

Sovereignty and Membership in the European Union: an Ongoing Federal Experiment

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Resumo: Este artigo afirma que a pertença à UE afecta a governação, mas não o estatuto de soberania próprio de cada Estado (a sua independência e a sua forma constitucional). Por conseguinte, começamos por contextualizar três modos de conceber a UE e enfatiza a preeminência dos governos em todos eles; depois, discute-se uma proposta recente (Siebersson 2008) de caracterização da relação entre estados e União; por fim, conclui-se que mesmo o Tratado de Lisboa não contém elementos que permitam afirmar estar em causa a «estatalidade» dos membros da União.

Palavras-Chave: «linhas divisórias», integração europeia; federalismo; legitimidade governativa; soberania; Estados.

Abstract: This paper claims that EU membership impinges in governance, not in the status of sovereignty proper (the independence of each State and the form of polity each one assumes, either a republic or a monarchy). Therefore, the argument expanded is threefold: first, we characterize the three different models of conceptualizing the EU and focus on the government-level membership all three models assume; secondly, we explore a recent proposal (Siebersson 2008) of characterization of the relation between member-states and the EU, namely that of «dividing lines»; finally, a third point drives the conclusion that although there is a connection between the levels of sovereignty and governance requirements that EU membership entails, nonetheless the evolution of the EU in recent years (i.e., the failed constitutional process e and the Lisbon Treaty) does not allow us to conclude that member-states are, qua states, in any danger of subversion or under attack.

Key-words: «Dividing lines»; European integration; federalism; government legitimization; sovereignty; statehood.

1. Models of European integration and arguments on political legitimacy of the EU

It is customary to maintain that the EU suffers from a democratic deficit of legitimacy, both in scholarly literature as in media covering on its activities. Notwithstanding the shortcomings of the EU in what respects the transparency of its internal processes, a flaw common to all great political entities, such a criticism requires substantial revision for reasons both empirical and theoreticalⁱ. For empirical aspects, see below «2». As for the founding of the theoretical criticism of the EU's legitimacy, we shall consider in this section the different models under which European integration is discussed and appreciate how each one of those models assumes but fails to properly appreciate the characteristics of all three possible views of European integration in what they share – the primacy of government of sovereignty featuresⁱⁱ.

1.1. The EU as an international organisation.

The most common and the longest established understanding of the EU's nature and function is the «international organisation» model. Whether this very designation is to keep (instead of the alternative «intergovernmental organisation», as we will discuss later, see «2»), is arguable. What is evident, irrespective of any criticism, is the success this model of conceiving the UE has gained.

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For historical reasons, that success can be simply explained by the fact that the European Coal and Steel Community was for all purposes an agreement between European nation-states. Here lies perhaps the first of its *suggestio falsi*: technically it was from the very start a cooperation between states and not nations, that is to say between governments and not so much collective masses (peoples), a point to which we will return to later (see «2»). Yet, all its success did obtain a sense of community between longstanding enemies and, as such, the economical cooperation fostered by governments came to symbolize a new international community that grew from the 1950's until the 1980's (the adherence of Portugal and Spain in 1986 serving as a *limes*) as a new Europeⁱⁱⁱ.

From a conceptual perspective, what framework does the «international organisation» model of EU legitimacy provides us? According to this view of the EU, the international organisation is the logical definition of the Union as it does justice to its historical development, to its current state of affairs and to its core political values.

The first part of this argument was already presented, as it focuses on the legal and political continuity between the original community and today's EU, presenting such *continuum* as natural and indeed desirable. It does take for granted the sense of legitimacy of each nation-state and, subsequently, of national affiliation of individuals (as if that was not a problem in countries like Belgium, Spain, Italy or the United Kingdom, to name but a few). By doing so, it assumes that the constructive character of nationalities is irreversible and that the EU's role can only be to supplement it with a bureaucratic apparatus designed to support the national interest and, when that is not possible, at least not to interfere with it.

