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**Claiming Sovereignty, Backing it up,  
and being called to Follow:  
The case of Swiss-EU Bilateralism**

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## Abstract

What if Switzerland were to be asked to back up with empirical evidence its claims of sovereignty with regard to bilateral relations with the European Union? To answer this question, this paper proposes a discussion to lay the foundations of a test that can bridge the gap between theory and practice of sovereignty and avoid the scientific impasse due to the widespread neo-realist hypocrisy according to which states are sovereign until proven otherwise. This paper firstly gives a precise conceptual content to Swiss claims of sovereignty through the adoption of a deconstructionist notion of sovereignty revealing its *spectral* presence/absence consisting of the claim of a present and future ability to provide unconditioned and ordering decisions however constantly deferred. This temporal *différance* creates a hypocritical mechanism giving credibility to claims of sovereignty just due to a lack of counterevidence. Thanks to this hypocrisy, the sovereign can even retroactively claim the sovereign nature of its forced choices. Such a theorisation of sovereignty applies to and depicts Swiss claims of sovereignty in the frame of the bilateral relations with the European Union. Indeed, Switzerland claims to be sovereign as long as it can maintain the ability to have its say within that integrated supranational context. Focusing on empirical evidence from the implementation rather than negotiation of Swiss-EU bilateral agreements, any deferred temporality can be neutralised as well as any possible hypocritical claim of sovereignty.

## I. The Swiss Focus on Sovereignty

The British Army's motto "Nemo me impune lacessit" is a *claim of sovereignty* – whose ancient verbalisation is attributed by some to Julius Caesar. The principle is very simple; anyone who dares to attack the UK will suffer the consequences. The Falklands War teaches: at stake was a lot more than the Falklands themselves, or the credibility of a claim of sovereignty. Similarly, although less militarily pressurised, Switzerland has also a long tradition in the use of rhetorical claims to the possible defence and maintenance of its state sovereignty (Steinberg, 1996).

To this end, during the last decades, Switzerland has forged a particular political project. Indeed, instead of following the same path of supranational integration which led all of its European neighbours, and most of its European partners, to build up and access the European Union, Switzerland has chosen a different way, the so-called *Alleingang* - a lonely non-integrative path. It follows the Swiss concern about keeping intact its decisional autonomy and independence from influential international or supranational institutions and organisations. This produces a *sui generis* situation where "Switzerland is one of the most integrated countries in Europe. [...] In spite of the economic and cultural integration, the institutional involvement of Switzerland in the European political structures is weak" (Ambühl, 2006: 6 - Translation from the original text in German). The Swiss emphasis on decisional autonomy and independence brings about concerns (Adler and Rühli, 2015) regarding the possible compatibility between the defence of the Swiss rather unique tradition and frequent use (Kriesi, 1998, Church, 2007)

of *direct democracy* (through the *compulsory* and *optional* referenda and the *popular initiative*) on the one hand, and international cooperation on the other. In particular, the possible autonomous enactment and enforcement (*autonomer Nachvollzug*) of EU law into Swiss domestic law and the correlative possible exclusion of *direct democracy* represent a real challenge. Indeed, thanks to the ever-possible<sup>1</sup> use of direct democracy the *Swiss people* could traditionally claim the ultimate ownership and repository of Swiss sovereignty<sup>2</sup>.

This communicational aspect based on the possibility of claiming something as credible is fundamental to the economy of this article. This means that the possible evaluation of the overall *Alleingang* chosen from Switzerland and of its institutional features (such as Swiss-EU bilateralism in particular) can be read through the lens of this perspective. Indeed, it is crucial to establish if Switzerland shows any sign of consistency between the actual purpose for which the *Alleingang* is designed, namely the maintenance of the sovereignty of the Swiss people, and the political practices that ensue. In short, it needs to be understood if and how the concrete articulation of Swiss-EU bilateralism allows one to claim that the results for which it is adopted are in fact achieved. Hence, the question is not just whether there is a match between claim and result, but how can such a match be established and determined.

## II. The Reason for Sovereignty

Historically invented or not, legally positive or not, and, even, empirically achievable or not, the functioning of the Swiss claims of sovereignty clearly present the features of Althusius's approach to sovereignty which emphasises "the fiduciary responsibilities of all sovereigns, and the consent – implicit or otherwise – required through a contract (covenant) between sovereign and subjects. From this perspective, the "unmoved mover" of any sovereignty is not a sovereign, but the collective power of subjects as members of a social body. [...] Sovereign rulers are thus always beholden to the collective body that grants them political authority; by implication, what is yielded can be rescinded" (Pavlich and Barbour, 2010: 2-3).

