National Sovereignty - an Outdated Concept of the Globalizing World?

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Today, the changes that accompany globalization range over entire Europe and the whole civilized world, including Estonia. On analyzing the processes of globalization, people usually agree upon two important facts. Firstly, under the conditions of globalization of the world economy, the number and influence of international organizations increases significantly and international society grows stronger. Personification of international relations occurs. Economic relations leaving from the borders of a nation state and increasing dependency on each other have, induced that in addition to nation states and international organizations, many other initiatives of foreign affairs like international non-governmental organizations, private corporations, people themselves, etc. have begun to form. At the same time, the interests of these non-governmental organizations may not coincide with the interests of a nation state.

Secondly, globalization of economy and personification of international relations create presumptions of political globalization. It means that several political events in different states, like conflicts, elections, political struggle, etc., might acquire global meaning and be concerned with the interests of other states. For example, military conflicts in Iraq, Afghanistan, Serbia or recent political events in Ukraine, Georgia, etc. Many events that were internal at the beginning, e.g. the questions about national sovereignty and political power, have acquired global dimensions and international meaning. Hence, the questions about nation-states have arisen acutely nowadays. What part in this globalizing world will remain to nation-states and is there a place for nation-states in this kind of world? Or in other words, can any small or even medium size nation-state avoid social models set by global economic regimes?

In spite of the increase and strengthening of international co-operation in today's world, one must agree with those, who think that nation-state has not exhausted its historical function (Brezinski 1983; Habermas 1998a, 2001). J. Habermas has a standpoint that in the globalizing world, the European Union must seriously consider how to create a stronger European Union with greater international influence, so it could improve its member states' opportunities to have a say in the matter of creating such a Europe, which would be able to balance social, political and cultural effects of global economy (ibid.). But what do these processes mean for national sovereignty? Is sovereignty, as one of the main features of a state, an outdated concept in this globalizing and rapidly changing world? Firstly, we will turn to the 19th -20th century to find answers to these questions. It was the time when the legal concept of sovereignty formed and developed; secondly, we will focus on the last years of the 20th century and on the beginning of the 21st century, when veiy rapid and paradigmatic changes, which were mainly connected to transition from industrial society to information society and globalization, brought along important changes in handling national sovereignty.

Historically, sovereignty has been the legal reflection of political reality. Legal theorist John Austin started the legal doctrine of sovereignty in the 19th century. This doctrine has also been called legal-sovereignty doctrine, where everything originates from the principle that all laws are commands of the sovereign and these are binding because the sovereign has the power to enact punishment. At the same time, there is no other power that could punish the sovereign power. International law cannot exist because there is no sovereign to impose it (Grazin 1983). J. Austin reputedly developed legal positivism, which consists of a system of valid laws and legal provisions. His teaching of law as the orders of the sovereign

sets a goal to find such a criterion of legal provisions that would not depend on their contents or any *ad valorem* attitudes. According to J. Austin, positive law should be apart from religion and morality *(ibid.)*. Despite the fact that common law, archaic law, and international law are left out from the concept of law, J. Austin's justifying of state's power has had a great influence for a long time.

Modern Westphalian sovereignty of the system of states should be seen as more than just the formal, legal aspect of this system (Sorensen 1997). Westphalian sovereignty established the entire international political system and international law. It started endeavours to create international society. Where independent states would have plenipotentiary power over the territory under their jurisdiction, they observe the interests of other states and will not damage the interests of their own population. The Peace of Westphalia was a fulcrum, which separated church and state (Schilling 1998).

The states that belong to the international society were sovereign, but they also had to follow generally recognized provisions, rules and responsibilities. Order and stability were to be guaranteed by the main principles of the Peace of Westphalia:

1) balance of power, with the aim to obviate distinction of greater and more powerful states and limit possible aggression;

2) all parties have to follow the rules and principles of international law;
greater conflicts should be solved with the help of international consultations;

3) diplomatic communication should be developed, it would help the states to get in;

4) contact with each other for settling differences (Watson 1984, pp. 23-25).

Some authors have the opinion that sovereignty does not have to meet all the named features and even cannot do so nowadays. If the requirements of the Peace of Westphalia are not met, we have incomplete sovereignty. In today's practice, it is quite common. For example, a state can be internationally recognized, but still be subject to external control. Thus, according to some authors, in the case of incomplete sovereignty, we are dealing with a breach of the Westphalian sovereignty , because its most important feature is state's right of external nonintervention (Krasner 1999), irrespective of whether we are dealing with a constrained (military intervention) or voluntary intervention. For example, the examples of voluntary intervention could be the primacy of the European Court of Justice over state courts or the World Bank giving loans, while the borrowing country was demanded to change national structure to more democratic one *(ibid.)*.

