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The Concept of Monetary Sovereignty Revisited

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Abstract

Few legal concepts have been subject to as little critical scrutiny over the past few decades as that of monetary sovereignty. This stands in contrast to the renewed interest in different aspects of broader concepts of sovereignty. Filling this important gap in the literature, this article examines whether the concept of monetary sovereignty is subject to evolution under the impact of globalization and financial integration. This article fully takes into account the dual nature of monetary sovereignty as a concept with not only positive but also important normative components. It is argued herein that the concept of monetary sovereignty is more than a mere framework for debates on rights and duties of states, but that it is still relevant as a legal concept for evaluating the contemporary exercise of sovereign powers in the realm of money and for improving our understanding of the driving forces behind the evolution of the law in this crucial field. After a review of the conceptual foundations of monetary sovereignty, this article assesses its conceptual evolution under the impact of contemporary constraints on its exercise, and examines the main implications of the proposed new understanding of monetary sovereignty, with its normative components providing normative guidance and serving as a legitimacy benchmark.

> So much of barbarism … still remains in the transactions of the most civilized nations, that almost all independent countries choose to assert their nationality by having, to their own inconvenience and that of their neighbors, a peculiar currency of their own.
>
> John Stuart Mill (1806–1873)[1]

1 Introduction

Attempting to fill an important gap in the literature, this article examines whether the concept of monetary sovereignty is subject to evolution and is still of any actual

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1 J.S. Mill, *Principles of Political Economy* (1848), ii, at 155.

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relevance. It will be argued that the concept of monetary sovereignty is still more than a mere rhetorical framework for debates on specific rights and duties of states.[2] Monetary sovereignty is still relevant today as a legal concept for evaluating the contemporary exercise of sovereign powers in the realm of money and for improving our understanding of the driving forces behind the evolution of the law in this important field.

Few legal concepts have been subject to as little critical scrutiny over the past decades as that of monetary sovereignty. This stands in contrast to the renewed interest that the political science, legal philosophy, and legal literatures (often in pursuance of an interdisciplinary approach) have shown in different aspects of broader concepts of sovereignty over the past two decades.[3]

Interestingly, the concept of monetary sovereignty has never been expressly recognized by the international community, either in the Articles of Agreement of the International Monetary Fund (hereinafter 'IMF' or 'Fund'; 'IMF Agreement' or 'Fund's Articles'),[4] or in any other key instrument of international law.[5] It is a judgment of the former Permanent Court of International Justice (PCIJ) that is commonly cited as the first official recognition of monetary sovereignty in modern international law. As famously stated by the PCIJ in 1929 in the *Serbian Loans Case*, 'it is indeed a

[2] For detail on the view that debates over sovereignty constitute a mere vehicle for more specific debates over rights and duties of states see Lowe, 'Sovereignty and International Economic Law', in W. Shan, P. Simons, and D. Singh (eds), *Redefining Sovereignty in International Economic Law* (2008), at 84. The conclusion to the present article further comments on Lowe's position.

[3] This vast body of literature includes, notably, Aalberts, 'The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading', 42 *J Common Market Studies* (2004) 23; Besson, 'Sovereignty in Conflict', 8(15) *European Integration Online Papers* (2004), available at: http://eiop.or.at/eiop/pdf/2004–015.pdf; A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Hathaway, 'International Delegation and State Sovereignty', 71 *L & Contemporary Probs* (2008) 115; Jackson, 'Sovereignty Modern: A New Approach to an Outdated Concept', 97 *AJIL* (2003) 782; J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006); H. Kalmo and Q. Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (2010); Krasner, 'Sovereignty: An Institutional Perspective', 21 *Comparative Political Studies* (1988) 66; S.D. Krasner, *Sovereignty: Organized Hypocrisy* (1999); Lake, 'Delegating Divisible Sovereignty: Sweeping a Conceptual Minefield', 2 *Rev Int'l Orgs* (2007) 219; Lake, 'The New Sovereignty in International Relations', 5 *Int'l Studies Review* (2003) 303; N. MacCormick, *Questioning Sovereignty* (1999); Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *JIEL* (2003) 841; Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* (1990) 866; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005); Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government', 25 *Michigan J Int'l L* (2004) 1107; A.-M. Slaughter, *A New World Order* (2004); Shan, Simons, and Singh (eds), *supra* note 2; and Sørensen, 'Sovereignty: Change and Continuity in a Fundamental Institution', XLVII *Political Studies* (1999) 590.

[4] Articles of Agreement of the International Monetary Fund, 22 July 1944, 60 Stat. 1401, 2 UNTS 39, as amended effective from 18 Feb. 2011, available at: www.imf.org/external/pubs/ft/aa/index.htm. The IMF Agreement is the constituent treaty of the IMF. Having been adopted on 22 July 1944, at the UN Monetary and Financial Conference held at Bretton Woods, New Hampshire, it entered into force on 27 Dec. 1945.

[5] Burdeau, 'L'exercice des Compétences Monétaires par les Etats', 212 *Recueil des Cours de l'Académie de Droit International (Recueil des Cours)* (1988) 211, at 236–237.

generally accepted principle that a state is entitled to regulate its own currency'.[6] It is on this basis that the state's sovereignty over its own currency and, by implication, over both the internal and external aspects of its monetary and financial systems has traditionally been recognized by public international law.[7] In the words of F.A. Mann:

> To the power granted by municipal law there corresponds an international right, to the exercise of which other states cannot, as a rule, object. ... It must follow that, subject to such exceptions as customary international law or treaties have grafted upon this rule, the municipal legislator ... enjoys sovereignty over its currency and monetary system.[8]

The contemporary constraints (both legal and economic in nature) on the exercise of the various sovereign powers in the realm of money have already been thoroughly analysed, under various aspects, in the legal, economics, and political science literatures.[9] Most authors, however, appear to approach monetary sovereignty as a purely positive, and static, concept, i.e., as a mere catalogue of state competences the prescriptive implications of which, if it ever possessed any, have been emptied of any relevance over time.[10]

The existing literature convincingly analyses the fact that economic globalization and the increasing integration of financial markets have severely constrained formal

6 *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Serbia)*, Judgment of 12 July 1929, PCIJ Rep Series A Nos 20–21, at 44.

7 See, e.g., Burdeau, *supra* note 5, at 236; D. Carreau, *Souveraineté et Coopération Monétaire Internationale* (1971), at 52–54; R.M. Lastra, *Legal Foundations of International Monetary Stability* (2006), at 16–17; C. Proctor, *Mann on the Legal Aspect of Money* (2005), at 500; and M.R. Shuster, *The Public International Law of Money* (1973), at 9.

8 Proctor, *supra* note 7, at 500–501.

9 In this vast, interdisciplinary, body of literature see, e.g., Broz and Frieden, 'The Political Economy of Exchange Rates', in B.R. Weingast and D.A. Wittman (eds), *Oxford Handbook of Political Economy* (2006), at 587; Carreau, *supra* note 7; D. Carreau and P. Juillard, *Droit international économique* (2007), at 559–706; Carreau, 'Le système monétaire international privé (UEM et euromarchés)', 274 *Recueil des Cours* (1998) 309; Cohen, 'The International Monetary System: Diffusion and Ambiguity', 84 *Int'l Aff* (2008) 455: http://escholarship.org/uc/item/97r5n8jx (accessed 15 Sept. 2011); W.M. Corden, *Too Sensational: On the Choice of Exchange Rate Regimes* (2004); B. Eichengreen, *International Monetary Arrangements for the 21st Century* (1994); Frieden, 'Globalization and Exchange Rate Policy', in E. Zedillo (ed.), *The Future of Globalization* (2007), at 344; Lastra, *supra* note 7; A.F. Lowenfeld, *International Economic Law* (2008), at 593–851; Mundell, 'Money and the Sovereignty of the State', International Economic Association Conference Paper (1997), available at: www-ceel.economia.unitn.it/events/monetary/mundell14.pdf (accessed 1 Sept. 2011); Proctor, *supra* note 7; Sorel, 'Les Etats face aux marchés financiers', in C. Leben, E. Loquin, and M. Salem (eds), *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle: Mélanges en l'honneur de Philippe Kahn* (2000), at 507; B. Steil and M. Hinds, *Money, Markets, and Sovereignty* (2009).

