*, 2013

Besson, S., Tasioulas, J. (eds.), *The Philosophy of International Law*, Oxford, Oxford University Press, 2010

Bix, B., 'Ross and Olivecrona on Rights', *Australian Journal of Legal Philosophy*, XXXIV, 2009, pp. 103-119

Bjarup, J., 'Scepticism and Scandinavian Legal Realists', in T. Endicott – J. Getzler – E. Peel, *Properties of Law. Essays in Honour of Jim Harris*, Oxford, OUP, 2006

Bjarup, J., 'The Philosophy of Scandinavian Legal Realism', *Ratio Juris*, XVIII-1, 2005, pp. 1-15

Blackshield T. – G. Williams, *Australian Constitutional Law and Theory* (4th edition, Sydney: The Federation Press, 2006), pp. 134-143

Bobbio, N., *Giusnaturalismo e Positivismo Giuridico*, Milan, Edizioni di Comunita', 1965

Bodin, J., *On Sovereignty: four chapters from the six books of the commonwealth* (1576), Cambridge, Cambridge University Press, 1992

Bourguignon, F., *The Globalization of Inequality*, Princeton, Princeton University Press, 2015

Bowett, D.W. *The Law of International Institutions*, London, Stevens&Sons, 1975, pp. 356-362

Bowsky, W.M., *Henry VII in Italy: the conflict of empire and city-state*, Lincoln, University of Nebraska Press, 1960

Brierly, J.L., *The Law of Nations*, Oxford, Clarendon Press, 1963

Brown, J.S. *Autonomy and Federation within Empire. The British Self-Governing Dominions*, Washington, D.C., Carnegie Endowment for International Peace, 1921

Bryce, J., *The Holy Roman Empire*, London, Macmillan and Co. Ltd., 1910

Carlyle, A.J., *A history of medieval political theory in the West*, (Volume IV), Edinburgh – London, W. Blackwood & Sons Ltd., 1970

Cassese, A., *International Law*, Oxford, Oxford University Press, 2005

Cassese, A., *Self-Determination of Peoples*, Cambridge, Cambridge University Press, 1995

Chen, L.C. ‘Self-Determination as a Human Right’, in: W.M. Reisman & B.H. Weston (eds.), *Toward World Order and Human Dignity*, New York, Free Press, 1976, pp. 198–261

Chiassoni, P., *L'indirizzo analitico nella filosofia del diritto*, Torino, Giappichelli, 2009

Chilton, C.W., ‘The Roman Law of treason under the Early Principate’, *The Journal of Roman Studies*, XLV, 1955, pp. 73-81

Clark D. & R. Williamson (eds.), *Self-Determination: International Perspectives*, Basingstoke, Macmillan, 1996;

Cobban, A., *The Nation State and National Self-Determination*, London, Collins, 1969 (second edition)

Cohen, J.L., *Globalisation and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge, Cambridge University Press, 2012

Coleman, J., *A history of political thought. From the Middle Ages to the Renaissance*, Oxford, Blackwell, 2000

Collingwood, R.G., *The Principles of History and Other Writings in Philosophy of History*, Oxford, Oxford University Press, 1999

Coppieters B. – R. Sakwa, *Contextualizing Secession: Normative Studies in Comparative Perspective* (Oxford: Oxford University Press, 2003)

Crawford, Brownlie's Principles of Public International Law, Oxford, Oxford University Press, 2012

Crawford, J. 'The criteria for statehood in international law', *British Yearbook of International Law*, XLVIII, 1976-77

Crawford, J. *The Creation of States in International Law* (2nd edition, Oxford: Oxford University Press, 2007)

Dahl, R. 'Can International Organizations Be Democratic? A Skeptic's View', in: I. Shapiro & C. Hacker-Cordon (eds.), *Democracy's Edges*, Cambridge, Cambridge University Press, 1999, pp. 19-36

