The problem of sovereignty according to Hans Kelsen and Luigi Ferrajoli

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Introduction

This contribution examines the problematic concept of 'sovereignty', in its historically best known meaning (as *suprema potestas superiorem non recognoscens*) and in the light of the critical considerations formulated by Hans Kelsen and Luigi Ferrajoli.

Departing from this semantic tradition and in a propositional key, the concept of sovereignty could be understood in a twofold sense: firstly, to identify any entity endowed with a certain authority (and thus identifiable as a centre of power), and secondly, to highlight the "spatial" primacy (the being *above*, indeed) of a *centre of power* over the others considered in a given institutional context.

The first meaning of the word would make possible to frame and explain the growing phenomenon of "polycentrism" – i.e. the proliferation of diversified authorities in multiple interconnected scenarios – combined with the progressive decentralization of the exercise of power – whereby this is not only condensed in the authority of the state, but it *spreads* and manifests itself in multiple centres of government located inside and outside its territory, increasingly at transnational, communitarian and international levels.

The second meaning hereby associated with *sovereignty* – as the *spatial primacy* of a centre of power over those possibly subordinate to it – in recent decades would not seem to have any particular representative usefulness, in the face of a world (at least until recently) that is strongly interconnected and increasingly observable in a *flat* perspective. This is because of the increasingly *horizontal* (not vertical) and differentially hierarchical perspective (since the criterion of hierarchy persists, but takes on new forms) that for several decades seems to have inspired and characterised, at various levels and with changing intensity, distinct but interconnected realities, such as: the several authorities (as points of *governance*) existing and operating at the crossroads of increasingly intertwined and communicating normative systems, the sources of law located in diverse (but often interacting) legal orders, and thus the resulting norms, observable, comprehensible and interpretable in a network (or multiple networks) of legal connections. Nonetheless, this second meaning of sovereignty – that is, the spatial supremacy of one centre of power over the others – in recent years seems to be regaining strength and illustrative power, in the face of the return of nationalisms, of a (state) organisation of power and legal sources that is predominantly pyramidal, and of the reaffirmation of the traditional criterion of hierarchy, informed by a markedly vertical dimension.

However, thus returning to the first meaning of sovereignty identified at the beginning of the introduction – the main object of this analysis –, already from the most orthodox and twentieth-century theoretical perspective of the normative system and articulation of power, inspired by the criteria of vertical hierarchy and logical coherence – the one contemplated by Kelsen and Ferrajoli –, the *traditional* idea and meaning of sovereignty are structurally in crisis and determine an illogic on the theoretical-conceptual level. As mentioned above, this work deals with them critically, highlighting the arguments in support of their overcoming.

Apropos of 'sovereignty': some critical remarks

Far from proposing any attempt of semantic solution for the long-standing and "tormented" concept of 'sovereignty', I will offer a *non-definition* of it, thereby accepting the implicit invitation of a distinguished legal historian where he warns against the risk of "definitions that, even in their best expressions, tend

to take on the connotations of any conventional and scholastic proposition" (Quaglioni, 2004: 5).[1]

More precisely and out of metaphor, by clarifying the theoretical context taken as a reference here, as well as its intrinsic axiological perspective, I will stress that the semantic scope of the expression 'sovereignty' is at most marginally relevant.

I agree with the approach according to which this concept, linked to the rise of the modern state,[2] "was born [...] and fades, finding historically in Bodin its best known formulation ('summa legibusque absoluta potesta', 1567) and in Kelsen its radical critique, its final transformation and its completion" (Kelsen & Carrino, 1989[1920]: ix).[3]

It is precisely the author of the "pure doctrine" of law who from the 1920s onwards traced the coordinates for the "overcoming" of sovereignty,[4] a category ontologically in crisis from its very beginnings and in constant contradiction with the very idea of law (as Ferrajoli would later argue, *infra*). Such an "occurrence", interpreting Kelsen's thought, is prodromic for founding a doctrine of the international legal order with a *monist* vocation that assumes and, at the same time, allows the *primacy* of international law to assert itself with respect

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1 The original italian quote follows: "definizioni che, anche nelle loro migliori espressioni, tendono ad assumere i connotati di ogni proposizione convenzionale e scolastica" (Quaglioni, 2004: 5). Please note that all translations of quotations in this work are my own. I always insert the English version first and then the original quoted text.