10 An authoritative, commonly accepted, list of the sovereign powers falling within the conceptual scope of monetary sovereignty does not exist at present. For three different views, by three different authors, on which regulatory powers are truly 'sovereign' powers in the realm of money see Lastra, *supra* note 7, at 22–23; Proctor, *supra* note 7, at 500–501; and Gianviti, 'Current Legal Aspects of Monetary Sovereignty', in IMF Legal Department, *Current Developments in Monetary and Financial Law* (2005), iv, 3, at 4. To the author of the present article it appears appropriate to define the contemporary regulatory scope of monetary sovereignty in a broad manner as comprising the formal state competences to create money via the issue of currency and via the regulation of credit, to conduct monetary and exchange rate policies, to determine the appropriate amount of current and capital account convertibility, and to organize financial regulation and supervision.

state competences in monetary and financial matters, but omits to question critically whether the underlying concept of monetary sovereignty itself has evolved over time and what this may imply. Hence, it is hardly surprising that large parts of the literature conclude that monetary sovereignty has become increasingly eroded,[11] that it can be accepted only as 'a figure of speech',[12] and, even stronger, that it should be regarded as no more than a myth.[13]

Approaching the concept of monetary sovereignty that way invites the undertaking of judgements over the degree to which a given state, the members of a monetary union, or the international community as a whole should be considered as having preserved or as having lost their respective monetary sovereignty under the impact of various economic and legal constraints. Indeed, as has been rightly observed by John Jackson, 'most (but not all) of the time that "sovereignty" is used in current policy debates, it actually refers to questions about the allocation of power; normally "government decision-making power"'.[14]

The approach adopted in this article is different. Certainly, most states are subject these days to various legal constraints on the exercise of their sovereign powers in the realm of money, notably to constraints arising from membership of the IMF or, on a regional level, of a monetary union. In addition, factual constraints brought about by economic globalization and the increasing integration of financial markets worldwide have rendered several formal state competences in monetary and financial matters essentially hollow. But does this undeniable erosion of the formerly exclusive character of certain state competences really imply, as is being claimed in much of the existing literature, that monetary sovereignty as a legal concept has itself become outdated?

In the light of the above, this article examines whether the concept of monetary sovereignty, as a concept with not only positive but also increasingly important normative components, is subject to evolution. After an analysis of the conceptual evolution of monetary sovereignty under contemporary constraints on its exercise (section 2), this article assesses the implications of the proposed new understanding of monetary sovereignty for the evaluation of the exercise of sovereign powers in the realm of money (section 3).

2 The Conceptual Evolution of Monetary Sovereignty under Contemporary Constraints on its Exercise

This section begins with a succinct overview of the historical and doctrinal origins of the international law concept of monetary sovereignty (subsection A) before examining whether the concept of monetary sovereignty, instead of having become outdated, has evolved in the light of the dual nature of sovereignty as a both positive and

11 See, e.g., Lastra, *supra* note 7, at 26–32 and Treves, 'Monetary Sovereignty Today', in M. Giovanoli (ed.), *International Monetary Law: Issues for the New Millennium* (2000), at 111.

12 *Ibid.*

13 Carreau, 'La souveraineté monétaire de l'Etat à la fin du XXe siècle: mythe ou réalité?', in Leben, Loquin, and Salem (eds), *supra* note 9, at 491.

14 Jackson, 'Sovereignty Modern', *supra* note 3, at 790.

normative concept (subsection B). Finally, this section approaches monetary sovereignty as an essentially contested concept in order to fully expose the concept's underlying nature (subsection C).

A Ex Post Facto Ius Oritur:[15] *Classical Monetary Sovereignty in Context*

The writings of Jean Bodin (1529–1596) in *Les Six Livres de la République* (1576) are the first systematic expression of the principle of sovereignty as the key foundation for the exercise of state power.[16] Bodin's concept of sovereignty is of particular interest for this article as it explicitly incorporated the royal prerogative to coin money.[17] Bodin is likely to have been influenced by a much less famous contemporary, François Grimaudet (1520–1580).[18] Both Bodin and Grimaudet came from the French city of Angers. In 1560, Grimaudet had given an important speech in which he proclaimed that 'the welfare of the State demanded the subjection of the ecclesiastical to the civil power, in whose hands all the functions of society were legally invested'.[19] In his major treatise *The Law of Payment* (1579) Grimaudet insisted that 'the value of money depends on the State; that is to say, in a monarchy, upon the prince, and in an oligarchy, upon the State, which alone has the right to coin money, or to have it coined and to stamp a valuation upon it'.[20] Bodin and Grimaudet had an important precursor in Charles Dumoulin (1500–1566), also known as Molinaeus.[21] Writers such as Charles Loyseau (1566–1627) and Cardin Le Bret (1558–1655) lent further conceptual support to the absolutist monarchs' unfettered right to change the value of the coins they issued.[22]

Early on, however, other jurists, in particular from outside then absolutist France, called into question the monarch's unfettered monetary sovereignty. The Spanish Jesuit Juan de Mariana (1536–1624), for example, denied the monarch the right to reduce arbitrarily the weight of coins, arguing that any such alteration of the monetary substance unduly deprived the monarch's subjects of their very own fortune. Samuel von Pufendorf (1632–1694) further insisted that the value of a coin should be changed only in case of great need or danger and only in as much as was necessary

15 Latin for 'law arises out of fact'.

16 See, e.g., Carreau, *supra* note 7, at 37–38, Lastra, *supra* note 7, at 6–7. Providing an exhaustive overview of the historical and doctrinal origins of the concept of monetary sovereignty would go well beyond the scope of this article. For more detail, also on the relationship of monetary sovereignty to broader concepts of sovereignty, see, e.g., Carreau, *supra* note 7, at 35–41; and Lastra, *supra* note 7, at 3–21.

17 J. Bodin, *Les Six Livres de la République* (1576) i, ch. 11, at 213 (quoted in A. Nussbaum, *Money in the Law – National and International* (1950), at 34.

18 See Mundell, *supra* note 9, at 14.

19 F. Grimaudet, *Remonstrances aux Etats d'Angers* (1560) (originally delivered in French as a speech to the Provincial Assembly of Angers on 14 Oct. 1560) (quoted in W. Maude (trans), *The Fluctuations of Gold (by Alexander von Humboldt) – The Law of Payment (by François Grimaudet)* (1971), pt 2 on *The Law of Payment*, at iv.

20 *Ibid.*, at 11.

21 See Carreau, *supra* note 7, at 38 and Nussbaum, *supra* note 17, at 177.

22 For detail see Carreau, *supra* note 7, at 38.

and that, ultimately, the monarch was obliged to re-establish the original state of affairs.[23] Last but not least, Emmerich de Vattel (1714–1767), in his famous treatise *Le Droit des Gens*, equally accepted the idea that monetary sovereignty implies not only rights but also duties for the monarch.[24]

When it comes to assessing the importance of these writings for the overall concept of monetary sovereignty, the literature is divided. François Gény asserts that it was a broadly acknowledged principle in the legal philosophy of the 18th century that states are subject, in their exercise of monetary sovereignty, to certain superior rules depending on overarching ideas of justice and general welfare.[25] Dominique Carreau has criticized this as a hazardous conclusion. He argues that the doctrinal work of the previously cited French writers and, even before that, consistent state practice have made monetary sovereignty, as one of the key attributes of general state sovereignty, the central foundation of the modern state.[26] Overall, however, the positions of both authors do not entirely exclude each other. Both should be read as providing valuable lessons for any contemporary analysis of the conceptual evolution of monetary sovereignty such as the present one.