Dewey, J., 'Austin's Theory of Sovereignty', *Political Science Quarterly*, IX, 1894, pp. 31-55

Dias, R.W., 'Legal politics: norms behind the *Grundnorm*', *Cambridge Law Journal*, XXVI, 1968

Dickinson, E. *The Equality of States in International Law*, Cambridge (Mass.), Harvard University Press, 1920

Dickson, J., 'How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union', *Problema*, 2008

Dickson, J., Eleftheriadis, P., *Philosophical Foundations of EU law* (Oxford: Oxford University Press, forthcoming, October 2012)

Dunn, F.S. 'The new international status of the British Dominions', *Virginia Law Review*, 13 (1927), pp. 354-379

Dworkin, R., *Sovereign Virtue: the theory and practice of equality*, Cambridge (Mass.), Harvard University Press, 2000

Ekins R., 'Constitutional Principle in the Laws of the Commonwealth', in: J. Keown & R.P. George (eds.), *Reason, Morality, and Law: the Philosophy of John Finnis*, Oxford, Oxford University Press, 2013

Eleftheriadis, P., 'Law and Sovereignty', *Law and Philosophy*, XXIX, 2010

Emerson, R. 'Self-Determination', *American Journal of International Law*, LXV, 1971, pp. 459-75

Endicott, T., 'Comity among Authorities', *Current Legal Problems*, LXVIII, 2015, pp. 1-26

Evans M. (ed.), *International Law*, Oxford, Oxford University Press, p. 223.

Feenstra, R.C. & Taylor, A. (eds.), *Globalization in an Age of Crisis: multilateral economic cooperation in the twenty-first century*, Chicago, The University of Chicago Press, 2014

Finnis, J., *Aquinas: Moral, Political and Legal Theory*, Oxford, Oxford University Press, 1998

Finnis, J., *Natural Law and Natural Rights*, Oxford, Oxford University Press, 2011

Finnis, J., *Philosophy of Law. Collected Essays: Volume I-IV*, Oxford, Oxford University Press, 2011

Floridi, L., *The Ethics of Information*, Oxford, Oxford University Press, 2015

Gadamer, H.G. *Truth and Method* (English translation; 2nd edition, New York: Continuum International Publishing Group Ltd., 2004), pp. 290 ff.

Gadamer, H-G, 'Hermeneutics and Social Science', *Philosophy Social Criticism / Cultural Hermeneutics*, II, 1975, pp. 307-316.

Gaja, 'Positivism and Dualism in Dionisio Anzilotti', *European Journal of International Law*, III, 1992, pp. 123-138.

Gallie, W.B., *Essentially Contested Concepts*, p. 177-180

Genser, J., Cotler, I., Tutu, D., Havel, V. , *The Responsibility to Protect*, Oxford, Oxford University Press, 2011

Gilson, E. , *The spirit of mediaeval philosophy*, (1932), Notre Dame, University of Notre Dame Press, 1991

Goebel, J. *The equality of states: a study in the history of law* , New York, Columbia University Press, 1923;

Goldsworthy, J., *The Sovereignty of Parliament: History and Philosophy*, Oxford, Oxford University Press, 1999

Griffiths, M., O'Callaghan, T., Roach, S.C., *International Relations: the key concepts*, Abingdon, Routledge, 2008 (2nd edition)

Grimm, D., *Sovereignty – The origin and future of a political and legal concept*, New York, Columbia University Press, 2015

Guastini, R., 'Invalidity', *Ratio Juris*, VII, 1994

Guastini, R., *Lezioni di teoria del diritto e dello stato*, Turin, Giappichelli, 2006.

Harris, J.W., 'When and why does the *Grundnorm* change?', *Cambridge Law Journal*, XXIX, 1971

Hart, H.L.A., *Essays in Jurisprudence and Philosophy*, Oxford, OUP, 1983.