This fiduciary responsibility depicts the basis of a fundamental feature of sovereignty that consists of the sovereign-subject *relational dimension*. The latter crucially rests upon the idea that the governmental authority is *subject* to the (tacit or not) fiduciary consent of the *sovereign* people. Consistently, Swiss citizens – the Swiss *people* – aim to keep their sovereign fiduciary

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<sup>1</sup> The use of direct democracy comprises any possible decision on the Constitutional and legal review and the ratification and entry into force of international treaties (Auer et al., 2006: 14).

<sup>2</sup> Many reflections could be made about the political, legal, and philosophical implications related to the attribution of sovereignty to the people. To mention a few, *the people* has a precise historical origin (Jackson, 2007: 58) that, in legal terms, is therefore more positive than natural (Loughlin, 2010: 111). Moreover, the idea of *popular sovereignty* was mainly invented as a monarchomach reaction to the dynastical power of the kingdom. *In nuce*, once the idea of *the people* was invented, it was easier to speak of its *inalienable* right to sovereignty. For instance, "Rousseau's sovereignty originates in the people and it ought to stay there" (Held, 2006: 46).

power, and correlative *veto-playing* ability, with regards to the governmental leeway and to any of its decisions. Politically speaking, such a veto-power provides the Swiss people with the sovereign power to sanction the “governmental subject”. Notoriously, this occurred when Swiss citizens used this fiduciary idea of popular sovereignty to sanction the Swiss government and reject the accession to the European Economic Area (EEA) in 1992 (Kriesi et al., 1993), as previously negotiated and supported by the Swiss Federal Council of that time. In these circumstances, the Swiss sovereign people not only symbolically, but also very concretely, suspended fiduciary relations with the government in what pertains to national relations with the EU.

That crucial episode in recent Swiss political history led to the search for alternative paths to restore the fiduciary sovereign-subject relation in the domain of the Swiss-EU relations. As an alternative, Swiss citizens accepted the formalisation of their relations with the European Union through the adoption of sector by sector bilateral agreements (Vahl and Grolimund, 2006) as proposed by the government. Indeed, this sectorial strategy – inaugurated in the 1972 with the Free Trade Agreement with the EU – was recovered and increased through two packages of Swiss-EU bilateral agreements (so-called bilateral agreements I and II, hereafter referred to as BAs I & II). These agreements between Switzerland and the EU constitute the formal way through which the Swiss sovereign people has until today affirmed its will to shape relations with the European Union.

This does not mean that current relations are not subject to changes or unexpected events. Indeed, Switzerland deals with pressures to move forward towards further integration with the EU. Accordingly, Swiss–EU relations in this regard may be summarised as follows. First, the sector by sector strategy of bilateral agreements is considered to be appropriate to defend Swiss interests with regards to EU affairs (Vahl and Grolimund, 2006: 4). Second, questioning of that strategy is not only rather improbable, but the government has even been considering its possible incremental evolution, either by putting together BAs I and II under the same legal label (The Swiss Confederation, 2007), or by negotiating a third package of bilateral agreements<sup>3</sup>. Third, there has been an ever-increasing pressure from Brussels, recognised at the highest level of the Swiss government (swissinfo.ch, 2010a, swissinfo.ch, 2010b), requesting further integrative steps. Fourth, the EU specifically calls on Switzerland to autonomously adopt, and adapt to, EU law within the domain of the integrated sectors (i.e. those shaped by existing and future bilateral agreements). Finally, the latter point does not seem to be negotiable since, as Mme Leuthard formally stated<sup>4</sup>, Switzerland insists on “having a say” (swissinfo.ch, 2010b), before adopting any automatically binding law.

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<sup>3</sup> “Switzerland might even consider a bilateral association with the EU as a way of strengthening political dialogue and as a platform for the development of relations in the future” (The Swiss Confederation, 2006: 2)

<sup>4</sup> Mrs Leuthard is the former Swiss president and current Federal Councillor and Minister (Head) of the Federal Department of the Environment, Transport, Energy and Communications.