The second part of the model follows from the first. By holding the past as present it portrays current affairs in a very defined and substantial manner. In this light, nation-states are as much nations (historically) as they are states (in the present). In short, that means that states are perceived as subdued by their history (or rather a very nationally insulated version of the History of each nation-state, one might argue). But contemporary politics and society, not to mention the economy, are heavily indebted to global trends that do not allow such an autarchic conception of statehood. Both within the EU and in the relation between the EU and other regional powers, nation-states constantly adapt and reinvent themselves, as any modern society tends to do. As it goes, it has been argued by such eminent authors as Habermas that the slowness of the institutional response to social changes in European nation-states may drive forward a collective European polity as a logical, even inevitable response^{iv}. Before looking into this and other related arguments (see *infra* «1.2»), let us notice the third element of this model, its allegiance to established political values of member-states.

Last but not least, the allegiance to nation-state values as part and parcel of the EU legitimacy not only assumes those value to be peaceful and unquestioned in each member-state but also embellishes another confusion such as the one between nation and state, that of State and government. In fact, by emphasizing national values the «international EU» argument identifies those national realities with the usage that they are given in any moment in time by government action in EU decision-making. To be sure, such a connection is inevitable and even necessary, as governments are legitimated and inspected by their own national parliaments and as such they are entitled to speak and act in name of the nation-state^v. In no way disavowing that fact, the very nature of a democratic government (transient and not to be confused with the national reality it represents momentarily) should require moderation to those who claim the primacy of «national values» in characterizing the EU. Even if such values were not contended as they generally are, their representation is never fully embodied by any government.

This point is of crucial relevance to this paper's argument. In the «international» model of EU legitimacy as in the two following ones, the government level should not be confused with the sovereignty question (the «regime» or «polity» dimension of each member of the EU). By not taking into account such *distinguo* in its defence of national values in EU functioning, this model conflates the Union's legitimacy with a construct that no member-state in fact is, a government-slash-state entity. Quite the opposite, the EU clearly stresses such a divide and, as in reality, conditions adherence to it to the verification of democratic government practices and not to any set of political values, be they republican, monarchist or other (later we shall return to this).

1.2. The Supranational model of legitimacy for the European Union.

This model suffers from the same conceptual entailment as the «international» insofar as it identifies nation and State. However, it does so in order to advocate the state's obsolescence and the need for consideration of nationalities outside (overlooked by) nation-states, historical nations that now would have in the EU a champion and a fair broker for their claims. This more «multicultural» model of legitimizing the EU is more dynamic, or modern, in its consideration of social change than the «international» model and, because of that, it claims to be more representative or more democratic. A methodological criticism of this multicultural view is already available^{vi}. For that reason, I wish to focus here in evaluating its premises and claims in order to define it as a model for the European Union integration process of its members.

The criticism of the nation-state goes hand-in-hand with the presentation of federalism as a logical and in some versions inevitable successor in the EU's internal order and functioning. A regional power acting as a match to Russia, the USA, etc., the EU would in this version be a «regions power», i.e., a federation made-up of a central power (the Commission, the European Parliament, or both) that puts forward minorities' agendas at the expense of the traditionally consecrated national «values» and identities. The European identity would thus sprung from the coexistence of this plurality hitherto smothered by national interests and prejudices, somewhat like what happened with the economic growth brought about by the original Community.

This backs the second claim of this model of the EU to be more modern, in the sense of being more attentive to the social dynamics that constitute modern societies. The argument runs (in authors like Denis de Rougemont or Simone Weil) that just as nation-states were historically created so to (and by the same political means) an European political reality of a federal nature will evolve from the current state-system and make real the downtrodden aspirations of a European-people-to-be in all its complexity.

As for the third claim, of greater levels of democratic procedure it conveys an ideological stance, according to which it a Federal Union would be more close to the people and more peaceful towards other regional players. Such a viewpoint is arguable in itself and, in any case, not available to any empirical test. Not only that, it tries to ignore the ability for development and pacific cooperation proven by nation-states precisely in the EU history.