Hart, H.L.A., *The Concept of Law*, Oxford, Oxford University Press, 2012³

Hashmi, S.H. (ed.), *State Sovereignty – Change and Persistence in International Relations*, University Park (Pennsylvania), The Pennsylvania State University Press, 1997

Hayek, F.A., *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, London, Routledge & Kegan Paul, 1973-79

Hempel G.C. & P. Oppenheim, 'Studies in the Logic of Explanation', *Philosophy of Science*, XV, 1948, pp. 135-137

Hinsley, F.H., *Sovereignty*, Cambridge, Cambridge University Press, 1986 (2nd edition)

Holzer, B., Kastner, F., Werron, T. (eds.), *From Globalization to World Society: Neo-Institutional and Systems-Theoretical Perspectives*, New York, Routledge, 2015

Holzgrefe J.L. – R.O. Keohane (eds.), *Humanitarian Intervention* (Cambridge: Cambridge University Press, 2003)

Honoré, T., 'Reflections on revolutions', *The Irish Jurist*, II, 1967

Huizinga, J., *The autumn of the Middle Ages*, (1919), Chicago, University of Chicago Press, 1996

Ip, E., 'Globalization and the future of the law of the sovereign state', *International Journal of Constitutional Law*, VIII, 2010, pp. 636-655

Irving, H. *To Constitute a Nation. A Cultural History of Australia's Constitution* (Cambridge: Cambridge University Press, 1999)

Jackson, R., (ed.), *Sovereignty at the Millennium*, Oxford, Blackwell Publishers, 1999

Jacobs, F.G., *The Sovereignty of Law – The European Way*, Cambridge, Cambridge University Press, 2007

Jennings R. & A. Watts, *Oppenheim's International Law*, Oxford, Oxford University Press, 1996

Jessup, P.C. 'The Equality of States as Dogma and Reality', *Political Science Quarterly*, LX, 1945

Johnson, H.S. *Self-Self-Determination within the Community of Nations*, Leiden, Sitjhoff, 1967

Joppke, C., *Challenge to the Nation-State: Immigration in Western Europe and the United States*, Oxford, Oxford University Press, 1998

Keith, A.B. *The Sovereignty of the British Dominions* (London: Macmillan and Co., 1929).

Kelsen, H., 'Sovereignty', in: S.L. Paulson, *Normativity and Norms*, Oxford, 1998, pp. 525-36

Kelsen, H., 'The principle of sovereign equality of states as a basis for international organization', *Yale Law Journal*, LIII, 1944, pp. 207-220

Kelsen, H., *Das Problem der Souveränität und die Theorie des Völkerrechts (Beitrag zu einer Reinen Rechtslehre)*, Tübingen, 1928; Italian translation: H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale (Contributo per una dottrina pura del diritto)*, Milano, Giuffrè, 1989

Kelsen, H., *General Theory of Law and State*, Cambridge (Mass.), 1945

Kelsen, H., *Pure Theory of Law* (translated by M. Knight), Berkeley and Los Angeles, 1967

Kelsen, H., *The Law of the United Nations: a critical analysis of its fundamental problems*, New York, Praeger, 1964

Keown, J., George, R.P. (eds.), *Reason, Morality, and Law: The Philosophy of John Finnis*, Oxford, Oxford University Press, 2013

Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly*, XXVIII, 2006, pp. 186–206

Kohen, M.G. *Secession: International Law Perspectives* (Cambridge – New York: Cambridge University Press, 2006)

Kooijmans, P.H. *The doctrine of the legal equality of states: an inquiry into the foundations of international law*, Leyden, A.W. Sythoff, 1964;

Koskenniemi, M., 'What use for sovereignty today?', *Asian Journal of International Law*, I, 2011

Koskenniemi, M., *From Apology to Utopia – The Structure of International Legal Argument*, Cambridge, Cambridge University Press, 2006

Krasner, S.D., *Power, the State, and Sovereignty*, London & New York, Routledge, 2009

Krasner, S.D., *Sovereignty – Organized Hypocrisy*, Princeton (N.J.), Princeton University Press, 1999

Kreijen, G., Brus, M., Duursma, J., De Vos, E., Dugard, J., *State, Sovereignty, and International Governance*, Oxford, Oxford University Press, 2002

Ku, J. & Yoo, J., 'Globalization and Sovereignty', *Berkeley Journal of International Law*, XXXI, 2013, pp. 210-234.