The problem of EU pressure on Switzerland on one side, and the latter's emphasis on the importance of maintaining its sovereignty on the other, reached its peak after Switzerland accepted the federal popular initiative entitled "Against mass immigration" with a tight majority of 50.3% of voters. In essence, this popular initiative, that exemplifies the principle of popular sovereignty through direct democracy, enhanced the complexity of Swiss-EU bilateral relations since it challenged the implementation of the existing BAs. Particularly, the implementation of this initiative in Swiss law collides with the principle of free movement of persons already introduced in Switzerland by the BAs I.

Given that the EU exerted pressures on Switzerland to vote again on the same issue because it did not accept any limitation of this single BA without jeopardising all the two BAs packages, it followed a legal, political, and diplomatic impasse producing two elements of particular relevance. First, the Swiss government showed discomfort with the situation created by the popular use of direct democracy and aired the opportunity to vote again to break the deadlock<sup>5</sup>. Second, the Swiss government complained of having to find a solution to a very thorny problem that it did not create directly. In particular, the Swiss justice Minister Mme Sommaruga<sup>6</sup> publicly declared that a second vote on the same issue would be "extremely dangerous" (Sda-Ats, 2015) and claimed that the Federal Council can not be attributed any responsibility for the situation created by asking: "But is it the Federal Council which created this situation?" (Sda-Ats, 2015). This cryptic question is ambivalent. First it reveals uneasiness on the part of the *subject* toward its *sovereign*. Put differently, the Swiss government seems to be in the position of taking action on the sovereign will against its own will. Second and foremost, the Swiss government claims some difficulty in having political room for manoeuvre. This is why "having a say" is seen by Switzerland as a crucial matter and represents a keystone that cannot be renounced to defend Swiss state sovereignty. Unless Swiss-EU bilateralism puts in danger the Swiss ability to "have a say" – also through the use of direct democracy – such an institutional set-up is taken as fitting well with the Swiss aim of maintaining Swiss sovereignty.

However, the difficult implementation of the popular initiative "Against mass immigration", hardly compatible with the BAs, *de facto* manifests the possible presence of information asymmetry between what the Swiss popular will claims, declares, and says and what can be sovereignly obtained through the activity of the governmental agent, the subject. But this possible discrepancy between what the sovereign expects to achieve and what the subject knows he can concretely obtain now comes only as a result of the events mentioned above or has a prior presence? Put differently, the question therefore arises as to whether the implementation of the BAs between Switzerland and the European Union actually allow claiming that Swiss state sovereignty is maintained. As well as the Federal Council knows and denounces the complexity of the current situation issued from the vote

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<sup>5</sup>To this end, see for instance the declaration of the Federal Councillor Widmer-Schlumpf in early 2015 (Rist and Gemperli, 2015).

<sup>6</sup>Federal Councillor and Head of the Federal Department of Justice and Police.

on the initiative “Against mass immigration”, what do they say those subjects who more broadly deal on a daily basis with the BAs? Under which circumstances, and to what extent, do bilateral agreements allow Switzerland to claim having a (sovereign) say?

If there may be certain vagueness concerning the meaning and importance of being in the condition of “claiming to have a sovereign say”, there are, on the contrary, very specific features that characterise the institutional set-up of the bilateral agreements, making them particularly appropriate to answer these questions. Indeed, most of the time, their implementation passes through the activity of ad hoc settled Swiss-EU *joint committees*, or by Swiss and EU high civil servants and experts working side-by-side, day-by-day. Consequently, there is no doubt that Swiss officials participating in such activities are aware of the effectiveness of the BAs as a means to keep the Swiss sovereign say. Before addressing them, however, it is necessary to fill the above theoretical vacuum concerning the meaning and relevance of being in the condition of claiming to “have a sovereign say” in order to understand why that fact relates to the maintenance of the state sovereignty. What is the relationship between “having a say”, on the one side, and maintaining sovereignty, on the other?

To know whether the Swiss-EU BAs affect Swiss sovereignty it is necessary to put in perspective the “what is sovereignty?” question and why the possible lack of “having a say” would deal with the sovereignty issue. Indeed, this sort of question must be tackled in order to understand the reasons why the claim of having a sovereign say is so very important in maintaining Swiss sovereignty.