Ultimately, this model of legitimacy of the UE pays tribute to the workings of modern global societies but at the same time disavows the distinction between governments and states, by focusing exclusively in a one-dimensional presentation of the national-state in order to render its termination a necessity and in the same stroke replacing national governments by a federated European central government. By doing so it becomes not only a fantasy unavailable for testing but also disinterested of the concrete history it claims to represent, as it deliberately ignores the already existing association of governments provided by the EU with no need for a federative status and much less the suppression of national-states.

1.3. The post-national model of legitimacy of the EU

This last argument presents itself as a case for a European State, of a non-national kind. Unlike the previous supra-national argument, that states the need for surpassing nation-states through a federative solution, the post-national stance states the need for a new State that establishes its allegiance to the people as Europeans and not as members of pre-existing nations^{vii}.

In this model, the EU would in fact replace not only government functions but also statehood as we know it in Europe. National authorities would have to accept to be supervised by European institutions, as individuals would be able to appeal to the EU against their states. This much is already possible and the Lisbon Treaty of 2007 develops such possibilities (such as the right of petitioning). But, unlike what is already in practice, it would turn the EU in a sovereign state over national states. In this model, the *de facto* situation of government federalism of the supra-national model becomes a *de jure* solution.

By doing so, the moral and political claim of this model appears as realistic. Yet, the resistance to this evolution by member-states and their public opinions speaks for itself against such realism. It is of a logical nature, applied to a subject (statehood) where History and not Logic is decisive^{viii}. In the same vein, the claim of improving democratic processes falls under the criticism of being a technocratic notion of politics in which all policies end up to be some sort of «European Affairs».

Just as the two previous models, the EU as a post-national reality fails to fully take into account the fundamental difference between government (democratic, as EU demands it to be to all member-states) and political regime (statehood, a Republic or a Monarchy, a matter which the EU does not interfere with). In the international model, statehood was reduced to government; in the supra-national, government change towards a more openly federative arrangement would entail automatically a removal of states from the political scene; in the post-national model, the EU becomes a state as she assumes more and more governing functions.

It is now time to look for an alternative model of understanding (as in *verstehen*) the EU, one that does justice to its effective complexity, legal, political and historical.

2. «Dividing lines» in the European Union

At this point, it is useful to look into a recent proposal for a redefinition of the EU in its most recent form (in fact, not still in place), the Lisbon Treaty. In a recent work, *Dividing Lines Between the European Union and Its Member States* (Siebersson 2008) a proposal is made for a new characterization of the EU, according to its «dividing lines». These «lines» require an appreciation in several layers of complexity. To use the author's summary (pp. 59/60), we can identify the following ones: the division between EU competences and member-states rights in the functioning of the Union; at a second level, the affirmation of Union values and goals, which is not competing with values and goals of member-states but rather complementing (and coordinating) them; and a third level, always requiring interpretation, that of many principles of EU functioning (such as subsidiarity) – in fact, reproducing the intrinsic controversy of any political principle (liberty, equality, etc.).

To quote directly from Siebersson's work:

In broad terms, the dividing lines serve as a metaphor for the entire course of the European integration. Individual sovereign nations have decided to band together for the greater good, but they do not wish to lose their nationhood in the process. No matter how successful the EU

has proven to be, one may never lose sight that is not yet a United States of Europe. Many Europeans have viewed each stage of the Union development with a critical eye and an earnest intention that the EU will never become integrated to that extent. (Sieberson 2008: 60)

Before advancing any further on the empirical consequences of the usage of «dividing lines» as the proper model for understanding Europe, a small *caveat*: when referring to «nationhood», it would be more adequate to write «statehood», as «individual sovereign nations» sometimes are not a single nation and the sovereignty is an attribute of the State, not of any particular nation. But this is a minor remark.