Kurtulus, E.N., *State Sovereignty: concept, phenomenon and ramification*, Basingstoke, Palgrave Macmillan, 2005

Laski, H., *A Grammar of Politics*, New Haven, Yale University Press, 1925

Lauterpacht, E., 'Sovereignty – myth or reality?', *International Affairs*, LXXIII, 1997

Lechner, F.J. & Boli, J., *The Globalization Reader*, Chichester, Wiley-Blackwell, 2015

Levi, E.H., 'The Sovereignty of the Courts', *University of Chicago Law Review*, L, 1983, pp. 679-700

Lindahl, L., 'Deduction and Justification in the Law: The Role of Legal Terms and Concepts', *Ratio Juris*, XVII, 2004

Lintott, A., *The constitution of the Roman Republic*, Oxford, Clarendon Press, 1999, pp.159-160

Loughlin, M., *Foundation of Public Law*, Oxford, Oxford University Press, 2012

Lowe, V. *International Law*, Oxford, Oxford University Press, 2007

Macdonald, R. & D.M. Johnston, *The Structure and Process of International Law*, Dordrecht, Martinus Nijhoff, 1983

Mahaffy, R.P. *The Statute of Westminster 1931. With an Introduction, Notes and Index* (London: Butterworth & Co., Ltd., 1932), pp. 5-15.

Maritain, J. , 'The concept of sovereignty', *The American Political Science Review*, XLIV, 1950, p. 343-357

Maritain, J. , *Man and the State*, Chicago, University of Chicago Press, 1951

Maritain, J., 'The concept of sovereignty', *The American Political Science Review*, XLIV, 1950, pp. 355-356.

Marshall, G., *Constitutional Theory*, Oxford, Clarendon Press, 1971

May, S., *Nietzsche's On the genealogy of morality: a critical guide*, Cambridge, Cambridge University Press, 2011

McCann, H.J., *Creation and the sovereignty of God*, Bloomington, Indiana University Press, 2012

McCorquodale R. (ed.), *Self-Determination in International Law*, Dartmouth, Aldershot, 2000.

McMinn, W. G. *A Constitutional History of Australia* (Oxford, Oxford University Press, 1979)

McPherson, B.H. *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007)

Murdoch, I., *The Sovereignty of Good*, London, Routledge, 1991

Murray, W.E. & Overton, J., *Geographies of Globalization*, London, Routledge, 2014

Newman D., *Community and Collective Rights*, Oxford, Hart Publishing, 2011.

Noel Baker, P.J. *The Present Juridical Status of the British Dominions in International Law* (London – New York – Toronto: Longmans, Green & Co., 1929)

Norman, W.J. *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State* (Oxford: Oxford University Press, 2006);

O'Connell, D.P., *International Law*, London, Stevens & Sons, 1970 (second edition)

Oliver, P.C., 'Sovereignty in the twenty-first century', *King's College Law Journal*, XIV, 2003

Oppenheim, L. *International Law* (3rd edition, London – New York; Longmans, Green & Co., 1920-21).