The origin of these unavoidable questions may be found in the fast-growing literature depicting the enhanced difficulty to claim that (modern) states are sovereign. Indeed, a robust literature, with varying theoretical and methodological approaches, has widely shown how the state sovereignty, particularly in its *modern* Westphalian conception, has constantly been put under pressure, perhaps even more so in current times (MacCormick, 1993, MacCormick, 2010, Negri, 2010, Lipping, 2010, Pürimäe, 2010, Pavlich, 2010, Joyce, 2010, De Ville, 2010, Caporaso, 2000, Lake, 2006, Camilleri and Falk, 1992, Aalberts, 2004, Skinner and Kalmo, 2010, Beitz, 1991, Held, 1991, Held, 1995, Litfin, 1997, Connolly, 2007). To this end, Sassen (1996, 2007) offers an interesting analysis illustrating a changing social perception of modern sovereignty, rather than a substantial change. That is to say that the level of analysis is placed not so much on the *substance* (or content) of sovereignty, but rather on that of his appearance (or form). Consequently, the problem of answering questions such as “what is sovereignty?” or “who is sovereign?” has shifted towards a *formalistic* dimension rather than of content. Put differently, there seem to be politics whose sovereignty is formally recognised despite a sceptical perception concerning their factual sovereignty.

The supranational integration process provides an example of that changing trend since it has notoriously helped to reframe the logic on how to determine whether or not a given political entity owns some sort of

sovereignty, and to what extent. Indeed, the “*who is sovereign?*” question has started to appear daily within media coverage of major worldwide political events thus suggesting the perception of a possible shift of *factual sovereignty*, especially when conceived in terms of *policy competence*, from the domestic domain of states towards that of supranational powers, such as for instance the European Union (Walker, 2011, Eriksen, 2011, Neyer, 2011, Beck and Grande, 2011), and the UN (Negri, 2010, Manners, 2011).

As far as this discussion is concerned, answering these questions on sovereignty, and on that of Swiss sovereignty particularly, firstly requires us to move beyond conventional and aprioristic assumptions that claim that a state such as Switzerland is by definition sovereign by virtue of its *formal* sovereignty. Moreover, not supported by any empirical evidence, these assumptions are misleading since they are unable to analyse and explain concrete events such as those apparently pushing Switzerland to vote again on the same popular initiative. It follows that an appropriate approach to answer such questions on sovereignty must be able to distinguish between *formal* and *factual*. In particular, the latter must be emphasised. Indeed, in order to have a scientific rather than political posture on the subject, it is necessary to start by asking what concretely implies that activity of being sovereign frequently claimed, and sometimes even recognised, to given political entities. In a word, speaking of and assessing someone’s or something’s sovereignty requires prior *conceptualisation* (Sartori, 1970, Sartori et al., 1975).

To this end, Aristotle’s lesson explaining the presence of the matter because of its *function* – the so-called *function argument* (Aristotle, 2003 [350 BC], Korsgaard, 2008) – allows for the hypothesis that claiming sovereignty must inevitably have an effect, perhaps even some advantage. If being considered sovereign had no effect or benefit, no one (not even states) would lose time and energy to claim sovereignty. Very importantly, it follows that the one thing that is certainly known about sovereignty is that *it is worth claiming*. Politically speaking, despite the ontological contestedness and elusiveness of sovereignty (Sarooshi, 2004, Besson, 2004) there must necessarily be at least a (preferable) *reason* for claiming sovereignty rather than not. The logic suggests that the crucial question to be treated before any other becomes the “*why sovereignty?*” question. Indeed, the Swiss affairs mentioned above show that this country does not escape that logic since Switzerland formally opts for claiming its sovereignty - as for instance through the possible and unlimited use of Swiss direct democracy, or also within the implementation of the BAs.

At this stage, three steps must be followed. First, a general reason why states decide to claim sovereignty must be looked for. Second, the reason and features of the Swiss claim of sovereignty must be better defined. Third, it must be investigated whether the Swiss reason proves to be appropriate. As will be seen, the latter point particularly refers to the case where Switzerland would be asked to give content to its claims of sovereignty by revealing its reasons, its intent, and thus be subject to the evaluation of the success of its claim of sovereignty.

### III. The sovereign order as a promise of order

The “why sovereignty?” question, grounded on the application of Aristotle’s functional approach, calls to determine which need the use of those claims of sovereignty is trying to fill, with varying success. Why is the presence of sovereignty important enough to push such claims? Indeed, the basic question simply arises as to why there is a need for sovereignty and what reason there could be for having it. This question is particularly relevant by taking into consideration the further pertinence of the so-called *anxious*, or *agonal ontology* characterising many approaches to the general study of politics (Machiavelli, 2008), and of sovereignty in particular (Schmitt, 2005 [1922])<sup>7</sup>. Accordingly, *war*, *conflict*, would be the origin of all existing things, including sovereignty, and both Machiavelli and Schmitt consider politics and sovereignty to have necessarily arisen from a starting conflict. Indeed, something’s, or someone’s existence would necessarily depend on the conflictual opposition of something else<sup>8</sup>. Consequently, if something like sovereignty exists, it must necessarily be due to its ability to resist, oppose, and distinguish itself from something else and, in particular, its opposite.