2 Cf. Ferrajoli (1995:v 7–8): "There is no doubt that the notion of sovereignty as *suprema potestas superiorem non recognoscens* dates back to the birth of the great European national states and the correlative collapse, at the threshold of the modern age, of the idea of a universal legal order that the medieval culture had inherited from the Roman one. Talking about sovereignty and its historical and theoretical occurrences therefore means addressing the vicissitudes of that particular politico-legal formation that is the modern nation-state, born in Europe a little over four centuries ago, exported in this century all over the planet and now in its twilight years" / "è indubbio che la nozione di sovranità quale *suprema potestas superiorem non recognoscens* risale alla nascita dei grandi stati nazionali europei e al correlativo incrinarsi, alle soglie della età moderna, dell'idea di un ordinamento giuridico universale che la cultura medioevale aveva ereditato da quella romana. Parlare della sovranità e delle sue vicende storiche e teoriche vuol quindi dire parlare delle vicende di quella particolare formazione politico-giuridica che è lo Stato nazionale moderno, nata in Europa poco più di quattro secoli fa, esportata in questo secolo in tutto il pianeta e oggi al tramonto".

3 "Nasce [...] e tramonta, trovando storicamente in Bodin la sua più nota formulazione ('summa legibusque absoluta potesta', 1567) e in Kelsen la sua critica radicale, la sua finale trasformazione e il suo compimento" (Kelsen & Carrino, 1989[1920]: ix).

4 Cf. Kelsen & Carrino (1989[1920]), Kelsen (1967[1934]), Kelsen & Losano (1966), Kelsen & Ciaurro (1990[1944]).

to the single national laws of the various states. What animates the famous Viennese jurist, in terms of a desirable axiological horizon, and it is made possible by the abandonment of the "fetish" called sovereignty, it is precisely the aim of proving that (all) the law integrates *one only unitary* legal order, a result that would discredit on a scientific level the so-called *dualist* thesis (still in the majority today and postulating the harmonious coexistence of state and international law).[5] Kelsen precisely "vindicates" a merely *derivative* legitimacy of states, in function of an *exclusive* sovereignty of the international order (indeed, the "monist" thesis). This way, he represents, on the level of legal theory, "the unity of the universal legal system" (Kelsen, 1967[1934]: 168)[6] and thus he promotes, on the level of political reflection, the (renewed) Kantian project of universal pacification through the union of peoples.

In the wake of this tradition of thought today there is a distinguished Italian exponent of *global constitutionalism*, Luigi Ferrajoli. As far as it is of interest here to emphasise, his work is illuminating especially in the part in which he offers a critical framing of the concept of 'sovereignty'. Indeed, he highlights three different aporias that inexorably invest it: firstly, he stigmatises it on the philosophical-legal level, considering it a "pre-modern relict that is at the origin of legal modernity and at the same time, with it, virtually in contrast" (Ferrajoli, 1995: 8–9).[7] That is because it is a category of natural law that ends up contributing to the construction of the legal positivist vision of the State and the modern model of international law.

Secondly, Ferrajoli observes that the historical developments of the idea of sovereignty, understood as *potestas* free from constraints, *superiorem non recognoscens*, unfold in two distinct strands, which do not even coincide chronologically: on the one hand, there is its *internal* history, whereby it declines

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5 Cf. Kelsen & Carrino (1989[1920]: vii, 14–15).

6 "L'unità del sistema giuridico universale", (Kelsen, 1967[1934]: 168). See Kelsen (1967[1934]: 154), where he holds that the international law and the various state laws integrate "a unitary system of norms" / "un sistema unitario di norme", at the same time affirming the *primacy* of the former over the latter (163). Precisely because he considers the State "a partial legal order derived from international law" / "un ordinamento giuridico parziale derivato dal diritto internazionale", by conceiving it as an "organ of the international legal community" / "organo della comunità giuridica internazionale" (166), he advocates the overcoming of "The dogma of state sovereignty" / "Il dogma della sovranità dello stato" (159) on a political, factual and organizational level, whose "theoretical dissolution" / "dissoluzione teoretica" (168) has already been reached and is indicated by Kelsen as one of the most salient results of his "pure doctrine" of law.