Otsubo, S.T., *Globalization and Development (Volume I) – Leading issues in development with globalization*, London, Routledge, 2015

Paton G.W. (ed.), *The Commonwealth of Australia: the development of its laws and constitution* (London, Stevens & Sons Ltd., 1952)

Paulson, S.L., 'How Merkl's *Stufenbaulehre* informs Kelsen's concept of law', *Revus*, XXI, 2013, pp. 29–45

Paulson, S.L., 'Material and formal authorisation in Kelsen's pure theory', *Cambridge Law Journal*, XXXIX, 1980, pp. 172-93

Pogge, T.W., 'Cosmopolitanism and Sovereignty', *Ethics*, CIII, 1992

Poggi, G., *The State: its Nature, Development and Prospects*, Cambridge, Polity Press, 1990

Pollock, F. *A First Book of Jurisprudence for Students of the Common Law* (6th edition, London: Macmillian, 1929)

Primoratz I. & A. Pavkovic (eds.), *Identity, Self-Determination and Secession*, Aldershot, Ashgate, 2006; M. Moore (ed.), *National Self-Determination and Secession*, Oxford, Oxford University Press, 1998.

Quinton, A. (ed.), *Political Philosophy*, Oxford, Oxford University Press, 1967

Ragin, C.C., Becker, H.S., *What is a Case? Exploring the Foundations of Social Inquiry* (Cambridge: Cambridge University Press, 1992)

Ramos, J.M. *Changing Norms through Actions. The Evolution of Sovereignty*, Oxford, Oxford University Press, 2013.

Raz, J., 'Human Rights Without Foundations', in: S. Besson & J. Tasioulas (eds.), *The Philosophy of International Law*, Oxford, Oxford University Press, 2010

Reinhard, W., *Geschichte des modernen Staates* (2007); Italian translation: Reinhard, W., *Storia dello stato moderno*, Bologna, Il Mulino, 2010, pp. 115-120

Reus-Smit, C., 'Human Rights and the Social Construction of Sovereignty', *Review of International Studies*, XXVII, 2001, pp. 519-538

Rigo Sureda, A. *The Evolution of the Right of Self-Determination*, Leyden, Sijthoff, 1973;

Ritzer, G. & Dean, P., *Globalization: A Basic Text*, Chichester, Wiley-Blackwell, 2015

Ronen, D. *The Quest for Self-Determination*, New Haven, Yale University Press, 1979;

Rorty, R., *The Linguistic Turn*, Chicago, The University of Chicago Press, 1992

Ross, A., 'Law and the Growth of International Society', *University of Illinois Law Forum*, 1956, pp. 262-269

Ross, A., 'Tû-Tû', *Harvard Law Review*, LXX, 1957, pp. 812-825

Ross, A., *A Textbook of International Law: General Part*, London, Longmans, Green and Co, 1947

Ross, A., *Constitution of the United Nations. Analysis of Structure and Function*, Copenhagen, Ejnar Munksgaard, 1950

Ross, A., *On Law and Justice*, London, Stevens and Sons, 1958

Ross, A., *The United Nations: peace and progress*, Totowa (N.J.), Bedminster Press, 1966

Ross, A., *Towards a Realistic Jurisprudence*, Copenhagen, Einar Munksgaard, 1946, pp. 88-89

Ross, A., *Why Democracy?*, Cambridge (Mass.), Harvard University Press, 1952, p. 87.

Salkever, S.G., 'Aristotle's Social Science', *Political Theory*, 9 (1981), pp. 479-508

Sarooshi, D., 'The essentially contested nature of the concept of sovereignty: implications for the exercise by international organizations of delegated powers of government', *Michigan Journal of International Law*, XXV, 2003-2004, pp. 1107-1140

Sarooshi, D., *International Organizations and Their Exercise of Sovereign Powers*, Oxford, Oxford University Press, 2005

Sassen, S., *Losing Control? Sovereignty in the Age of Globalization*, New York, Columbia University Press, 1996

Saunders, C. *The Constitution of Australia* (Oxford – Portland, Oregon: Hart Publishing, 2011)

Shaw, M., *International Law*, Cambridge, Cambridge University Press, 2008

Shue, 'Limiting Sovereignty', in: J.M. Welsh, *Humanitarian Intervention and International Relations*, Oxford, Oxford University Press, 2004

Sills, D.L. (ed.), *International Encyclopedia of the social sciences*, Volume 15, New York, Macmillan, (reprint edition 1972)

Simpson, B., 'The Analysis of Legal Concepts', *Law Quarterly Review*, LXXX, 1964

Skinner, Q. *Visions of Politics. Volume I – Regarding Method* (Cambridge: Cambridge University Press, 2002), pp. 158 ff.