This approach to the existence of things through an oppositional *logic* has not only a – rather intuitive – spatial dimension, but also – and foremost in respect to the economy of this discussion – a temporal dimension with precise empirical implications. Indeed, for Derrida, in order to exist, everything must resist its opposite/enemy *at the same time and all the time* (Derrida, 2005b: 6-17) to allow presence and prevent disappearance. In temporal terms, existence thus requires the parallel risk of disappearance at *any time*, and the incumbent menace of nothingness. Derrida thus conceives sovereignty as that *mythical* condition apparently allowing unconditional and self-positing presence, or existence, or life *without the limits* imposed by the risk of the opposite’s, of the enemy’s, possible coming at any time and potentially causing disappearance (Derrida, 2009, Regazzoni, 2008, Derrida, 2005b)<sup>9</sup>. Indeed, the word “sovereignty” itself derives from the Latin word *superanus*<sup>10</sup>, or the Latin present participle *superans*, indicating that thing currently overcoming, still and steadily going beyond (Derrida, 2008: 42). Etymologically, it indicates someone’s or something’s ability to go beyond the opposite, thus obtaining existence in opposition to limits, barriers, frontiers, and any other form of alterity<sup>11</sup>. Derrida calls *ipseity* this presumed self-positing ability attributed to sovereignty and consisting of making possible the ability to give life to themselves and to others. As Joyce explains:

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<sup>7</sup> On Schmitt’s and Machiavelli’s agonal ontology see Loughlin (2004: 39-41).

<sup>8</sup> See Severino’s description of Heraclitus’ *Pòlemos*, and the *fight between opposites* (2011: 22).

<sup>9</sup> Ferraris (2011) explains, that many of Derrida’s works are related and rest upon that agonal ontology leading him to treat sovereignty as the ever returning *spectre of unconditionality* (Derrida, 1987, 1993, 1996, 2002, 2005b, 2007, 2008, 2009, 2010, 2010 [1994], De Ville, 2010, Regazzoni, 2008, Derrida, 2012, Derrida, 2005a).

<sup>10</sup> Both *superans*, or what is currently going beyond, and *superūlum*, or to surpass, thus overcoming, overwhelming, overpowering – especially limits, obstacles, enemies, *hostes* – have the same etymological origin.

<sup>11</sup> Heraclitus calls it “duality”.



“At the heart of Derrida’s work on sovereignty is the relation between selfhood and autonomy. That is, the relation between a self’s self-designation (what it is) and the authority it claims over itself (what it can authorize itself to do). This relation can be reduced to what is at stake whenever someone says, for themselves, the two words “I can ...” (Derrida, 2005b: 11)”(Joyce, 2010: 46).

In functional terms, the *reason for sovereignty* therefore appears as *an answer to the need for life*, for existence and any *claim of sovereignty* is aimed at satisfying and heartening someone’s or something’s need for life. Moreover, any claimed *presence* of sovereignty aims at convincing about that possible satisfaction thanks to a given (sovereign) entity, within a given polity. However, Derrida explains in detail that sovereignty is expected to bring about life because the sovereign “is instituted as sovereign by the possibility of the enemy, by that hostility in which Schmitt claimed to recognise, along with the possibility of the political, the very possibility of the sovereign, of sovereign decision and exception” (Derrida, 2009: 10).

It follows that the *undeniable* and *incontestable* possibility to adopt decisions – that can be claimed as *free* and *autonomous*, *self-positing* with respect to the presence of any possible otherness – is the way through which any actor claiming sovereignty is expected to prove the truthfulness of his/her claim of sovereignty (Derrida, 2005b: chapters II and III). In other words, the credible presence of sovereignty within a given polity does not depend on the effective satisfaction *hic et nunc* of the need for life, but on the belief that there is the possibility to satisfy that need for life<sup>12</sup>. Therefore, providing the belief in the *possible adoption* of free and autonomous self-positing *decisions* is the expected sovereign’s way of bringing life. It also follows that sovereignty certainly stops being what it is supposed to be when it is proven as not deciding, or *ordering* anymore, or when it is concretely prevented from functioning as a credible source of *order*. By extension, the enemy of any claim of sovereignty, what neutralises it, consists of the inability to believe in the *present* and *future* possibility to decide, to sovereignly order and create the sovereign *legal* order that gives life.