The great interest in this theoretical proposal is that it allows us to verify in the functioning of EU institutions, deliberations, etc., how do the dividing lines evolve, either giving our withdrawing power from the member-states or assuring the member-states of their independence inside the Union. In a final survey of that review, Sieberson (Sieberson 2008: 245-253) Sieberson begins by sketching a conflict between federalists and intergovernmentalists, the first defending the need for the EU to supersede its member-states, the second resisting unflinchingly to such a prospect; and, in its turn, present a middle ground, of his own, designated as realist. This middle ground affirms the complementary nature of the EU and its member-states. In other words, «federalists» include supra- and post-nationalists, and intergovernmentalists are so-called internationalists. It is noticeable the change from internationalists (the first model of the EU mentioned above, see 1.1.) to intergovernmentalists, as Sieberson prefers: in fact, the survey of EU functioning according to the dividing lines mentioned above clearly shows that it is not the European nations that are united but the European governments or, more precisely, some (many) actions by those governments. In a broad stroke, most of the current changes in the EU (i.e., as the Lisbon Treaty stipulates) do not shift those dividing lines (pp. 245/6) or do so only slightly and in diverging ways, sometimes favouring the EU institutions attributions, sometimes maintaining member-states prerogatives (pp. 246/7). Combined, these shifts concur to the bolstering of member-states abilities by way of intergovernmental cooperation, as highlighted in four instances: greater overview of EU activity by parliamentary bodies of member-states; the admission of «enhanced cooperation» between groups of member-states whenever the EU as a whole is unable to reach a consensus; thirdly, the possibility of suspending a member-state that fails to comply with its obligation, instead of forcing him to comply which would be a state-like answer; the possibility of a member-state to withdraw from the Union, dissolving (through a multi-stage process) its membership and reassuming areas of previously shared and cooperatively governed in the EU sphere (ck. pp. 248/9).

As Sieberson notes (pp. 250/1), there is nothing in the Lisbon Treaty crossing the lines from the current institutional arrangement of the EU into a deferral superstate. In the same spirit (and unlike the attempt to create a European Constitution), aspects of European citizenship are merely supplementary to national identity and symbolic changes (flag, hymn, etc) are avoided. The democratic government requirement for EU membership (and the concomitant rule of law, etc.), alongside the «transparency deficit» are also tackled by the Lisbon Treaty in order to approximate EU institutions to patterns of good practices in national states. Finally, the process from the projected European Constitution to the Lisbon Treaty shows is that member-states are not willing to cross the dividing line between their individual sovereignty and a Federal state, and that makes the case for a reappraisal of the meaning of federal dispositions in the EU.

In fact, the analysis taken through by Sieberson indicates that an area like health and food safety is more integrated and coordinated by the Union, whereas

defence and foreign affairs remains even in accordance with the Lisbon Treaty very much a strict domain of each member-state. That is to say: matters of democratic government that interest all member states as a whole (say, combating the swine flu) are likely to develop in a federal way^{ix}; areas in which it is not government but statehood that is at stake remain outside the proper area of EU activity. With this in mind, let us consider how sovereignty is kept and shared in these conditions.

3. A European Federalism: government, not sovereignty

It is of particular relevance the fact that the EU imposes as an admission condition democratic procedures of government and that its operational configuration is intergovernmental, as we have seen above. By refraining from interference in the political dimensions that constitute polities (value-laden questions like the political regime – a monarchy or a republic – and national symbols, like flags, etc.), the EU curtails itself from interfering with the characteristics of the *locus* of sovereignty, the institutions of modern States and their independence.

As we have seen, EU action develops primarily within the competences of governments that are not fundamental to the autonomy of each State (*ergo* the considerable articulation of EU policies in domains like health by contrast with the primitive stage of foreign policy or military matters). The consideration of the dividing lines between EU and its member-states is more elucidative than any other characterization of the EU as it allows us to appreciate in several levels the diverse balances that modulate the relation between EU institutions and the members' governmental policies. It has established the primacy of governments (not nations^x) in the dealings of each member with the EU. Only through such governmental mediation (nowadays more and more articulated with parliamentary activity by national parliaments and by the European Parliament) is possible to consider the sovereignty dimension of member-states of the EU.