Smith, G. & Naím, M., *Altered states: globalization, sovereignty, and governance*, Ottawa, International Development Research Centre, 2000

Soames, S., *Philosophical Essays – Volume 2: The philosophical significance of language*, Princeton (N.J.), Princeton University Press, 2009

Spruyt, H., *The Sovereign State and Its Competitors – An Analysis of Systems Change*, Princeton (New Jersey), Princeton University Press, 1994

Stone, J., *Legal System and Lawyers' Reasoning*, London, Stevens & Sons Limited, 1964
Tasioulas, J. 'Human Rights, Legitimacy, and International Law', *American Journal of Jurisprudence*, LVIII, 2013, pp. 1-25

Thrift, N., Tickell, A., Woolgar, S., Rupp, W.H. (eds.), *Globalization in Practice*, Oxford, Oxford University Press, 2014

Tierney, S. (ed.), *Nationalism and Globalisation*, Oxford, Hart Publishing, 2015

Tomuschat C. (ed.), *Modern Law of Self-Determination*, Dordrecht, Nijhoff 1993.

Troper, M., 'Sovereignty and Natural Law in the Legal Discourse of the Ancien Régime', *Theoretical Inquiries in Law*, XVI, 2015, pp. 337-366

Troper, M., 'The Hierarchy of Norms and the Emergence of the State', *The Straus Institute for the Advanced Studies of Law & Justice*, Straus Working Paper No. 06/12, 2012

Turpin, C., Tomkins, A., *British Government and the Constitution*, Cambridge, Cambridge University Press, 2011

Ullmann, W., *The medieval idea of law as represented by Lucas de Penna: a study in fourteenth century legal scholarship*, London, Methuen & Co. Ltd., 1946

Ullmann, W., 'The development of the medieval idea of sovereignty', *The English Historical Review*, LXIV, 1949

VV. AA., *The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty*, Ottawa, International Development Research Centre, 2001

Waldron, J., 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', *Law & Philosophy*, XXI, 2002

Walker, N. (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003).

Warbrick, C., Tierney, S., *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law*, London, The British Institute of International and Comparative Law, 2006

Weinberg, J.R., *An Examination of Logical Positivism*, London, Kegan Paul, Trench, Trübner & Co., 1936

Weinschel, 'The doctrine of equality of states and its recent modifications', *The American Journal of International Law*, XLV, 1951

Werner, W.G., 'Speech Act Theory and the Concept of Sovereignty: a critique of the descriptive and the normative fallacy', *Hague Yearbook of International Law* 2000, XIII, 2001, pp. 105-112

Werner, W.G., De Wilde, J.H., 'The Endurance of Sovereignty', *European Journal of International Relations*, VII, 2001, pp. 283-313

Wheare, K.C. *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960)

Wheare, K.C. *The Statute of Westminster 1931* (Oxford: Clarendon Press, 1933)

Wheare, K.C. *The Statute of Westminster and Dominion Status* (5th ed., Oxford: Oxford University Press, 1953)

Wittman, W., Desmarais, A.A., Wiebe, N. (eds.), *Food Sovereignty: reconnecting food, nature & community*, Oxford, Pambazuka, 2011

Yee, S., *Sovereign equality of states and the legitimacy of "leader states"*, Leiden, Martinus Nijhoff, 2005

Zaum, D., *The Sovereignty Paradox: The Norms and Politics of International Statebuilding*, Oxford, Oxford University Press, 2007