Assuming that sovereignty deals indeed with the ability of creating order (and the *legal* order itself, the law – even in a paradoxical *inside-out* manner<sup>13</sup>), this leads us to wonder whether there are orders that are not sovereign, and how it is possible to distinguish them from authentic sovereign orders. Put differently, if the possibility of yielding sovereign legal *order* is evidence of the presence of that decision-making power that is characteristic of sovereignty, when does it occur and what form does it take the absence of a sovereign order and the correlative sovereign decision? What exactly makes a legal order a sovereign order?

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<sup>12</sup> This space/time deferred verifiability of the presence of sovereignty regards the Derridean concept of *différance* (Derrida, 1997 [1974], Derrida, 2010).

<sup>13</sup> “I, the sovereign, who am outside the law, declare that there is nothing outside the law” (Agamben, 1998: 17).

Agamben's archaeology of orders clarifies this point hypothesising that the very beginnings of linguistic communication provides an inspiring proposal. Accordingly, human communication would not move from the original *constative* act of communication – that is grasped by the descriptive infinitive verb “to be” – but from the *performative* “be!”. Consequently, the imperative form of communication would also precede the indicative form (Agamben, 2011) and the performative act of ordering someone or something “be!” would have a sovereign connotation to the extent that there is an indicative correspondence. Indeed, the phenomenology of the sovereign order occurs through a communicative action, or *speech act*, aiming at making something real and *alive*, since *really happening*. The performative order “be!” must produce an equivalent state of affairs corresponding to the “to be” constative, and the sovereign order can be *really* taken as such if, and only if, it finds concrete and equivalent application when shifting from the sovereign order to the action.

Agamben's hypothesis appears compatible and complementary to Derrida's theory of sovereignty, conceived as a matter of a deferred time/space communication. On the one hand, the *imperative/ordering* form of communication must temporally precede the *indicative* form. Namely, I cannot be the obedient subject claiming for the respect of the sovereign order if there is not a *previous order* to respect. On the other hand, the very prerogative of the sovereign order is that of making the “be!” becoming a “to be”, or making them *same* by deleting any possible space/time *différance* between the performative and the constative. Sovereignty, thus, takes the shape of a *speech act* whose content must find concrete existence.

It follows that the *spectral* connotation of sovereignty also rests upon a temporal *différance*. Indeed, the sovereign order has thus a *deferred* temporal accountability that allows the distinction between two phases: what is initially ordered, and what this order then achieves. Accordingly, the sovereign order is not necessarily an effective decision yet (like the one on the state of exception), but a *promise* of both the constant and future ability to decide, all the time and at all times, since having the sovereign faculty to produce and make effective sovereign orders. This necessarily raises the question of the *credibility* of any claim of sovereignty stating that sovereignty would be *present* whereas being, *at same time*, also *absent* since still to come in concrete. The credibility of this spectral presence/absence is all to be determined. Indeed, whatever claim of sovereignty is credible depending on the ability to produce a perfect match between the sovereign order and its factual outcome by making possible the presence of *différance*.

As for any other performative, the claim of sovereignty and its correlative promise of ipseity may therefore be credible or not depending on the observation of a match between the performative and constative. In essence, this mechanism of *différance* works as if the sovereign was trying to buy time to convince us that it is and will be able to really do what was and is promised. Such a mechanism works if, all the time and at all times, the sovereign can be recognised as the promoter of what happened, and its sovereignty continues since being *credible* and formally *undeniable*. For the sovereign it is so fundamental to maintain credible the claim that its action

is possible now and still possible in the future. And this is why it is crucial that the sovereign maintains a *credible opening* to its possible sovereign action *to come*.

This leads us to better understand what is the point of the issue of bilateral agreements between Switzerland and the European Union. The formalisation, within specific political systems such as states, of precise claims of sovereignty creates accountability in terms of credibility of the claims of sovereignty themselves. Certainly, it is more difficult for states to maintain the credibility of their claims of sovereignty in a democratic regime. Indeed, political entities such as authoritarian states may decide not to formalise their claims of sovereignty and obtain credibility thanks to a rather structural lack of accountability. On the other hand, political entities openly formulating and formalising the expected *form* and *content* of their claimed ability to be and remain sovereign must be able to comply and follow credibly. In other words, once democratically formalised, the claim of being able to make sovereign decisions and produce effective orders becomes subject to empirical testability. The stake is to lose credibility similar to Rousseau's description of the Japanese charlatan promising sovereignty without the credible possibility of combining the sovereign performative and constative (Baranger, 2010: 62).