It is indeed very important to keep in mind, as elaborated by Carreau, that the concept of monetary sovereignty was originally elaborated by loyal legal writers in an attempt to integrate the already well-established exercise of internal monetary sovereignty by absolutist monarchs into a coherent legal framework. However, whereas monetary sovereignty as an essential attribute of general state sovereignty may always have been particularly important to states in the modern era, the concept itself has never expressed a sacrosanct, constitutional privilege of the sovereign. The concept was originally developed to provide justification *ex post* to the exercise of state power in the monetary realm in a narrow sense, at a time when the central power in most states was still very weak.

Why should the concept of monetary sovereignty not have significantly evolved since then, in order to continue to integrate the exercise of state competences in the realm of money into a coherent legal framework shaped by evolving contemporary constraints? Gény's observation concerning the majority position in the legal philosophy literature of the 18th century is of particular interest in this regard. As rightly observed by Carreau, the idea that monetary sovereignty entails both rights and obligations for states has not become part of the majority position in international law. However, the fact that as early as in the 17th century, when the concept of monetary sovereignty was as yet in a nascent state, legal writers seriously contemplated monetary sovereignty as a both positive and normative concept constraining state power, and not only as fettering an unbounded exercise thereof, indicates that it is necessary to engage in closer scrutiny of the concept.

[23] *Ibid.*, at 39–40.

[24] See F. Gény, *Quelques observations sur le rôle et les pouvoirs de l'Etat en matière de monnaie et de papier-monnaie* (1929), at 406.

[25] *Ibid.*

[26] Carreau, *supra* note 7, at 40–41.

B *Factual Erosion of Monetary Sovereignty or Conceptual Evolution in the Light of the Dual Nature of Sovereignty?*

The contemporary exercise of the various sovereign powers in the realm of money[27] is subject to both legal and economic constraints. The constraints on the exercise of monetary sovereignty that arise from customary international law[28] and international treaties (most notably the IMF Agreement with its Articles IV[29] and VIII[30]) have been rightly analysed in the literature as constituting only relatively minor constraints for states compared to the factual economic constraints that have arisen from economic globalization and the increasing integration of financial markets.[31] On the purely legal side there are even examples, notably the Second Amendment of the Fund's Articles in 1978, preceded by the *de facto* breakdown of the IMF's par-value system in 1971, where states can be regarded as having recovered a large margin of discretion with respect to the exercise of at least one sovereign power in the realm of money, namely the conduct of exchange rate policies.[32] On the regional level, states that enter into a monetary union thereby consent to major constraints on how they may exercise various sovereign powers in the realm of money. Some of these powers are usually even transferred to the organs of the union altogether.

In addition to legal constraints like the ones noted above, the factual constraints on the exercise of monetary sovereignty have been thoroughly analysed in the existing literature. That literature is right to point to the increasingly dominant role of global financial markets and to argue that many formal state competences in monetary and financial matters give an impression of regulatory flexibility that states *de facto* no longer enjoy. The following examples perfectly illustrate this state of affairs. To begin with, Article VI(3) of the IMF Agreement certainly leaves IMF members entirely free to impose capital controls as long as they are not exercised in a manner that will restrict payments for current transactions. However, once a state has liberalized its

27 As noted in the introduction to this article (see *supra* note 10), a commonly accepted definition, broad or narrow, of which regulatory powers in the realm of money are truly sovereign powers does not exist.

28 For a succinct presentation of relevant constraints arising from customary international law see Proctor, *supra* note 7, at 500–520.

29 IMF Art. IV(1) contains a code of conduct for IMF members. Most notably, IMF Art. IV(1)(iii) obliges IMF members to avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members. For a detailed assessment of the IMF's code of conduct in IMF Art. IV(1) in the light of contemporary challenges to systemic stability, providing a detailed analysis of the complex phenomenon of exchange rate misalignment under international monetary and trade law, see Zimmermann, 'Exchange Rate Misalignment and International Law', 105 *AJIL* (2011) 423.

30 IMF Art. VIII sets out various general obligations of IMF members. In particular, according to Art. VIII(2)(a), no IMF member shall impose restrictions on the making of payments and transfers for current international transactions without approval of the Fund. For details see, e.g., Zimmermann, 'The Promotion of Transfer-of-Funds Liberalisation across International Economic Law', 12 *J World Investment & Trade* (2011) 725, at 726–730.

31 Lastra, *supra* note 7, at 26–32.

32 The Second Amendment of the Fund's Articles entered into force on 1 Apr. 1978, adjusting the law to economic reality, thereby confirming once again: *ex post facto ius oritur.*

capital account, the economic cost of reversing this move and reintroducing capital controls in the future is likely to prove prohibitive.[33] The loss of factual state control is even more impressive with regard to money creation.[34] Notes and coins, i.e., the currency in circulation, account for no more than approximately 10 per cent of the money supply in developed countries,[35] with various forms of scriptural money (notably eurocurrencies[36]) and rapidly spreading innovative financial instruments (notably credit derivatives), having played an increasingly important role (mainly, but not exclusively, for professional market players) since the onset of economic globalization in the 1960s.

However, the fact that states are subject to a great number of consensual limitations and to increasingly powerful factual constraints in their exercise of what were formerly exclusive state competences in the realm of money does not imply that the states concerned have given away their monetary sovereignty as such.

It is crucial not to overlook the fact that the concept of sovereignty can be validly approached in two ways: directly, by focusing on the supreme and irreducible authority of independent states, and indirectly, by looking at the sovereign powers that originally all derive from the same source, namely the capacity of independent statehood. As analysed in a timeless manner a century ago by Carré de Malberg, whereas sovereignty as the supreme authority of independent states is irreducible, sovereignty, if looked at through the prism of the powers originally vested in sovereign states, can be shared.[37] This same differentiated view of sovereignty is reflected in the position adopted by the PCIJ its very first case, the *Case of the SS 'Wimbledon'* of 1923:

> The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the

[33] Carreau rightly makes this observation with respect to the liberalization of the capital and current accounts: see Carreau, *supra* note 9, at 499.

[34] For related comments, see, e.g., *ibid.*; and Sorel, *supra* note 9.

[35] For the purpose of conducting monetary policy, the money supply is usually broken down into more or less narrowly defined monetary aggregates, the main ones of which are M0, M1, M2, and M3 (with M0 (notes and coins) being the narrowest aggregate and M3 (extending to various types of deposits like savings and demand deposits) being the largest). In the eurozone, e.g., notes and coins in circulation as of Feb. 2011 accounted for merely 8.4% of the total monetary stock M3 (own calculation based on figures published by the Banque de France, latest figures available at: www.banque-france.fr/fr/statistiques/monnaie/monnaie.htm (accessed 1 Sept. 2011)).

[36] The term 'eurocurrencies' designates what had originally become known as 'eurodollars'. Eurocurrencies are deposits of a specific currency outside the territory of the issuing state. A neutral designation such as 'xenocurrencies' (from the Greek 'xeno' for foreign) might have been preferable, but the prefix 'euro' is now firmly established in financial practice and the related literature. In summary, the phenomenon of eurocurrencies deprives the issuing state of some factual control over money creation since this phenomenon limits the state's capacity to control credit as an important aspect of money supply.

[37] As formulated by Carré de Malberg in the French original:
'[D]ans son sens originaire, la souveraineté désigne le caractère suprême de la puissance étatique. Dans une seconde acception, elle désigne l'ensemble des pouvoirs compris dans la puissance d'Etat. La souveraineté, en tant que puissance suprême, demeure l'apanage de l'Etat; la souveraineté, en tant que l'ensemble des pouvoirs compris dans la puissance de l'Etat, peut en revanche être partagée': R. Carré de Malberg, *Contribution à la théorie de l'Etat* (1920), at 79.

> exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.[38]

In light of the almost exclusive focus of the literature on analysing the factual and legal constraints on the exercise of sovereign powers in the realm of money, i.e., on monetary sovereignty as a positive concept,[39] it is not surprising that most authors have concluded that monetary sovereignty has become eroded. However, approaching monetary sovereignty as a purely positive concept captures at best half the picture. With respect to sovereignty in general this dilemma has been perfectly described by Robert Howse as follows:

> In understanding the significance of globalisation … for sovereignty we must always bear in mind the fundamentally dual … nature of the concept—that it remains both a statement of a normative ideal … and a judgment about the actual capacity of states and/or their governments to affect or determine outcomes. … The way in which sovereignty continues to structure and restructure global order cannot be properly appreciated or explained through attempts to simplify the idea into a purely normative or purely positive concept. The formalism with which many international lawyers continue to treat sovereignty is perhaps a way of trying to avoid this difficulty but at the cost of not being true to the phenomena, and in many respects … distorting them.[40]

As will be argued in what follows, monetary sovereignty, due to its dual nature as a concept with both positive and normative components, is not static but adapts constantly to a changing economic environment, with its normative components providing regulatory guidance and serving as a legitimacy benchmark for the contemporary exercise of sovereign powers in the realm of money (as understood in a wider sense). However, prior to looking at the conceptual implications of a contemporary understanding of monetary sovereignty, the following section aims to expose the concept's underlying nature in more detail.

C *Contemporary Monetary Sovereignty as an Essentially Contested Concept*

Monetary sovereignty may be best understood as what has been called an 'essentially contested concept' in the philosophy of language.[41] Samantha Besson appears to have

[38] *Case of the SS 'Wimbledon' (United Kingdom, France, Italy, Japan v. Germany)*, Judgment of 17 Aug. 1923, PCIJ Rep Series A No. 1, at 25.

[39] For a notable exception, taking into account the dual nature of the concept of monetary sovereignty as a both positive and normative concept, see Martucci, 'De l'Union Economique et Monétaire à l'Ordre de la Politique Economique et Monétaire', 21 *European Rev Public L* (2009) 1097.

[40] Howse, 'Sovereignty, Lost and Found', in Shan, Simons, and Singh (eds), *supra* note 2, at 61, 75.

[41] Walter B. Gallie was the first to develop the idea of essentially contested concepts in Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* (1956) 167. Several authors further elaborated the concept, notably Gray, 'On the Contestability of Social and Political Concepts', 5 *Political Theory* (1977) 331; and Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', 21 *L & Philosophy* (2002) 137. Whereas Gallie wrote about essentially 'contested' (and not 'contestable') concepts, subsequent studies (see notably Besson, *supra* note 3) have used both terms synonymously.

been the first to analyse sovereignty as an 'essentially contested concept'[42] and Dan Sarooshi further added to this analysis.[43] In the words of Besson:

> [An essentially contested concept] is a *concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept is itself*. … [T]he recognition of the essentially contestable nature of a concept is an *analytical* statement. It implies the possibility of conceiving a concept as normative, that is to say as encompassing a contestable value.[44]

Due to the intrinsic relationship between the concepts of general state sovereignty and monetary sovereignty as described earlier in this article,[45] many of Besson's findings with respect to sovereignty in general can be directly applied to this analysis of the concept of monetary sovereignty. In particular, it appears valid to say with Besson that monetary sovereignty, in the same way as sovereignty,

> [i]s not a merely prescriptive political concept that insists on constraining political and legal reality according to an abstract standard. Nor is it a purely descriptive political concept that refers to an independent and objective reality. … [Monetary] [s]overeignty should be entitled to remain the same concept and hence [provide] a conceptual framework in which debate can take place, while also fluctuating at the same time through changes of paradigms and of conceptions; the essential contestability of [monetary] sovereignty 'can account for both change and for continuity in change'. Instead of understanding [monetary] sovereignty as a mere fact or as a purely normative standard, the concept's essential contestability makes it possible to account for its institutional and discursive resilience while also respecting its normative input.[46]

The above view is perfectly in line with the analytical stance taken in this article: monetary sovereignty is not a static and purely positive concept that over time has moved away from the political reality it once described and the prescriptive elements of which have become hollow. Contemporary monetary sovereignty certainly stands in conceptual continuity with the doctrinal and historical origins of classical monetary sovereignty, but the concept's nature is essentially dynamic, with both its positive and normative components being subject to constant evolution, thereby enabling the concept to adjust to the changing economic environment brought about by increasing globalization and financial integration.

In order to amount to an essentially contested concept, a concept must be (i) intrinsically complex (i.e., it must encompass different dimensions of meanings), (ii) a-criterial (i.e., it must lack immutable minimal criteria of correct application), and (iii)

42 Besson, *supra* note 3, at 7–16. Whereas Besson in her analysis of sovereignty appears to have been the first author explicitly to rely on the framework of 'essentially contested concepts' as developed by Gallie, other authors had previously pointed to the nature of sovereignty as an increasingly contested concept, arguing rightly that sovereignty was characterized by both changing and stable elements and that the appropriate debate was not one of continuity versus change. See notably Sørensen, *supra* note 3, at 604.

43 Sarooshi, 'The Essentially Contested Nature', *supra* note 3, at 1108–1120; and Sarooshi, *International Organizations*, *supra* note 3, at 3–11.

44 Besson, *supra* note 3, at 6–7, original emphasis.

45 See section 2A of this article.

46 Besson, *supra* note 3, at 5 (quoting, in relevant part, Aalberts, *supra* note 3, at 39).

normative (i.e., it must express and incorporate one or several values).[47] The first two criteria are obviously fulfilled with respect to monetary sovereignty. The concept itself opposes different dimensions of meanings such as external and internal monetary sovereignty or the exercise of essential parts of monetary sovereignty by international organizations or by the community organs of a monetary union, to name just the two outstanding examples. That there is no commonly agreed upon set of minimal criteria of correct application of monetary sovereignty should equally have become obvious over the course of this article. In any event, it is essential to keep in mind that:

> [c]oncept determination amounts to more than a mere description of the concept's core criteria. … [T]he determination of the concept of [monetary] sovereignty cannot be distinguished from the values it entails and from the normative discussion that generally prevails around it.[48]

Acknowledging the normative nature of essential constituent elements of monetary sovereignty does not mean that the entire concept is normative,[49] nor even that it is *purely* normative. As noted earlier, any characterization of monetary sovereignty as a purely positive or purely normative concept would amount to an inappropriate oversimplification. In order for monetary sovereignty to amount to an essentially contested concept, it is not necessary (besides fulfilment of the other two characteristics) for the entire concept to be normative. It is enough that the concept expresses and incorporates *also* one or several values that are themselves, by their very nature, subject to evolution and contestation.

As for more general notions of sovereignty, the crucial question whether or not monetary sovereignty incorporates specific values that can adapt over time hinges upon the fundamental task of determining the *locus* of monetary sovereignty, i.e., of determining the true holder(s) of monetary sovereignty. Are the sovereign powers in the realm of money original powers of national governments, which national rulers may exercise at their full discretion, or are they rather the people's powers with the government (or international organizations upon further conferrals of powers[50])

[47] *Ibid.*, at 7. It should be noted that the characteristics of essentially contestable concepts have been expressed in various ways in the literature. Besson's convincing focus on 3 key characteristics is a reformulation of the approach taken in W.E. Connolly, *The Terms of Political Discourse* (1993), at 10–12. In his original account of essentially contested concepts Gallie had relied upon 5 conditions for expressing the same key ideas: see Gallie, *supra* note 41, at 171–172. See also Gray, *supra* note 41, at 332 for an early (1977) summary presentation of Gallie's ideas as 3 characteristics.