7 "Relitto premoderno che è all'origine della modernità giuridica e insieme, con essa, virtualmente in contrasto" (Ferrajoli, 1995: 8–9).

and collapses with the progressive affirmation of today's democracies and constitutional states of law; on the other hand, there is its *external* history, unfortunately still far from being concluded, whereby it has been progressively emphasised and absolutized, up to the peak reached in the first half of the last century on the occasion of the two world wars.

Finally, especially relevant here, there is the third aporia identified by Ferrajoli, which concerns the theory of law and relates to the unfortunate binomial 'law' – 'sovereignty'. In short, it consists of a structural and irreducible *antinomy* between the two concepts of the binomial mentioned. This antinomy takes places on both the *internal* and *external* legal fronts. On the one hand, within the legal orders of contemporary democracies, sovereignty inevitably collides with the paradigm of the (constitutional) rule of law and by definition cannot be reconciled with its assumption of *subjecting all powers to legal constraints* (i.e. the conceptual reverse of the idea of sovereignty as absolute power). On the other hand, this logical-conceptual contradiction there also exists on the *external* side (that is, the *extra-state* dimension of law), by now safeguarded, albeit with difficulty and most of the time just formally, by international law. In the latter legal sphere, indeed, state sovereignty is (or at least *should be*) strongly compressed, weakened, and even resolved,[8] given the supranational legal framework outlined by the UN Charter of 1945 and the Universal Declaration of Human Rights of 1948, in which one can well recognise "an embryonic constitution of the world" (Ferrajoli, 1995: 57).[9]

It is clear, therefore, that on a legal theory level, the assessment whereby sovereignty is now "an un-legal category" can be shared.[10] This antinomy, while it can be said to have been resolved in favour of 'law' in the domestic scenario of single state laws – since with the advent of today's constitutional

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8 Thus finally overcoming that *realist fallacy* represented by the much invoked "principle of effectiveness" / "principio di effettività", thanks to a science of (international) law at last capable of exercising a *critical-normative* and *planning role* (Ferrajoli, 1995: 56).

9 "Un'embrionale costituzione del mondo" (Ferrajoli, 1995: 57).

10 Cfr. Ferrajoli (1995: 43): he states that the *crisis* of sovereignty "begins precisely, in its internal as well as its external dimension, at the very moment in which [sovereignty] enters into relation with the law, since of law it is the negation, just as law is its negation. (...) This is why the legal history of sovereignty is the history of an antinomy between two terms – law and sovereignty – that are logically incompatible and historically struggling with each other" / "inizia per l'appunto, nella sua dimensione interna come in quella esterna, nel momento stesso in cui essa entra in rapporto con il diritto, dato che del diritto essa è la negazione, così come il diritto è la sua negazione. (...) Per questo la storia giuridica della sovranità è la storia di un'antinomia tra due termini – diritto e sovranità – logicamente incompatibili e storicamente in lotta tra loro."

democracies, the power is bound by the law and the law, through the various degrees of the normative system, restrains and regulates itself –, it continues to emerge in the international legal scenario, determining the prevarication of "state sovereignty"[11] to the detriment of law and the rights sanctioned in the acts of international law.

If it is true, therefore, that "In the rule of law there is hence no sovereign" (Ferrajoli, 1995: 44),[12] thus *internally* historicising the idea of sovereignty, *externally* this difficult but desirable process has yet to be accomplished. In order to realise a desirable project of *world constitutionalism* that would give *effectiveness* to the fundamental charts of rights, so far largely disregarded, it is necessary to realise the perspective that Kelsen already outlined in the middle of the last century,[13] by also promoting a critical and normative role for the (international) legal science, so that jurists would devote themselves to trace antinomies and legal gaps and thus to plan their overcoming.[14]

For the purposes of this work, therefore, I advocate the overcoming of the concept of sovereignty. This expression, at most, can be used to indicate the "result" of its *unmasking* or *unveiling*, i.e. what the concept conceals behind

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11 A kind of prevarication notably represented by the violations of fundamental rights and peace perpetrated by states and the corresponding lack of adequate guarantees to avoid or sanction them.

12 Similarly, Zagrebelsky, in his celebrated *Il diritto mite*, evokes a "constitution without a sovereign" / "costituzione senza sovrano" (Zagrebelsky, 1992: 8–11) to represent that in today's constitutional states of law, a *centre* of reference has been lost.