At this point, two questions arise. First, under bilateral agreements between Switzerland and the European Union, what is the content of the claim of Swiss sovereignty? Second, such a claim of sovereignty is credibly maintained in the face of a possible empirical testability? If the first question can be rather easily answered thanks to what was previously discussed – or the Swiss concern *to keep having a sovereign say* also within the BAs in line with the tradition of direct democracy – the second calls to determine how to concretely test the credible presence of such a content in the current claims of Swiss sovereignty within the BAs.

#### **IV. Empirical limits in testing state sovereignty**

A substantial literature on early modern theories of sovereignty<sup>14</sup> confirms that the performative and the constative of sovereignty (or *formal* and *factual* sovereignty) unavoidably seem to differ within democratic political systems (Pusterla, 2013). Nevertheless, a heuristically powerful argument within the recent IR literature has pointed out that polities such as states may be considered sovereign *until proven otherwise*. The record of a (perhaps even unavoidable) difference between the sovereign performative and constative would not really affect the credibility of the claims of sovereignty, but simply produce what is called the *hypocrisy of sovereignty* (Krasner, 1999). The latter would be within the field of what can be *credibly* claimed as being sovereign.

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<sup>14</sup> See Bodin (1962 [1576]), Locke (2003 [1689]), Rousseau (1997 [1762]), Dunn (1992, 1969), Franklin (2006, 1978, 1973), Ashcraft (1986), Walker (1991), Wintgens (2001), Terrel (2001), Putterman (2005), Kelly (2007), Lewis (2006), McRae (2006), Boucher (2009), Joyce, 2013).

In essence, Krasner's approach to sovereignty as an *organised hypocrisy* affirms that states may *de facto* be unable to match their performative claims of sovereignty with the constative reality. However, they may still be taken as credibly sovereign thanks to a logic allowing either to produce temporally retroactive claims of sovereignty that apply to the past, or thanks to a lack of empirical counterevidence. This "hypocritical organisation of sovereignty" fundamentally argues that a possible gap between the sovereign order and its concrete application is in fact due to their sovereign will. As is evident, such an argument rests upon the presence of a *hypocritical epistemology* allowing the affirmation "it cannot be proven otherwise". States must somehow be sovereign because it cannot be proven otherwise. Accordingly, by emphasising utilities rather than formal procedures, states may always claim – also retroactively by default of empirical counterevidence – their sovereign role in creating any *gap* between the performative claim of sovereignty and the following constative reality.

This argument is particularly important precisely because of the discussion regarding Derrida's spectrality<sup>15</sup> (Derrida, 2010 [1994]). Krasner's organised hypocrisy of sovereignty finds a logical solution to propose a positive argument (i.e. that a given state is sovereign) through an apparently unchallengeable hypocritical epistemology (i.e. there is no rebuttal). It appears clear that this triggers a spectral presence/absence mechanism that makes it more difficult to recognise the presence of charlatans claiming sovereignty without any reason. Krasner's sovereign performative, instead of saying "*in case of necessity, I decide, hic et nunc*" says "*in that past case of necessity, it was me who decided*". Krasner's concept of sovereignty as an organised hypocrisy indeed provides the possibility to produce vague and empty performatives empirically applied to the past and retroactively having perfect correspondence with the present constative. Indeed, the *retroactive* claim of sovereignty "*...it was me who decided*" neutralises the possible existence of any gap between any sovereign performative and constative<sup>16</sup>. Krasner's approach to sovereignty – and the related empirical evidence he provides to affirm sovereignty as an organised hypocrisy – thus exemplifies the *mythical* spectrality that applies to sovereignty as theorised by Derrida. The very idea that sovereignty may perhaps not belong to the state in the mode formally planned, but that states are somehow still sovereign since complacent over the course of events that may affect them both domestically and internationally and sovereignty, wherever it is located, thus remains their emanation, assumes the presence of (at least one) organising entity, or of a sovereignty. In a nutshell, the ontological position of Krasner consists of affirming that sovereignty *is organised*, which is to say that there is sovereignty, that sovereignty exists, and that it remains only to determine empirically who is its holder, while bearing in mind that states are suitable candidates for just such a purpose.