It is believed that the political base of sovereignty started to detach from its legal reflection already after the Second World War and maybe even before that. Some of the third world countries, also called quasi states, substantiated it as "legal carriage being in front of the empirical horse" (Jackson 1990, pp. 23-34). It means that the third world countries (most of the African, Asian and Latin-American countries) were sovereign in its legal, but not political or economical meaning. The economic level and the standard of living were not equivalent to these of western states. In the 1960s, some third world countries acceded with the Soviet bloc, but some countries took the western side. After the affiliation with blocs that were based on contrary ideologies, the concept of sovereignty got a new shade of economic meaning. It derived from moral obligations, connected to different complaints against imperialism and new colonialism, to help southern people to meet their social-economic needs (Nolan 1999, p. 158).

In the opinion of R. Miillerson, the fact that Westphalian sovereignty started slowly to lose its empirical basis is not connected only with the third world countries. Actually, it is very hard to tell where and when is sovereignty a horse and where it is a carriage. "Even in these cases, where we are dealing with internally quite stable and highly developed countries (the ones that Jackson calls "real" states), the legal concept of sovereignty plays an important role in the existence of these states as states." (Miillerson 2000, p. 120).

The concept of sovereignty and especially its reflection in the principle of international law of sovereign equality have an important role in the development of international society. This principle has even had an instrumental role in regaining and developing independence in many small and not as powerful countries (e.g. Estonia, Latvia, Lithuania). The equality principle of sovereignty became an important principle of international law at the time of fast widening of international society. By now, the situation has changed in that the number of states has increased extraordinarily due to the globalization and fragmentation of society. Of the states that are under the jurisdiction of international law, there are more and more of those who are not factually equal to sovereign states. One should agree with R. Miillerson in that none of the principles, of international law or regional national law, can make anyone more or less equal. The principle is just a general principle of law, but even non-equal states have a right for existence *(ibid.)*.

The United Nations General Assembly has declared that neither smallness nor geographic distance or even limited resources can be objections to sovereign nationhood (United Nations Resolutions 1970-71, pp. 180, 459-460).

On the basis of pragmatic changes in today's international society, it has become clear that Westphalian sovereignty and international law that is based on it, are changing radically, even though, it is believed that Westphalian sovereignty and its motivating theories started to slowly run out already during the first decades of the 20th century. Already at that time, sovereignty did not have legal basis, historical background, political purpose or empirical authenticity (Merriman 1990; Maclever 1947).

The idea of sovereignty's end, which on its basis draws on likening the concept of sovereignty with limits of rational decision, resulting from globalization, has found more support at the end of the 20th century (Loone et al. 2004). If sovereignty has factually disappeared, there is no point in discussing the subject anymore (Beitz 1999). G. Simpson (2005) has a viewpoint that the "attack" on state and sovereignty became the most intense in the 1990s. It is believed that this attack can be partly connected to globalization and the problems arising from it, when state was seen as the main culprit in all economic and social hardships and misery.

The author of the present thesis rather agrees with those, who have a point of view that the connection between economic and social rights and sovereignty in today's international society is more complicated than it might appear at first. Needless to say that one should partly take into consideration these arguments that deal with globalization and structural adjustment as factors undermining sovereignty and limiting economic and social rights (Buchanan & Congleton 1998; Matthews 1997, p. 56; Rondinelli 2002, pp. 366-367).

Globalization, by limiting states' power to control and tax big companies and capitals, limits the power of many states to implement economic and social rights. But this has probably still little to do with undermining sovereignty (Merriman 1990; Maclever 1947). Reputedly, companies have always had the right to operate globally, but only in the recent past they have started to obtain ability to get more economic benefits from this right. States have always had legal power to regulate and tax companies. One could agree that the balance of power has shifted nowadays, but neither companies nor states have increased their power, rights or sovereignty. States' right and power to regulate banks and businesses has not been given up, transferred or taken away. The dangers to economic and social rights of people that are connected to globalization, can by no means be compensated by improving sovereignty. Some analytics (e.g. Cox 1987; Robinson 2000) have suggested that globalization changes the character of a state - or state-society relations - towards an international or global state, which is oriented to protect the interests of global (rather than national) capital and forming international capitalist class. The problems of economic and social rights that derive from the aforementioned, are rather related to these intentions of a state for which the state exercises its sovereignty.