[48] Besson, *supra* note 3, at 7. In her argument, Besson convincingly relies on Kelsen's analysis of the *bellum justum* theory as advanced in1942, in the early days of contemporary international law. As Kelsen put it, 'The technical inadequacies of general international law do indeed to a certain extent justify the interpretation of the opponents of the *bellum justum* theory. … It is one of the peculiarities of the material which forms the object of the social sciences to be sometimes liable to a double interpretation. Hence, objective science is not able to decide for or against one or the other. It is not a scientific, but a political decision which gives preference to the *bellum justum* theory. This preference is justified by the fact that only this interpretation conceives of the international order as law': H. Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures* (1942), at 54.

[49] Lowe has made this point with respect to the concept of sovereignty in general: see Lowe, *supra* note 2, at 83.

[50] For a thorough study of the various types of conferral of sovereign powers by states to international organizations (agency relationships, delegations, and transfers) see Sarooshi, *International Organizations*, *supra* note 3.

being merely entrusted with their execution? The answer to this question is so obvious that it is not necessary to enter into great detail. At the time when the concept of monetary sovereignty first appeared, in order to support the exercise of the royal prerogative to coin money as exercised by absolutist monarchs, the *locus* of both sovereignty and the power to exercise it might still have been identical, but times have obviously changed.

The contemporary mainstream view of states being instruments at the service of their peoples as true holders of sovereignty[51] may be regarded as a corollary of the fundamental idea of popular sovereignty or sovereignty of the people. Similarly, and closely related to the notion of popular sovereignty, the idea of social contract as developed in the writings of Thomas Hobbes (1588–1679), John Locke (1632–1703), and Jean-Jacques Rousseau (1712–1778) is still relevant today and serves as a strong argument for considering monetary sovereignty as incorporating evolving values. According to the social contract school, individuals give up some rights in return for protection by those entrusted with the power to rule. Applied to the monetary realm at a time of economic globalization and ever-increasing financial integration, this means that peoples all over the world, as true sovereigns, may validly be regarded as having entrusted those in power with the exercise of the relevant competences in monetary and financial matters out of recognition that certain policy objectives can be achieved only if the exercise of certain powers is centralized. This is a clear expression of the complex dual nature of monetary sovereignty as a dynamic concept with both positive and normative components.

Although national governments, or anybody else exercising sovereign powers upon conferral, may not always be bound by a formal and explicit catalogue of objectives that must be achieved or of specific values that must be observed, they can certainly not be regarded as being entirely free to conduct whatever policy they deem fit. Those in power are responsible before the true sovereign, i.e., their people, for working diligently towards the achievement of the objectives which the contemporary social contract in the monetary field rests upon. These objectives, the normative components of monetary sovereignty, are not static but adapt over time to changing economic and political circumstances.[52]

51 As reflected upon by Kofi Annan, then Secretary-General of the United Nations (UN), a decade ago: 'We need to adapt our international system better to a world with new actors, new responsibilities, and new possibilities for peace and progress. State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa': (Annan, 'Two concepts of sovereignty', *The Economist* (online edn, 16 Sept. 1999, available at: www.economist.com/node/324795.

52 This analysis is in line with what Michel Virally, more than 30 years ago, analysed as follows: '*[C]omme tous les concepts juridiques également, [le concept de souveraineté] a une valeur opératoire. Par les valeurs qu'il exprime, par la logique interne qui lui est propre, il présente un dynamisme dont l'orientation effective dépend du système juridique dans lequel il est utilisé. Le débat d'idées sur la souveraineté n'est donc pas sans importance, même s'il a été exagéré, et la doctrine, à l'opposé de ce qu'enseigne un certain positivisme, n'est pas innocente* ': Virally, 'Une pierre d'angle qui résiste au temps: avatars et pérennité de l'idée de souveraineté', in R. Blackhurst *et al.* (eds), *Les relations internationales dans un monde en mutation* (1977), at 179–180.

Abandoning the still dominant, yet outdated, classical approach to the concept of monetary sovereignty thus appears to be perfectly in line with the widespread, broader, acknowledgment in contemporary international law that the notion of sovereign statehood itself is changing under the impact of the evolving core values enshrined in the concept of sovereignty. As analysed by Daniel Thürer:

> Considering the evolution and integration of the international legal order, sovereignty cannot just mean the final, superior decision-making power ('Höchstmächtigkeit' or 'letzte Entscheidungsgewalt') under international law. It also implies … the idea that a state is a political community which is invested with the effective power to grant, to realize and to implement certain basic values inherent in the principle of the 'rule of law' understood in a substantive sense. … [D]ue to its purpose and because of its very nature state sovereignty represents a *value-laden* notion. It does in fact, as a concept of present-day international law imply the *capacity to realize human rights and other basic values recognized by the international community*.[53]

Overall, it emerges that in order fully to understand the continuing relevance of the concept of monetary sovereignty under the impact of contemporary factual and legal constraints, it is necessary to take a closer look at the evolving values that are expressed by, and incorporated in, monetary sovereignty as a contemporary concept and to assess the implications of the conceptual revision undertaken in this article.

3 Conceptual Implications for the Evaluation of the Exercise of Sovereign Powers in the Realm of Money

The third section of this article takes a close look at the normative components of monetary sovereignty which provide regulatory guidance and serve as a legitimacy benchmark for the contemporary exercise of contemporary monetary sovereignty (sub-section A), before analysing contemporary monetary sovereignty as cooperative sovereignty (sub-section B). Finally, for the purpose of illustration, this section discusses whether the increasing regionalization of monetary sovereignty would properly have to be considered as the surrender or as effective exercise of monetary sovereignty (sub-section C).

A *The Normative Components of Contemporary Monetary Sovereignty as Regulatory Guidance and a Legitimacy Benchmark*

The constituent values of contemporary monetary sovereignty are diverse and it appears impossible to come up with an exhaustive and incontestable list. However, as pointed out by Sarooshi with respect to general state sovereignty, the fact that such a list will be 'continually subject to contestation and change' is perfectly in line with the idea of an essentially contested concept.[54] As explained below, the concept

[53] Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law* (1999), at 38–39, original emphasis, footnotes omitted. See also Müller, 'Wandel des Souveränitätsbegriffs im Lichte der Grundrechte – dargestellt am Beispiel von Entwicklungen des internationalen Menschenrechtsschutzes auf die schweizerische Rechtsordnung', in S. Breitenmoser *et al.* (eds), *Fragen des internationalen und nationalen Menschenrechtsschutzes* (1997), at 45, 61–62.

[54] Sarooshi, *International Organizations*, *supra* note 3, at 9.

of monetary sovereignty certainly incorporates and expresses both more general values like democracy, equality, accountability, and legitimacy, and more specific ones like economic development, the maximization of global welfare, the maintenance of financial integrity, and the promotion of financial and monetary stability. At a time of ever-increasing economic globalization and financial integration and in the light of the damaging, yet insightful, experience of the 2008–2010 financial and economic crisis (Great Recession),[55] it seems appropriate to regard the last three values, i.e., the promotion of monetary and financial stability as well as the maintenance of financial integrity, as specific key values of contemporary monetary sovereignty.