Any state is logically and politically separate from the form of government it adopts, as changes in those forms with continuity of the state are common in any country's History. Not only that, even the form of the State can vary substantially (from monarchy to republic and back), without breach of legal existence^{xi}. These observations merely serve to indicate that sovereignty, properly understood as the power of the State to conduct matters with unsurpassable authority within its borders, is exerted through self-government and that the sharing of government functions, like it happens in so many areas of the EU, is as instrumental for the State as it is the option for not sharing those functions. No one argues (at least today) that France or Germany are any less sovereign because they traded their own currencies for the Euro whereas the United Kingdom has chosen to retain the Pound. Although a key aspect of government^{xii}, currency is instrumental and therefore the choice between a European and a national currency is a political option not fundamental to the maintenance of sovereignty.

It is legitimate to argue, in conclusion, that just as the EU is intergovernmental and not international, so too its members-states share governmental power, not sovereignty attributes. Even free-movement across state lines (that still exist, despite free circulation, and in fact states retain the possibility of reinstating borders temporarily if necessary) or European citizenship rights accrue to member-states provisions, with no means of undermining sovereign features from any state. Such EU policies add up to pre-existing state-level ones. As such, they are Union-level instruments of administering government action, not conflicting with sovereign statehood but working for its purposes.

It is no coincidence that the question of sovereignty is so frequently raised when discussing the EU and its alleged federative logic (as in a federation of states

instead of the governmental federation I am arguing it is, if properly understood). Not only sovereignty is a problematic concept if one tries to refine it beyond the simple notion just described^{xiii}, but also the very nature of the EU is a matter of contention. A double-binding conceptual challenge, so to speak^{xiv}. The argument against the EU in the name of sovereignty builds upon government activity, which is strictly instrumental to a state. Therefore, it is an alternative mode of conceiving the relation of these concepts that is needed.

In the first place, sovereignty is an attribute of states, regardless of their specific polity (republic, monarchy)^{xv}. Secondly, government (democracies, in the EU) is an instrument for the effectiveness of sovereignty. In third place, the transfer of government functions to intergovernmental organizations (like the EU) is of an instrumental kind, even if such organization possesses a relevant degree of initiative (such as the EU, with legislative power) Even in matters fundamental to sovereignty, like policing, such intergovernmentalism is instrumental, and highlights the ability of the sovereign dimension of polities to adapt to new institutional arrangements for government purposes^{xvi}.

The federative arrangement of the EU can be seen in the government level, as it is able to aggregate decision making, relying in state-level means to enforcement (i.e., relying in sovereign state power to guarantee EU law abidance). This sort of federative process is of a fundamentally different kind of those sovereign federations that are the sates of Germany or the USA. It is merely instrumental and, as such, EU membership federates governmental action (and only partially at that) while maintaining dividing lines between the EU (and its institutions) and the sovereign member states that form the Union. In short, (state) sovereignty is a status, while (European) membership is an instrument.

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ⁱ Perhaps the most relevant instance of such revision was developed ten years ago already. See Joseph Weiler (1999) *The Constitution of Europe*, Cambridge: Cambridge University Press.

ⁱⁱ The threefold model of legitimacy of the EU is drawn from António Figueira (2004) *Modelos de Legitimação da União Europeia*, Cascais: Principia. Despite that, all the argument is independent from that work, as it follows different paths and reaches conclusions of its own, not indebted or imputable to Figueira's work.

ⁱⁱⁱ Not surprisingly this process was also fostered by the fact that the Community opposed in its very principles the central-planned economy of the Eastern Block. Before 1989 there was much less criticism of the EEC's legitimacy.

^{iv} Jurgen Habermas (2000) *Après L'État-nation*, Paris: Fayard.

^v Although, in theory, other forms of government are conceivable. But even if they can come to reality, that has not happened yet. Inside the liberal intellectual tradition, see Antonio Franceschet (2000), 'Popular Sovereignty or Cosmopolitan Democracy? : Liberalism, Kant and International Reform', *European Journal of International Relations*, 6: 2; 277-302.