State's and sovereignty's downfall has been largely associated with actualization of human rights questions in 1980s-1990s. Here one should agree with R. Mtillerson that the downfall of the Westphalian concept of sovereignty should be discussed in a rather wider external context, i.e. that the change of the Westphalian sovereignty concept is more related to radical changes in understanding society and state, and not as much to emergence of human rights, which already, due to their essence, limit state's sovereignty (Mtillerson 2000).

The increase of conflict and tension hotbeds, the formation of new sovereign states or former states regaining independence after the cold war have raised a question what role the sovereign states play in today's globalizing and fragmentizing world. Recent great conflicts have made us think seriously whether these conflicts are still state's internal affairs. All this has impeached Westphalian sovereignty and raised questions about the linkage between legal and moral arguments. These problems have become actual especially due to the rapid development of the media. The media can quickly mediate videos of someone's barbarity or sufferings to millions of people from faraway and unknown places. Conflicts that have been internal affairs so far, can this way quickly acquire global and international meaning. Already mentioned Kosovo conflict gained global significance specifically thanks to the media. The invasion of NATO forces into a sovereign state's territory was not reputedly seen as much from the aspect of international provisions, but from the aspect of saving human lives.

Lately, in understanding international society and state, people are more often guided by *ad valorem* normative concept; thereby they are trying to handle sovereignty as an abstract idea based on more moral values. "A person can be a Christian or a Buddhist, but can one, crossing one's heart, say that one

is sovereign? [-] This abstract devotion has an alternative, which demands more instrumental view of sovereignty. But this is related to suggestions that some sovereigns deserve their existence, but others don't. "(Simpson 2005, p 45). Reputedly, international lawyers drew exactly on these positions when discussing Serbia's sovereignty in 1999 and Iraq's sovereignty in 2003. G. Simpson notes that from this period, we inevitably recall J. Westlake making a distinction between states with "good manners" and states with "bad manners" or T. Blair's (2003) "irresponsible states", Ministry of Foreign Affairs' "distressing states" or J. Rawls' (1999) "unworthy states" (Simpson 2005). Despite to the fact that in reality, states really act differently as subjects of international law (that even from moral perspective), such distinguishing of states is still politically risky and historically repressive. Besides, the practice of legally distinguishing between sovereign states, according to their external actions or internal features, is not pluralistic (Simpson 2004). This creates a situation, where in international society, some sovereigns are more equal than the others.

Such a situation is also contrary to the principle that the communication between states in international society as subjects of international law is based on equality and full rights. The equality of states has been called the main base of international society (Oppenheim 1952). Bruno Simma has confirmed this principle by saying that all states in the world have *suprema potestas* and thus, have not been put into any hierarchy. International law must follow equal bases of states' sovereignty. This principle has usually been discussed as sovereign's equality. In international law, mainly the sovereign's equality principle's dual function has been stressed. Firstly, it accepts international pluralistic society. Vattel said that nations treat each other as human beings, not as Christians or Moslems. Secondly, the sovereign's equality principle refers to the idea of egalitarian international legal order, which means that states are legitimately equal.

It is paradoxical because Europe, from where the Westphalian sovereignty originates from, is so intensively developing "the model of supranational organizations, which has in many ways decreased states' part in today's international society" (Miillerson 2000: 110). The idea of supra-nationality is more free from direct state-centered outlook, which has an aim not to eliminate nation-state, but just to limit excessive nationalism. The author of the paper rather sympathizes with R. Cooper's viewpoint that the European Union, as a postmodern state, should be enhanced as transnational network and not through the supranational model (Cooper 2004). Transnational model, as a network without a central point, would also correspond better to the concept of sovereignty given by the post-modernizing society.

Based on the context of divided sovereignty of the postmodern European Union, one could ask whether joining the European Union violates sovereignty of its member states. On discussing this question, we firstly rely on the assumption that international law has never tried to positively define sovereignty. International legal documents, under the guise of the EU, define sovereignty mainly in a negative manner, by saying what a sovereign state cannot do, i.e. what is not sovereignty. For example, states have to recognize other states as equal, may neither endanger the territorial integrity of other states nor use force in case of conflicts.