Prior to moving on, a few words need to be said about how these values are defined and what role they play in practice. *Monetary* stability, which can be regarded as a synonym for price stability, i.e., a low level of inflation, is usually the central target of monetary policy,[56] even though some central banks, notably the US Federal Reserve System, also aim to achieve a desired level of growth in real activity as part of their monetary policy. By contrast, many different definitions have been advanced in the economics literature for *financial* stability. Usually, this is done in an indirect manner by defining the opposite of financial stability, i.e., financial instability. A broad and systemic approach defines financial instability as the prevalence of a financial system that is unable to ensure, in a lasting way and without major disruptions, an efficient allocation of savings to investment opportunities.[57] Financial regulation on minimum capital ratios for banks is the main, but not exclusive, tool for avoiding financial instability (in particular in order to reduce systemic risk, i.e., multiple bank failures as a result of contagion). Financial integrity can be defined as the absence of money laundering, insider trading, and illegal capital flows, and is commonly regarded as contributing not only to increased global security but also increased economic and financial stability.

The normative components of an essentially contested concept fulfil a dual conceptual function. On the one hand they provide important practical policy guidance to those exercising sovereign powers. On the other hand they constitute a benchmark 'according to which political situations should be evaluated'.[58] Sarooshi has taken this argument one step further noting very convincingly that:

> The incorporation of these values as an integral part of the concept of sovereignty allows the argument to be made that the exercise of public powers of government can only be considered an exercise of sovereign powers when this is in accord with sovereign values, otherwise the

[55] The term Great *Recession* appears to be increasingly used in public discussions to designate the worst economic and financial crisis since the Great *Depression* of the 1930s. The ongoing sovereign debt crisis in several advanced European economies, though intrinsically linked to the Great Recession, may be considered a separate event, with the Great Recession covering the years from 2008 to 2010.

[56] The Governing Council of the ECB, e.g., has clarified that, in pursuing price stability as the ECB's primary policy objective, it seeks to keep inflation below, but close to, 2% over the medium term.

[57] See Issing, 'Monetary and Financial Stability: Is there a Trade-off?', paper presented at the ECB Conference on 'Monetary Stability, Financial Stability and the Business Cycle' held at the Bank for International Settlements, Basle (28–29 Mar. 2003), available at: www.ecb.int/press/key/date/2003/html/sp030329.en.html (accessed 1 June 2012).

[58] Besson, *supra* note 3, at 7.

> exercise of public powers is something entirely distinct from the exercise of sovereign powers and can even be considered as a violation of sovereignty.[59]

The above statement may be puzzling at first sight, but is perfectly coherent if one admits that monetary sovereignty is not a purely positive concept, i.e., a descriptive catalogue of regulatory powers in the realm of money (as understood in a wider sense), but that it also incorporates constantly evolving values that constitute a benchmark for the legitimacy of both regulatory action and inaction. Based on the well-established view in contemporary international law that peoples, and not those in power, are the ultimate holders of sovereignty,[60] any policy or regulatory action that consistently disregards the constituent values of monetary sovereignty would have to be considered a violation of that same monetary sovereignty. In the words of Michael Reisman:

> In modern international law, sovereignty can be violated as effectively and ruthlessly by an indigenous as by an outside force, in much the same way that the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner.[61]

Admitting that the maintenance of the integrity of the financial system and the promotion of global financial and monetary stability figure among the values incorporated in a contemporary concept of monetary sovereignty thus has major implications for assessing what constitutes a proper exercise of monetary sovereignty. Under this new perspective, those exercising sovereign powers in the realm of money have to do so in a way that promotes global monetary and financial stability and that ensures the integrity of the financial system. If a state were continuously to fail to orient its policies towards the promotion of these values, that state would effectively be violating the monetary sovereignty of its own people, thereby ultimately eroding the legitimacy of its own governmental actions. The same reasoning would apply to any entity exercising relevant sovereign powers following conferrals of powers within a given state (e.g., conferrals to national ministries or specialized agencies or to an independent central bank) or on the international level (e.g., conferrals to the IMF or to the organs of a monetary union).

Contrasted with the classical understanding of monetary sovereignty as a purely positive concept, implying independence from external interference in the management of a state's monetary affairs, this constitutes a huge paradigm shift. Under the contemporary understanding of monetary sovereignty as analysed in this article, it incorporates and expresses values, such as, notably, the maintenance of financial integrity and the promotion of monetary and financial stability, of accountability, and transparency. These values form a bundle of interrelated normative goals the precise contents of which constantly adjust to changes in the relevant economic framework.

59 Sarooshi, *International Organizations*, *supra* note 3, at 11.

60 See the analysis provided towards the end of section 2B of this article.

61 Reisman, *supra* note 3, at 872. Even though in that article Reisman deals with human rights violations by domestic actors and not at all with monetary sovereignty, his findings with respect to the locus of sovereignty and its violation by domestic actors appear to be generally applicable across the whole body of contemporary international law.

In order to avoid the slightest misunderstanding it seems important to underline that the constituent values of monetary sovereignty as an essentially contested concept are obviously not normative in the sense that they establish firmly binding legal rules the non-observance of which constitutes *ipso facto* a breach of law, potentially even entailing international legal responsibility for the state concerned. They are normative in the sense that those exercising sovereign powers in the realm of money (notably national governments, central banks, and international institutions like the IMF or hybrid bodies like the Financial Stability Board) cannot afford persistently to ignore these values if they do not want to provoke the erosion of the effectiveness, the authority, and, ultimately, the legitimacy of their decisions and actions in the long run. It is precisely this impact on policy design, and on the related evolution of the law in the realm of money (as understood in a wider sense), that is the main expression of the normative nature of essential components of the contemporary concept of monetary sovereignty as analysed herein.

The extent to which different societies have different ideas about the core values incorporated in contemporary monetary sovereignty and, in particular, the extent to which they have differing convictions on how to achieve these normative goals remains of course a potential problem.[62] Whereas ensuring the integrity of the financial system, i.e., avoiding illegal abuse of the financial system, can undoubtedly be regarded as a value that is shared worldwide, based on its intrinsic link to the rule of law, maintaining global monetary stability and promoting financial stability may be more problematic values. However, although those exercising sovereign powers in monetary and financial matters may indeed have differing ideas and economic beliefs about how best to achieve monetary and financial stability, there seems to be broad agreement that certain policies, such as imposing insufficient minimum capital ratios for banks, are counterproductive. In addition, most states probably agree that the exercise of sovereign powers in monetary and financial matters should be such as not to put global monetary and financial stability at risk. The earlier mentioned Article IV of the IMF Agreement can be read in support of this view in the light of the almost universal membership of the IMF with currently 188 members. It states in relevant part:

> Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members …

At a time when national economies are ever more interdependent and when financial markets are integrated as never before, the responsible exercise of sovereign powers in the realm of money increasingly requires close cooperation among states. Such cooperation under evolving economic constraints does not amount to ringing the death knell for the concept of monetary sovereignty. Instead, it may be more appropriate to regard such a joint exercise of monetary sovereignty as reflecting a special form of cooperative sovereignty.

[62] Sarooshi has made this point with respect to the exercise of sovereign powers by international organizations: see Sarooshi, *International Organizations*, *supra* note 3, at 10.

