

INTRODUCTION

The word “sovereignty” is one of those powerful words which has its own existence as an active force within social consciousness. Through the cognitive process of the human mind, not only can language represent reality, but it may play a leading part in creating and transforming reality, including the activity of modelling the shared consciousness of society. Such a word is thus a *form of social power*.

In the first quarter of the 20th century, during the *accalmie* of the Great War, Harold Laski wrote: “Nothing is today more greatly needed than clarity upon ancient notions. *Sovereignty*, liberty, authority, personality – these are the words of which we want alike the history and the definition; or rather, we want the history because its substance is in fact the definition.”¹ In the last quarter of that century, following the dismemberment of the Soviet Empire, Boutros Boutros-Ghali expressed similar concerns: “A major intellectual requirement of our time is to rethink the question of *sovereignty* – not to weaken its essence, which is crucial to international security and cooperation, but to recognize that it may take more than one form and perform more than one function.”²

At the heart of these statements lie two fundamental convictions, namely, (i) that the problem of defining *sovereignty* can be solved, and (ii) that there exist identifiable meanings which can be attributed to *sovereignty*. Whether or not consciously, several commentators in international law, as well as in other disciplines,³ have indeed based their opinions on these two assumptions. For

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1. H.J. Laski, *The Foundations of Sovereignty and Other Essays* (New York: Harcourt Brace, 1921), at 314. [emphasis added]
 2. B. Boutros-Ghali, “Empowering the United Nations” (1992-93), 71 *Foreign Affairs* 89, at 99. [emphasis added]
 3. In political sciences and international relations, for instance, it was once said that, “the concept of sovereignty has been used not only in different senses by different people, or in different senses at different times by the same people, but in different senses by the same person in rapid succession;” see M.R. Fowler & J.M. Bunck, *Law, Power, and the Sovereign State – The Evolution and Application of the Concept of Sovereignty* (Pennsylvania: Pennsylvania State University Press, 1995), at 4. See also V.A. O’Rourke, *The Juristic Status of Egypt and the Sudan* (Baltimore, U.S.: Johns Hopkins University Press, 1935), at 10, who wrote: “The word sovereignty holds various conflicting connotations and by no means arouses identical patterns in the minds of different students;” and, E.H. Carr, *The Twenty Years Crisis, 1919-1939 – An Introduction to the Study of International Relations*, 2nd ed. (London: Papermac, 1995), at 212, who opined that sovereignty “was never more than a convenient label; and when distinctions began to be made between political, legal and economic sovereignty or between internal and external sovereignty, it was clear that the label had ceased to perform *its proper function as a distinguishing mark for a single category of phenomena*.” [emphasis added]

instance, Lassa Oppenheim once noted that, “there exists perhaps no conception the meaning of which is more controversial than that of sovereignty.”⁴ James Crawford, for his part, wrote: “The term ‘sovereignty’ has a long and troubled history, and a variety of meanings.”⁵ Recently, Richard Bilder provided the following semantic summary:

I think that the term sovereignty is very generally used to mean simply a state’s right to do as it wishes, particularly within its own territory, free of external constraint or interference. But here are some more scholarly definitions:

- The *American Heritage Dictionary* defines sovereignty as “supremacy of authority or rule as exercised by a sovereign or sovereign state” or, alternatively, as “complete independence and self-government.”
- Max Huber, as Arbitrator in the 1926 *Island of Palmas* case, wrote that: “Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise there, to the exclusion of any other states, the function of a state.”
- Judge Alvarez, in his individual opinion in the *Corfu Channel* case, wrote that: “By sovereignty, we understand the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.”
- Helmut Steinberger, in the *Encyclopedia of Public International Law* says that: “Sovereignty . . . denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or territorial jurisdiction of a foreign state or to foreign law other than public international law.”
- Professor Lou Henkin, in *How Nations Behave*, writes that the principle holds that: “. . . except as limited by international law or treaty, each state is master of its own territory.”
- And at the recent ASIL meeting, Professor Tom Franck suggested, interestingly and much more broadly, that a going definition of sovereignty is the loci of the formation of rights and duties generally recognized as establishing and implementing entitlements, distributions and obligations.⁶

However, the problem of defining *sovereignty*⁷ – or any word for that matter – appears circular and can hardly be ‘solved’ finally because language can-

4. L.F.E. Oppenheim, *International Law – A Treatise*, vol. 1, Peace (London: Longmans, Green, 1905), at 103.

5. J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), at 26.

6. R.B. Bilder, “Perspectives on Sovereignty in the Current Context: An American Viewpoint” (1994), 20 *Canada-United States L.J.* 9, at 10-11. [footnotes omitted]

7. See L. Henkin, “International Law: Politics, Values and Functions – General Course on Public International Law” (1989), 216 *R.C.A.D.I.* 9, at 24-25, who highlighted the problems with the word ‘sovereignty’ as follows: “States are commonly described as ‘sovereign,’ and ‘sovereignty’ is commonly noted as an implicit, axiomatic characteristic of Statehood. The pervasiveness of that term is unfortunate, rooted in

not transcend itself. A more promising project consists in examining the reality-creating role of words, as organic instruments of social power within the shared consciousness of humanity.⁸ Furthermore, the second conviction that there exist ascertainable meanings inherent in the word *sovereignty* is deficient as it fails to take into account the creative and transforming function of words, which is also continuous and continuing, changing in its nature and effects over time. It follows that words like “sovereignty” have their own history, which is not only a history of their changing meaning, their changing definition, but a history of the social effects of their changing meaning.