It is said above that the only positive definition of sovereignty, which can be used in such a situation, is that states, operating independently on the international arena, are sovereign. International legal sovereignty refers to mutual recognition of states and legal equality (Krasner 1999), i.e. a state can join international organizations, enter into internationally binding contracts with other sovereign states, etc. It is a version of external sovereignty's minimalist definition. As to internal sovereignty, the majority of legal theorists (discussed in the second chapter) rely still on H. Kelsen's concept of base norm. It means that when building sovereignty, a state should be guided by the unity of state and law. Legal fundamentalists have a standpoint that from a legal theoretical aspect, a state cannot be defined in any other way than as a closed legal system. All other definitions are too vague and lead from jurisprudence to general theory of state, which was popular in the 19th century Germany. According to H. Kelsen's model, sovereignty means the existence of independent legal order without being subject to any other legal order, which has also considered as constitutional independence. It is believed that when analyzing internal sovereignty of any member state of the European Union (e.g. Estonia), it should be done from the aspect of these international organizations (i.e. UN, NATO and EU), which have influence over the sovereignty of the member states. Firstly, we should ask, what kind of decision making powers have been given to these organizations; secondly, to what extent are the decision making bodies "foreign" from its members *(ibid.)*. We should agree with Valk in that if member states decided voluntarily comply with these rules, then any decision making by qualified majority is the execution of their sovereignty, not transference of it. Unfortunately, we can agree with it only partly. To understand possible outcomes of this situation, we should look at sovereignty also from another aspect (Tokar 2001).

International cooperation is based on voluntary relations between sovereign states. Possible rights and responsibilities in this cooperation, which has a binding character, can form only on the consent of participants. The nation state model of the 19th century was based on the understanding that a sovereign is someone, whose decisions have to be obeyed and cannot be appealed. Let us try to develop this model further from the modern angle. Today it is stressed that decision-making power does not necessarily mean we have to make decisions on our own. A state, as any other legal person, may delegate its decision making power to some other entity. Let us suppose that a state authorizes the third sector to provide basic education. By doing so, the state gives part of its internal sovereignty, which is connected to providing education, to a legal person governed by private law, i.e. the state authorizes third sector organs to act as supreme authority in executing certain state orders.

As an example of partially delegating external sovereignty could be signing an international treaty. This way, a state delegates a certain part of its possibly binding international decisions to some international organizations (UN, NATO, etc.). On some occasions, the state clearly gives away part of its decision making power by letting other persons make decisions the state was able to make itself at the beginning. Still, it is assumed that the state has acted voluntarily in delegating its sovereignty. It also means that the state can take the given agreement back at any time. The actual decision making power or competence and the competence of authorizing the power are two different aspects of sovereignty and it seems that authorizing power and the right to take it back are way more important than it initially seems. Until a state has these rights, it can be treated as completely independent, even if it has delegated all decision making powers to other entities, of course, assuming that these authorizations have been given voluntarily and that the state has the right to take them back at any time. It means that these authorizations are termless; they can be abolished, for example, when they for some reason begin to interrupt the development of national sovereignty.

So, from a formal aspect, shared sovereignty, as long as the possibility to withdraw the delegated rights exists, is as complete as if the state exercised its legal competence itself. We can talk about a serious shift of sovereignty only in a case where the decision, which is binding to the state, has been made in a way where the state has joined involuntarily in a relationship from which such a decision arose from.

By accepting the formal-legal view on sovereignty, we must stress that today's world has become very utilitarian and even instrumental. It means that when signing or terminating some international treaty, we are rather guided by economic and foreign policy interests than by moral considerations. From the recent history and even from today, we can give enough examples of how, under the cover of spreading liberalism and democracy, the states have just tried to serve their own hegemony or economic interests (e.g. the United States of America's aggression in Iraq).

On the grounds of the above mentioned, we can conclude that:

1. Sovereignty includes two main elements: the competence of making final and binding decisions on certain issues and the right to delegate this competence to other entities or states, with the right to take it back;
2. Sovereignty cannot exist only as a delegating right.

We could hardly talk about sovereign state if it did not exercise a big part of its decision making power. Let us stress it again that if sovereignty is not officially impaired by delegating, security risks in taking back some rights and foreign as well as economic-political risks are often high enough to keep the states from taking this step. In discussing the European Union from these aspects, one should probably agree with those, who think that European integration is largely an irreversible process (Tokar 2001). Therefore, it should be seriously discussed again for achieving consensus in conceptual and legal basis of the European Union, which, on the one hand, would reckon with sovereignty of its member states and on the other hand with new economic-technological and political-legal realities of globalizing and post-modernizing society. Therefore, it should be asked again: would we call this supranational, or as R. Cooper suggests, transnational formation a new postmodern state or community?