B *Regulating an Increasingly Interdependent Global Economy: Contemporary Monetary Sovereignty as Cooperative Sovereignty*

As noted above, in the light of the increasing integration of financial markets and the interdependence of 'national' economies, the effective promotion of global monetary and financial stability requires cooperation among those exercising sovereign powers in the realm of money. Again, Besson's findings with respect to general state sovereignty are applicable to the more specific case of monetary sovereignty:

> [G]radually the exercise of [monetary] sovereignty has turned from an individual exercise into a cooperative enterprise. … This form of sovereignty *triggers duties of cooperation* on the part of the entities which cannot ensure the protection of all the values they should protect, as much as on the part of the entities which can help the former to protect those values they share. They should all be seen as working towards the same end: the realization of their shared sovereign values and principles.[63]

The contemporary concept of monetary sovereignty as analysed in this article does not call for the introduction of binding international law as part of a globally harmonized legal framework for the exercise of all formerly exclusive state competences in the realm of money. As explained below, the above-mentioned duty to cooperate in the promotion of the constituent values of contemporary monetary sovereignty is being strictly framed by the principle of subsidiarity, the observance of which has been convincingly analysed in the literature as being an integral part of the correct application of the concept of sovereignty itself.[64] As further elaborated by Besson, '[a]s a concept of power distribution, … the principle of subsidiarity implies a *test of efficiency* in power allocation. In each case, the sovereign authority will be that authority which can realize the objective in the most efficient way.'[65]

Hence, in conformity with the principle of subsidiarity, transferring certain sovereign powers to higher levels of governance increasingly distant from the people as the true holder of sovereignty would be an appropriate choice only to the extent that lower levels of governance cannot effectively promote the constituent values of contemporary monetary sovereignty as analysed in this article. Respecting the principle of subsidiarity thus ensures that regulatory decisions are taken no further away than necessary from the people to whom those in power are ultimately responsible.[66] In the

[63] Besson, *supra* note 3, at 13, emphasis added. See also Thürer, 'Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderungen?', *ZaöRV* (2000) 557, at 592; and Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', 16 *L & Philosophy* (1997) 377, at 415–417.

[64] Besson, *supra* note 3, at 13. For a related argument see MacCormick, *supra* note 3, at 135.

[65] Besson, *supra* note 3, at 12, original emphasis. On the complementarity between the principle of subsidiarity and sovereignty see also Müller, *Der politische Mensch – Menschliche Politik* (1999), at 171. See also Jackson, 'Sovereignty Modern', *supra* note 3, at 792–794.

[66] It should be added that, in practice, this type of responsibility does not always imply that those exercising sovereign powers in the realm of money can be held effectively accountable for the quality of their decisions by the people as true sovereign. Whereas this is obviously the case with respect to decisions taken by international organizations, the independence of central banks raises similar concerns on the national level. Hence the increasing importance of transparency and accountability in the exercise of contemporary monetary sovereignty as noted below.

monetary field, and depending on the nature of the task at issue and the economic circumstances, the appropriate level of governance could be a multilateral international organization like the IMF, a monetary union on the regional level, or merely the nation state or any of its sub-entities.

As far as its role in the broader conceptual framework set out in this article is concerned, subsidiarity as an important framing element of cooperative monetary sovereignty ensures that the conceptual continuity between contemporary monetary sovereignty and classical monetary sovereignty, as well as the conceptual link between monetary sovereignty and general domestic sovereignty, is preserved. As elaborated in this article, the concept of monetary sovereignty has significantly evolved over time and will probably continue to do so. However, the continued relevance of the concept's origins places the state as the supreme monetary authority in the very centre. As noted earlier, in order to be able effectively to promote their shared sovereign values in the realm of money (as understood in a wider sense), states are increasingly compelled to cooperate in the exercise of what were formerly exclusive, 'national', state competences. This joint exercise of monetary sovereignty may lead to the gain of a joint margin of manoeuvre for the participating states; a margin of manoeuvre that the same states would have lost under the impact of contemporary economic constraints had they insisted on exercising their sovereign powers individually.

Finally, with international cooperation in monetary and financial matters becoming more and more an economic necessity, it is important that the exercise of contemporary monetary sovereignty as cooperative sovereignty satisfies high standards of transparency and accountability. This seems particularly crucial in so far as such international cooperation involves conferrals of sovereign powers to international organizations or to the organs of a monetary union, due both to the increasing complexity that results from the related increase in the number of players involved and to the fact that such conferrals move the locus of decision-making further away from national peoples as the true holders of sovereignty.[67]

However, as has been convincingly pointed out by Keohane and Nye, 'accountability is sometimes treated as a good *per se*, but it is an instrumental value, subject to being subordinated as well as traded off against other values'.[68] The political choice, increasingly widespread in developed economies, of raising the effectiveness of monetary policy through granting central banks formal independence, thereby isolating them from direct political influence,[69] is a clear reflection of precisely this trade-off.[70] Central bank independence, coming at the price of reduced accountability in a conventional

[67] It goes without saying that for states acting individually, mechanisms ensuring transparency and accountability have become increasingly important issues, too, since states are far from being unitary actors: different agencies and ministries exercise relevant elements of the regulatory powers in monetary and financial matters.

[68] Keohane and Nye, 'Democracy, Accountability, and Global Governance', (2001) Harvard University John F. Kennedy School of Government, Politics Research Group Working Papers on International Relations No. 01–4, at 5 (quoted and commented on in Raustiala, *supra* note 3, at 862).

[69] On the economic rationale for central bank independence see, e.g., Fischer, 'Central-Bank Independence Revisited', 85(2) *American Econ Rev* (1995) 201; as well as the references listed therein.

[70] Raustiala, *supra* note 3, at 862.

sense, serves to isolate the long-term design of monetary policy from political pressure driven by short-term interests, thereby increasing the effectiveness with which central banks can promote monetary stability as one of the key values of contemporary monetary sovereignty, as analysed in this article. Indeed, as convincingly analysed by Raustiala,[71] if the legitimacy of an economic institution or body is at least to some degree grounded in the effectiveness with which it works successfully towards the promotion of sovereign values, a given institution may gain at least some legitimacy, *ceteris paribus*, from the simple fact that it is instrumentally useful, although it lacks traditional mechanisms of accountability.

Approaching the end of this article, and for the purpose of illustration, sub-section C below will now consider whether the increasing regionalization of monetary sovereignty would have to be regarded as surrender or as effective exercise of monetary sovereignty.

C *The Increasing Regionalization of Monetary Sovereignty: Surrender or Effective Exercise of Monetary Sovereignty?*

The states participating in a fully-fledged monetary union, like notably the Economic and Monetary Union (EMU) of the European Union (EU), have transferred large parts of their sovereign powers in the realm of money to the supranational level. Most notably, for the duration of their membership the members of a monetary union renounce their respective rights to create money and to conduct a national monetary policy, thereby renouncing a powerful instrument, at least in a short-term perspective, for demand management.[72]

To the extent that the members of a monetary union can no longer control the exercise of these powers by the union, these conferrals of powers are rightly analysed as transfers and not as delegations of powers, and this independently of whether the participating states retain a formal right to withdraw from the monetary union. As shown in detail by Sarooshi, a conferral of sovereign powers that is formally revocable may nevertheless have to be regarded as a transfer if the conferring states have no direct control over the supranational organization's exercise of those powers and if the organization possesses the sole right to exercise them.[73]

The question whether, absent an express treaty rule authorizing a unilateral withdrawal, a member state of a supranational organization may nevertheless assert its sovereignty by withdrawing from the organization, hence revoking *in toto* all conferrals of powers to that organization, is a highly contested one. The fierce debate on this issue in the EU prior to the clarifying inclusion, by the Lisbon Treaty, of a new Article 50 in the Treaty on European Union ('TEU') authorizing unilateral withdrawal from the Union perfectly illustrates why this issue is of particular relevance for the members of a monetary union. Without embarking on this issue in detail, three brief comments appear warranted.

71 *Ibid.*

72 See C. Goodhart, *The Central Bank and the Financial System* (1995), at 164–165.

73 For details see Sarooshi, *International Organizations*, *supra* note 3, at 28–32, 66–69.

First, there is little doubt that a new agreement of the member states of an economic and monetary union either to end their cooperation or substantially modify it by signing a new treaty would constitute a lawful revocation of the original conferral of powers by the member states, even if the relevant treaty framework was designed as a 'trip with no return' as in the EMU's case.[74] Strictly speaking, of course, such a revocation would not be unilateral in nature.