13 A perspective identifiable with the strong *mitigation* of state sovereignty through the establishment or strengthening of an apparatus of jurisdictional guarantees capable of protecting political subjects and individuals against violations of peace and human rights. Cfr. Kelsen (1990[1944]: *passim*). On the "removal" of the concept of sovereignty, understood as "the revolution in cultural consciousness that we first need" / "la rivoluzione della coscienza culturale di cui abbiamo per prima cosa bisogno", see Kelsen & Carrino (1989[1920]: 469).

14 "It is therefore this world constitutionalism that today imposes itself on jurists as the axiological horizon of their work. This means, for the internationalist doctrine, freeing itself from the realist fallacy of the flattening of law to fact, which still continues to burden it in the form of the "principle of effectiveness", and taking on as a scientific as well as political task the legal critique of the profiles of invalidity and incompleteness of the law as it exists today and the design of guarantees of future law" / "È dunque questo costituzionalismo mondiale che oggi s'impone ai giuristi come orizzonte assiologico del loro lavoro. Ciò significa, per la dottrina internazionalistica, liberarsi da quella fallacia realistica dell'appiattimento del diritto sul fatto che continua tuttora a pesare su di essa sotto forma di "principio di effettività", ed assumere come compito scientifico oltre che politico la critica giuridica dei profili d'invalidità e d'incompletezza del diritto vigente e la progettazione delle garanzie del diritto futuro" (Ferrajoli, 1995: 57–58).

it. Sovereignty as *the power* it hides.[15] It can thus be used and understood in a broad sense, as *potestas* that today is often *widespread* and *distributed*, to reflect any centre of power that is therefore invested with it, or to emphasise the possible spatial primacy of a pole of governance with respect to those considered in a certain institutional context (without implying that this pole does not recognise powers superior to it).

Drawing on this semantic revisitation, I consider it fruitful to connect the concept examined here with contemporary scenarios, characterised (at least until recent years) by growing socio-economic, political and legal interconnection and interdependence.

By relating "sovereignty" with the recent processes of *globalisation,*[16] indeed, one can make a twofold consideration: in the "traditional" sense, which is widely criticised here, as an idea linked back to the rise of the nation-state, which is in a condition of eternal conceptual crisis, it is antiquated, harmful and poorly suited to the globalised world, where administrative decentralisation, de-regulatory processes and above all *polycentrism* in decision-making,

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[15] In this sense, I admit, I am guilty of the twentieth-century 'stance' stigmatised by Alfieri and traceable to Focault, described as follows: "The late twentieth century believed it was the first to discover that sovereignty is a shadow and that the real problem is *power*, of which sovereignty is a mask. (...) There is no *sovereign*, there is our need, largely undeciphered, to think of it, to imagine it, to construct it. Almost to hide from ourselves as much that the power is *ours* as that we are *of the power*" / "Il tardo Novecento ha creduto di aver scoperto per primo che la sovranità è un'ombra e che il vero problema è il *potere*, di cui la sovranità è una maschera. (...) Non c'è il *sovrano*, c'è il nostro bisogno, largamente indecifrato, di pensarlo, di immaginarlo, di costruirlo. Quasi per nascondere a noi stessi tanto che il potere è *nostro* quanto che noi siamo *del potere*" (Alfieri, 2021: 44–45).

[16] For a semantic reference of the term *globalisation*, see the work of Giannuli (2012: 4–5), which, however, circumscribes the phenomenon to the period of social, political and economic transformations that started in particular in the early 1990s. From a definitional perspective, I consider the more "inclusive" and "open" contributions of Crouch (2019: 7) and Della Porta (2012: 12–13) to be more appropriate and therefore preferable. The former employs the term to describe the "development in good parts of the planet of relatively unrestricted economic relations, but this process has wider social and political implications. People from different cultures come to stand next to each other and national systems of economic governance are severely challenged. Disruptions of various kinds – economic, cultural and political – accompany globalisation (...)" / "sviluppo in buone parte del pianeta di relazioni economiche relativamente senza restrizioni, ma questo processo comporta implicazioni sociali e politiche più ampie. Persone di diversa cultura vengono a trovarsi l'una accanto all'altra e i sistemi nazionali di governo dell'economia sono messi a dura prova. Sconvolgimenti di varia natura – economici, culturali e politici – accompagnano la globalizzazione (...)". The second author, an advocate of a *discrete* view of globalisation, characterises it as an alternating and recurring long-term process, with *ebbs* and *flows*.

operating at various levels and often outside the usual vertical hierarchical logic,[17] are the rule. However, conceived as non-sovereignty, i.e. as unmasked, revealed *power*, the idea is functional in representing the *portions* of power that are being distributed or created within the *network* of a globalised world and thus also the "precarious" *spatial primacy* (insofar as susceptible to being overturned) that they may hold within it.