In the opinion of the author of the current paper, divided sovereignty can be discussed from a new aspect of organizational structural network of post-modernizing society, in which every sovereign state is a junction of the network, where its substance varies, depending on the state's relations and connections or from constantly changing rights and responsibilities with responsibilities and rights of other junctions — states - of the network. Of course, connections and relations of some junctions (states) can be more permanent, stronger and bearing, which probably depends on the material and technique of this junction, or

on economic-technological base of the state. Thus, one can suppose that these states-junctions with advanced economy are more sovereign in reality or *de facto* (e.g. The United States of America). Regardless of the differences between stability and strength of these junctions and the relations between them, the network can exist thanks to the relations and connections between all junctions, which form today's international society. From a formal-legal or network's form's aspect, its junctions-states are equally sovereign.

Thus, sovereignty is not an outdated concept, which should be given up altogether. Outdated is just sovereignty as a universal concept. Classical or modern legal theory, with the golden age at the end of the 18th and in the 19th century, was based on the concept of universal truth. Preparing and implementing legal provisions was based on a viewpoint that universal norms derive from universal and unchanging principles, which are the basis of individual laws. In the context of Westphalian sovereignty, the universal principles that had to ensure national sovereignty in the decentralized international system were aforementioned four principles.

Sovereignty (like other great narratives) changes always when states, separately and together, have to face new problems and possibilities, follow new interests, elaborate new norms and learn from past experience. Transformation of sovereignty reflects clearly the new understanding of expressed new and old norms, based on the new framework of international law and politics. During the past half a century, the formation of the legal aspect of this framework has been mostly connected to globalizing and fragmenting world.

The most dominating legal-theoretical view of the 20th century on international society and law has been instrumentalism. Law has been seen as an instrument, which creates and secures order. Its legitimacy depends on the efficiency of law to serve a social purpose. But by the end of the 20th century, it became clear that such handling of law has expired because law, if seen from the inside, as a closed system, cannot say anything about the purpose of society nor truth. A good proof of the failure of legal positivism and pragmatism is the collapse of the welfare state concept in reality, which was propagated in the West for a long time.

At the end of the 20th and beginning of the 21st century, we are forced to declare louder that Western society is changing paradigmatically: modern value system and understanding the world are being replaced by postmodern value system characterizing information society. It also requires discussing state and sovereignty and international society not only from the aspect of globalizing world, but also from the aspect of new, just forming legal paradigm. Today, postmodern legal theorists are characterized by the viewpoint based on neo-pragmatism or the irony method. Neo-pragmatists offer the so called softer or more moderate handling, which mainly criticizes legal fundamentalism and essentialism. By reviewing old standards and looking for new, according to the new external perspective, the stress would be laid on consensus. The second, postmodern view that is based on irony, stresses breaking and destroying all norms, or in other words, conflict.

Postmodern viewpoint, without considering certain differences in the attitudes towards modern law, accepts:

1) the world's cultural heterogeneity;
2) relativity of values, which is directly connected to cultural and religious heterogeneity;
3) external handling of law, which means that law is inseparable from its ethical principles and also from society's social-economic conditions;
4) emergence of very actual legal problems due to the rapid alteration of the world, which need to be solved by relying on new reality.

For example, the problems of human rights have extensively and more and more deeply merged with international law and political practice and helped to change our understanding of state and sovereignty. UN Secretary General Kofi Annan has in his speeches, as noted above, repeatedly stressed that traditional understanding of sovereignty cannot protect fundamental freedoms of people and that the UN does not protect states' but rather people's sovereignty. At the same time, Kofi Annan is certain that new international standards will emerge soon, "which foregrounds the fight against repressing minorities and forces state's sovereignty to the background" (Annan 1999, p. 40). There are acute disputes in the UN over euthanasia and giving rights to minors. According to P. Praet, the goal is to stop discriminating altogether and to emancipate all categories of people, including transvestites. The dispute over family law is very expressive of the need of giving rights to different groups (Praet 2001). Overstressed accent to the distinct and exaggerated fragmenting in the area of human rights has gone as far as declaring new fundamental rights,

which have a sacred halo, protected by constitution or international treaties. One should agree with P. Praet in that this way neutrality toward laws disappears completely. Therefore, postmodern legal status is often like premodern privileges *(ibid.)*.

Such pluralistic handling of law also changes the concepts of state and sovereignty to legally relative concepts, and their meaning depends on a particular cultural and social context or language play.

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