Myths are also powerful social productions, often expressed through language, which provide a shared explanatory structure for substantial areas of socially constructed reality.⁹ A very-large-scale myth, such as that of the “Westphalian state system” in international law, is liable to have a very-large-scale social effect on our consciousness and the consciousness of the world. Indeed, the myth of *Westphalia*, which refers to the historical events surrounding the *Peace of Westphalia* that ended the Thirty Years War in Europe, is deemed the basis upon which the idea, and ideal,¹⁰ of “sovereignty” has

mistake, unfortunate mistake. *Sovereignty is a bad word, not only because it has served terrible national mythologies; in international relations, and even in international law, it is often a catchword, a substitute for thinking and precision.* It means many things, some essential, some insignificant; some agreed, some controversial; some that are not warranted and should not be accepted.” [footnotes omitted] [emphasis added]

8. This idea of “shared social consciousness of humanity” is borrowed from the moral philosophy of Georg Wilhelm Friedrich Hegel, in particular from G.W.F. Hegel, *Phänomenologie des Geistes* (Hamburg: Meiner, 1952), first published in 1807, §§ 632-671; see also the translation by A.V. Miller, G.W.F. Hegel, *Phenomenology of Spirit* (Oxford: Clarendon, 1977), at 383-409.

The idea of ‘consciousness’ associated to an ensemble of human beings was suggested by G. Butler, “Sovereignty and the League of Nations” (1920-21), 1 *British Y.B. Int’l L.* 35, at 42, who discussed the word *sovereignty*, and more particularly the expression “external sovereignty,” by resorting, *inter alia*, to insights from the new field of psychology. See also P. Allott, “Reconstituting Humanity – New International Law” (1992), 3 *European J. Int’l L.* 219, at 223, who expressed the following view: “Society exists nowhere else than in the human mind. *And the constitution of a given society exists in and of human consciousness, the consciousness of those conceived as its members and its non-members, past and present.* Wherever and whenever a structure-system of human socializing is so conceived in consciousness, there and then a society is conceived – family, tribe, organized religion, legal corporation, nation, state . . .” [emphasis added]

9. Actually, “sovereignty” has been referred to as a myth: see L. Henkin, “The Mythology of Sovereignty,” in R.St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994), 351. Similarly, “state” has also been considered a myth: see E. Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946).
10. The “imprecise word” *idea* was defined by Philip Allott as “a bringing-together of units of consciousness which has an effect within consciousness greater than the sum of the effects of the individual units which it contains,” while the term *ideal*

developed since the 17th century. Such fabulous social power is all the more extraordinary because, as with all myths, its historical foundation is no longer considered relevant or is viewed as incontestable.

The purpose of the present study is to enter into the history of both of these mental-social phenomena – *sovereignty* and *Westphalia*. The latter will be examined to show that the events surrounding the *Peace of Westphalia* are substantially remote from what the myth of Westphalia has stood for, namely, the consecration of state sovereignty and the beginning of a new era of international relations. As regards “sovereignty,” the history of the *word* – as opposed to the history of the *concept*¹¹ – will be considered by looking at two of the most important early doctrinal contributions on the issue, namely, those of Jean Bodin and Emer de Vattel. The objective is to uncover the function that “sovereignty,” the word, has played in the formation of socially constructed reality and the role it is playing in the present-day reality-creating, that is to say, in the present understanding of the world as it is and the world as it might be in the near future.

Before embarking upon such a journey into the challenging, and often contradictorily-mapped, historical lands of Westphalia (part 3) and sovereignty (part 4), it is absolutely crucial to establish some *groundwork*.¹² This will include the issues, already alluded to, of the meaning of meaning, the nature and function of words, as well as the question of myth and mythology (part 1). Out of this morass will be suggested an approach to the problem of analysing language, which will treat as useful sources the well-established, if radically obscure and controversial, intellectual methods known as *deconstruction* and *hermeneutics* (part 2).

would mean “*what reality should be* (the ideal);” see P. Allott, *Eunomia – New Order for a New World* (Oxford: Oxford University Press, 1990), at 14 & 190. [emphasis added] [hereinafter *Eunomia*]

11. This proposal of distinguishing between the history of the word and the history of the concept was inspired by Philip Allott, *Eunomia*, 9: “Social history is thus as much the history of words as it is the history of deeds. The history of words has as much explanatory power as any history of politics or diplomacy or law or economic life.”
12. The terminology of “groundwork” is borrowed from Immanuel Kant’s philosophical works, in particular, I. Kant, *Grundlegung zur Metaphysik der Sitten*, 4th ed. (Riga: Hartfnoch, 1797), first published in 1785. See also the translation by M. Gregor, I. Kant, *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998).