Secondly, to the extent that it is willing and able to assume the economic consequences of leaving the monetary union, any member state may always decide to breach the rules of the monetary union and leave. If, for example, Greece were to decide to leave the euro and to reintroduce the drachma in 2014 and to assume the economic and political cost of that decision, there is little the EU or Greece's fellow eurozone member states could do about such a break-up of the eurozone. The United States' unilateral decision, on 15 August 1971, to end the convertibility of the US$ to gold, hence unilaterally rewriting the rules of international monetary conduct, is certainly the outstanding example of an assertion of monetary sovereignty contrary to valid treaty obligations.[75]

Thirdly, in line with the famous ruling by Germany's constitutional court, the *Bundesverfassungsgericht*, in the *Maastricht* case,[76] one could go even further and argue as follows. Each member state of a monetary union, in its capacity as one of the 'masters of the treaty', may not only recover the conferred powers *de facto* by simply leaving the union. In addition, every member retains an *irreducible right*, based on its capacity as a sovereign state, to withdraw unilaterally from the union. Through such unilateral withdrawal, the state concerned lawfully revokes all conferrals of sovereign powers, independently of what the relevant treaty may say.

Overall, the fact that participation in a monetary union is regarded by some as surrender of monetary sovereignty and by others as its effective exercise under contemporary economic constraints seems to a large extent to be due to the dual nature of the concept of sovereignty. As explained in this article, the concept of sovereignty can be validly approached in two ways: by focussing directly on the supreme and irreducible authority of independent states and indirectly by looking at the various sovereign powers that originally all derive from the same source, namely the capacity of independent statehood. On the one hand, this explains why one can speak of regionalization of monetary sovereignty whenever independent states decide to pool certain sovereign powers in the realm of money by transferring them to a supranational body. On the other hand, however, to the extent that the member states of a monetary union

[74] In this sense see, e.g., Lastra, *supra* note 7, at 242 and Treves, *supra* note 11, at 116.

[75] As pointed out perfectly by Treves, *supra* note 11, at 116.

[76] Prior to the introduction of TEU Art. 50, the question whether EU Member States could unilaterally withdraw from the Union had been subject to fierce debate, not only in academic writing, but also between the highest courts of the Union and its Member States. Whereas the ECJ had consistently held that the conferral of sovereign powers by member states to the Union (then still, the EC) were irrevocable, the *Bundesverfassungsgericht* had insisted in the *Maastricht* case (89 BVerfGE 155) that Member States do have the right to withdraw unilaterally. For a succinct discussion of the relevant case law and various useful references see Sarooshi, *International Organizations*, *supra* note 3, at 66–69.

can potentially recover their sovereign powers,[77] all they essentially do is to transfer to the supranational level, until further notice, certain state competences in the realm of money, but not their monetary sovereignty itself.[78]

Vast transfers of state competences in the realm of money to a monetary union imply, by definition, that the state concerned renounces, at least temporarily, the independent exercise of those competences. However, to the extent that agreeing to such transfers is what provides the state's population with a maximum of monetary and financial stability under contemporary economic constraints, it appears appropriate to analyse the underlying transfer of sovereign powers not as a surrender of monetary sovereignty, but as its effective exercise under contemporary economic constraints. As noted earlier, by entering into a monetary union, the participating states may jointly regain a margin of manoeuvre with respect to sovereign powers in the realm of money the individual, national, exercise of which had previously become more and more ineffective under the impact of economic globalization and financial integration.[79] Hence, to the extent that the economic conditions of the participating states warrant such regional integration in the first place, the transfer of far-reaching sovereign powers to a monetary union, instead of provoking the erosion of the monetary sovereignty of the participating states, may have to be regarded as the most effective means for states to reassert such sovereignty under the special form of cooperative sovereignty.[80] This analysis seems true despite, or precisely because of, the experience of the sovereign debt crisis that currently afflicts the eurozone.

The above arguments apply to a large extent also to the phenomenon of dollarization, i.e., the official or *de facto* use of a major foreign currency, such as the US$ or the euro, by the inhabitants of a given country, usually one with a very small economy, as a store of value, unit of account, and/or medium of exchange within the domestic economy. Such use of the foreign currency would be in parallel to or instead of the actual domestic currency.[81] While this issue cannot be analysed in detail as part of this article, it is worth pointing to the key reason why any country would not only want to deprive itself of any ability to conduct independent monetary and exchange rate policies but would also accept the loss of seigniorage revenues by no longer issuing its own currency. Clearly, if a country decides to dollarize its economy officially it does so with the objective of greater fiscal discipline and thus greater macroeconomic stability, the

[77] As noted above, withdrawal from a monetary union remains always an option, at least in theory, independently of what the treaty framework underlying the monetary union may say.

[78] On this point see Martucci, *supra* note 39, at 1056–1057.

[79] This point has been analysed more generally with respect to cooperation between states as undertaken through international organizations by Louis and Ronse. As put by these authors in the French original, '*[L]'exercice de compétences au sein d'institutions communes d'une organisation d'intégration ne se traduit pas en termes de 'perte' de souveraineté pour l'Etat. Adhérer à de telles organisations est le seul moyen dans un Monde globalisé de récupérer une capacité d'action qui est devenue purement formelle pour la quasi-totalité des Etats*': J.-V. Louis and T. Ronse, *L'ordre juridique de l'Union européenne* (2005), at 9–10.

[80] See Martucci, *supra* note 39, at 1060.

[81] Kosovo, Monaco, and Montenegro are examples of fully dollarized economies using the euro. Notable examples of countries relying exclusively on the US$ are the British Virgin Islands, Ecuador, El Salvador, and Panama.

objective of lower inflation rates and thus lower real exchange rate volatility, and the objective of a deepened financial system. All these objectives ultimately serve to foster monetary and financial stability, i.e., the key normative goals of the contemporary concept of monetary sovereignty as analysed in this article. Thus, just as for the decision to enter into a monetary union, the economic circumstances for a small country with a weak economy may be that thus renouncing key regulatory powers in the realm of money by dollarizing its economy is what provides that state's population with a maximum of monetary and financial stability under contemporary economic constraints.

Having reached the end of the analysis provided in this article it appears appropriate to conclude briefly as follows.

4 Conclusion

Under the contemporary definition of monetary sovereignty as elaborated in this article, and based on the inherently dual nature of sovereignty as a dynamic concept with not only positive but also constantly evolving normative components, the concept of monetary sovereignty cannot, by its very nature, become eroded under the increasingly strong impact of various economic and legal constraints. However, there is no denying that such contemporary constraints play a major role in defining which steps need to be taken in order to promote global monetary and financial stability and the other core values incorporated in, and expressed by, contemporary monetary sovereignty. As analysed in this article, the concept of monetary sovereignty is able to adapt to a constantly changing economic environment, and thereby in turn helps to define what constitutes a responsible exercise of the sovereign powers in the realm of money (as understood in a wider sense).

There is indeed little doubt that most, if not all, daily questions relating to specific rights and obligations of states, international organizations, and private persons can be asked and resolved effectively without having recourse to the concept of monetary sovereignty.[82] The conceptual revision and fundamental update provided in this article do not change this realistic observation. The findings of this article do not deny that reflections on the underlying nature of the concept of monetary sovereignty serve above all as a stimulating framework of enquiry and also as a convenient vehicle for debates on specific rights and obligations relating to the contemporary exercise of the formally exclusively national sovereign powers in the realm of money.

Yet it would be a mistake to believe that the above observations turn the concept of monetary sovereignty and its evolution as analysed herein into a subject that lawyers have no need ever to deal with.[83] As this article has attempted to show, and to the extent that we are interested not only in what the law is today, but also in gaining a better understanding of the driving and shaping forces behind the evolution of international law in the realm of money, monetary sovereignty remains arguably a timeless concept at the intersection of law, economics, and politics.

[82] Lowe was right to make this fundamental point with respect to the concept of sovereignty in general: see Lowe, *supra* note 2, at 84.

[83] For this slightly provocative, and herein refuted, view, as expressed by Lowe with respect to debates over sovereignty in general, see *ibid.*