Curiously enough, this suitability, as long as the concept is called by its *proper name*, can also be found in moments (or phases) of *de-globalisation* (*infra*), in which we witness processes of centralisation of power, the revival of nationalisms and a loss (or impoverishment) of supra-national collective identities (as is happening to the much reviled "common European identity"), to the benefit of local egos. It being understood that, even in the de-globalised scenario now described, sovereignty in the "traditional" sense – as *suprema potestas superiorem non recognoscens* – although it may once again "serve" national egoisms and political demagogy, continues to determine the contradictions and aporias illustrated above (on the jus-philosophical, historical--political and theoretical-legal levels) and should therefore finally be historicised and overcome.

In support of the consideration that the current juncture incorporates a phase of de-globalisation, I recall the following observations: Giannuli highlights the significant gap between the actual processes underway and the neo--liberalist predictions associated with the idea of a globalised world (Giannuli, 2012: 8–11), for instance, the "decay" of nation states has only partly taken place, without homogeneity, and the devolution of sovereignty (as power) to supranational bodies has only occurred in certain contexts, such as Europe, but not in others (consider the Chinese side of the world). This author also observes that "the unification of financial markets and telecommunication networks has not been matched by a similar political unification of the world; on the contrary, there has been a regression from this point of view" (2012: 9).[18] Not to mention again the lack of *effectiveness* that often affects international legal institutions and their founding legal acts. Moreover, Giannuli questions

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[17] So that elements of socio-legal and economic reality communicate, interact and can even *change each other* regardless of their location in the overall system, for example, when a custom or regulatory practice over time comes to modify the normative interpretation of a legal provision.

[18] "All'unificazione dei mercati finanziari e delle reti di telecomunicazione non ha corrisposto una analoga unificazione politica del Mondo, anzi, al contrario, si registra un regresso da questo punto di vista" (Giannuli, 2012: 9).

the reasons why, in certain contexts, after reaching a certain level of economic development, "the social, political and cultural processes that characterised the European experience first and the North American experience afterwards" (2012: 15) are not becoming reality.[19] At the same time, he points out the "fragility" of the transplantation practices of the Euro-American model of liberal-democracy, which has proven not to be the "magic formula" for all the countries in the world.[20] Others note that "an epic clash between globalisation and a resurrected nationalism" is taking place, capable of transforming "identities and political conflicts all over the world" (CROUCH, 2019: 7) and at the same time they warn that, in order to avoid a chaotic drift, it is possible to exercise some form of control "over a world characterised by ever-increasing interdependence only through the development of democratic identities and institutions of governance capable of reaching beyond the dimension of the nation-state" (2019: 10).[21]

All the more reason, therefore, also in order to balance or correct the imbalances generated by the process of globalisation,[22] currently undergoing a crisis or *slowdown*,[23] I stress the importance of: overcoming the concept of sovereignty anchored to the idea of the nation-state,[24] strengthening suprana-

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19 "I processi sociali, politici e culturali che hanno caratterizzato l'esperienza europea prima e nord-americana dopo" (Giannuli, 2012: 15).

20 With great figurative force, Giannuli states that: "The globalisation project was a letter that the West sent to the rest of the World, identified as a lagging or "imperfect West". That letter was rejected at the sender and obliges us to a profound rethinking not only of that project but of the theories on which it was based and of the very idea of modernity that underpinned it" / "Il progetto di globalizzazione è stata una lettera che l'Occidente ha mandato al resto del Mondo, individuato come "Occidente imperfetto" o in ritardo. Quella lettera è stata respinta al mittente e ci obbliga ad un ripensamento profondo non solo di quel progetto ma delle teorie su cui esso si fondava e della stessa idea di modernità che era alla base" (Giannuli, 2012: 36).