^{vi} See Amartya Sen (2006), *Identity and Violence*, N.Y.: W. W. Norton..

^{vii} It can be argued (see Figueira 2004:95) that such an argument adds to the supra-national economic argument a moral argument as well. However, to our eyes, not only the fundamental to the supra-national is not restricted to economic concerns (as we have mentioned above, see 1.2), but also the post-national moral teleology (Figueira) does not go without a political reasoning. Despite Figueira's criticism of the incoherence of this political reasoning (a bureaucratic and legalistic conception of society and politics) he should not be overlooked in the argument presented in this paper.

^{viii} Although, naturally, History and Logic are not in opposing fields. The path to higher-than-state politics is manifold, as shown by the discussions among Kantians about the German philosophers «cosmopolitan law» requires the demise of the state. See for instance Garrett Wallace Brown (2005), 'State Sovereignty, Federation and Kantian Cosmopolitanism', *European Journal of International Relations*, 2005, Vol. 11 (4), 495-522. And many other examples in the Kantian tradition as well as in others are possible.

^{ix} This requires detail, by the way. See Stephen C. Sieberson (2008), *Dividing Lines Between the European Union and Its Member States*, The Hague: T.M.C. Asser Press (see p. 209).

^x For a radical criticism of the pre-eminence of the *nation*-state in global affairs, see Sylva Walby (2003), 'The Myth of the Nation-State: Theorizing Society and Politics in a Global Era', *Sociology* (2003), Vol. 37 (3): 529-546..

^{xi} This is a simple statement of a fundamental theoretical assumption of this essay. Ultimately, this subject has retained a very high level of controversy since the Renaissance. Whether sovereignty is, or not, a mere fiction designed to overplay the powers of government is a matter of dispute impossible to address, let alone solve, here. From an historical viewpoint, this essay stands alongside Jean Bodin, not Machiavelli (to follow the distinction of sovereignty and government since early modernity advanced by Luc Foisneau in Alain Renaut, dir. (1999), *Histoire de la philosophie politique, vol. II – Naissances de la modernité*, Paris : Calmann-Lévy. (2nd Section, chapter 1). Regardless of the fact that during the Modern Age government functions have grown not only in practice but in theory, as social sciences have, since the 19th century, focused on empirical aspects of political life, it is our belief that setting aside sovereignty, although necessary for some purposes (like coming to terms with the EU), is not a valid theoretical option. Sovereignty remains a fundamental dimension of politics (of Statehood, if we will), and calls for specific discussion (to be conducted elsewhere) For a contemporary opposite view, see Jeanne Morefield (2005), Morefield, J., 2005, 'States Are Not People: Harold Laski on Unsettling Sovereignty, Rediscovering Democracy', *Political Research Quarterly* (2005), 58, 659-669.

^{xii} Both conceptually and historically. See for a brief presentation Robert A. Mundell (2002), 'Monetary Unions and the Problem of Sovereignty' in *The Annals of the American Academy of Political and Social Science*, 2002; 579, 123-152.

^{xiii} For a four-sided approach, see Stephen D. Krasner (1999), *Sovereignty: Organized Hypocrisy*, N.J.: Princeton University Press.

^{xiv} In addition, one must also consider the variable definition of the notion of federation. Both the USA and Germany are federations (and republics), but by no means they are identical polities.

^{xv} By focusing on sovereignty this line of argument is not to be confused with any «ethical-metaphysical» theory of the state» (see for instance Brian T. Trainor (2005), 'Back to the Future: The Emancipatory Essence of the State', *European Journal of Political Theory*, 2005, 4, 413-428. although both theoretical accounts can share some of their aspects.

^{xvi} For a case in favour of the relevance of this «abiding sovereignty», see Stephen D. Krasner (2001), 'Abiding Sovereignty' in *International Political Science Review* (2001), Vol. 22, No. 3, (229-251).