21 Others note that "uno scontro epico tra globalizzazione e un risuscitato nazionalismo" is taking place, capable of transforming "le identità e i conflitti politici in tutto il mondo" (Crouch, 2019: 7) and at the same time they warn that, in order to avoid a chaotic drift, it is possible to exercise some form of control "su un mondo caratterizzato da un'interdipendenza sempre maggiore solo attraverso lo sviluppo di identità e istituzioni democratiche e di governo in grado di spingersi oltre la dimensione dello Stato-nazione" (2019: 10).

22 Indeed, there is a need to "reform the guise that this process has taken on" / "riformare le sembianze che questo processo ha assunto" (Crouch, 2019: 11), while standing for globalisation and against the new uprisings of authoritarian nationalism.

23 As already stated, I find Della Porta's point of view shareable (Della Porta, 2012: 12–13).

24 Where in the constitutional rule of law to be *Sovereign* is at most the *Constitution* (Zagrebelsky, 1992: 8–11), understood as *a system of constraints and guarantees* erected to protect citizens and institutions against the *arbitrary* exercise of power. On the need to go *beyond* the category

tional identities and democratic institutions (as well as participatory practices), implementing the *guarantees* that assist global legal institutions, so as to increase their *effectiveness* and allow the construction of a truly peaceful world horizon that respects fundamental rights.[25]

Conclusions

In the moments of greatest vigour of globalisation processes and functional interconnection between transnational political, economic and social agents (albeit with all the gaps and bottlenecks that have been observed), the ideal empirical framework for overcoming the concept of sovereignty on a political and theoretical-legal level perhaps can be glimpsed. This way, a sort of administrative "polycentrism" (of the many *nodes* of governance), decentralisation with regard to the traditional centre of power, and the multiple connections that can be observed in a *horizontal* perspective, among the various *actors* existing in a *global network*, can proliferate and stabilise.

On the other hand, at a time like the present, when we are witnessing the resurgence of nationalisms and local egos, and where states, instead of devolving competences and abdicating the concept of sovereignty, often claim heterogeneous prerogatives, claim borders, exclusive powers and conduct "proprietary" and belligerent policies (not tolerating the supposed "interference" of international legal institutions), it is counter-intuitive and certainly not "convenient" for them to abandon the "fetish" of sovereignty, an occurrence that would be especially adverse to the traditional state logic.

However, on the axiological level of horizons that are desirable because they are materially urgent, one cannot but promote such a conceptual "abandonment", both in the political sphere and in the field of legal theory, while at the same time fostering a legal science (with an internationalist vocation) that finally plays a *critical* and *planning role* with respect to the law, particularly the one of states.

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of *nation*, as not being intimately essential to the democratic order, since it does not integrate a community that *precedes* politics, but represents its *contingent product*, see Habermas (1999).

[25] Be they of man or of the "Earth". In support of this desirable and urgent horizon are the recent works of Ferrajoli, which can be inserted in the framework of *global constitutionalism* (Ferrajoli, 2020, 2022).

In this contribution, therefore, we re-propose the (Kelsenian) idea of conceiving a single global legal order,[26] which we would like to see inspired by the *art of mutual coexistence* of which Bauman speaks, that is, the most important legacy that Europe can leave to an interdependent and globalised world, so that the latter can aspire to realise that Kantian ideal of the unification of peoples and universal peace.[27]

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Abstract

The problem of sovereignty according to Hans Kelsen and Luigi Ferrajoli

This contribution deals with the theme of 'sovereignty', especially state sovereignty, as a problematic concept that, from legal modernity onwards, falls into crisis and determines multiple aporias. According to the theoretical constructions of the two authors here considered in a diachronic key, Kelsen and Ferrajoli, it should be overcome in favour of an internationalist dimension of law, which can effectively guarantee the protection of fundamental rights and peace, thus approaching the horizon that Kant outlined at the end of the 18th century. This contribution will therefore set out several reasons why such a shift is desirable.

[26] A legal order allegedly, but not necessarily only, constructed by *degrees* – this marking a departure from the formalist tradition and thus a partial transformation of Kelsen and Ferrajoli's geometric idea.

[27] Cf. Bauman (Bauman, 2019: 17–18).