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<sup>15</sup> "If there is something like spectrality, there are reasons to doubt this reassuring order of presents and, especially, the border between the present, the actual or present reality of the present, and everything that can be opposed to it: absence, non-presence, non-effectivity, inactuality, virtuality, or even the simulacrum in general and so forth. There is first of all the doubtful contemporaneity of the present to itself" (Derrida, 2010 [1994]: 48).

<sup>16</sup> This is how and why the presence of formally recognised sovereign entities and their historical endurance is frequently taken as a proof of sovereignty (Krasner, 2010).

For instance, using the ‘*until proven otherwise*’ argument, any Swiss claim of sovereignty in the form of having a sovereign say would be unproven as well as undeniable. This is similar to what occurs in the decision to vote again on the popular initiative “Against mass immigration”. Even if the subject warmly invites – and perhaps even forces – the sovereign to take a different decision, the latter may hypocritically remain sovereign just because it may always claim its decisional autonomy to sovereignly retrace its steps. In other words, there is no evidence that the Swiss sovereignty was forced (and limited) to act, thus losing (at least part if not all of its) sovereignty. In other words, Krasner’s until-proven-otherwise-sovereignty is a formal loophole that neutralises any sovereign temporality and has validity because of the (apparent) logical, epistemological, and methodological inability to provide rebuttals and counterevidence.

Moreover, unlike what neo-positivism prescribes, this approach does not respect the criteria of falsifiability. On the contrary, this claimed realism even takes advantage of such an epistemological blank. Indeed, the key to the reading provided by Derrida’s analysis allows in this case deconstructing appropriately the hypocrisy associated with this neo-realist approach argument carpeted with positivism while, like it or not (Krasner, 1996), not providing data that are substantially different from those *interpretations* typical of so mistreated critical approaches (Merlingen, 2013, Campbell, 2013). Assuming the necessity to refuse scientific apriorisms, but more importantly logical stretching and epistemological distortions, it must be determined whether and in what way evidence may be collected in order to overcome unfalsifiable approaches such as Krasner’s. In essence, it is to neutralise the use of that hypocritical mechanism that allows someone to say that, whatever happens, even if it is manifestly illogical, Switzerland will keep having a sovereign say within the BAs simply because of the lack of counterevidence. In other words, one cannot accept that the credibility of sovereignty is hypocritically and spectrally present, perhaps in the form of state rhetoric and propaganda, thanks to a hypocritical epistemology devoid of any evidence.

## **V. Testing sovereignty within policy implementation**

In principle, the sovereign can always deny its decision and make this evidence of his undisputed sovereignty. Indeed, the sovereign Swiss voters could retrace their steps as a result of many pressures, for example in respect of the said initiative “Against mass immigration”, but still claim to act in the midst of Swiss sovereignty. Formally speaking, the decision to abolish the previous decision is indeed a sovereign decision, although the spectral element is clearly perceived. That is, at some time between one decision and the other, both hypocritically sovereign from the formal point of view, the sovereign may be under the influence of pressures that undermine its sovereignty. It can even be hypothesised that someone, some relevant people, will be able to testify that the sovereign could lose, between one decision and the other, at least part of its sovereignty. This would happen if the following two cumulative events were to occur.

- A. The sovereign *is not* the promoter of a given decision that concretely affects the subject(s).
- B. Even if the sovereign becomes aware of A, the sovereign *cannot* take a new decision that amend A and is able to restore the initial status quo.

In this case, the spectrality of the correlative claim of sovereignty would be clearly brought to light and could no longer be used to reclaim its own sovereignty for lack of evidence. But who can reveal the presence of such events, and in what context?

Referring to the case-study of this research, the Swiss claim of maintaining state sovereignty within Swiss-EU bilateral relations, the empirical focalisation on a specific *actor* (hereafter referred to as *subject-agent*) provides us with the answer. Conceiving the possible recognition of the credibility of a claim of sovereignty in relational terms (Loughlin, 2004: 65)<sup>17</sup>, it can certainly be stated that the credibility of a claim of sovereignty factually depends on the subject's recognition. If the sovereign is expected to be sovereign in accordance with his own claim of sovereignty, the subject is expected to obey sovereign orders, thus implicitly recognising the former's sovereignty, and also to be able to confirm his compliance with the sovereign order itself. Therefore, between these two actors - the one claiming sovereignty and the other recognising that claim - only the latter (i.e. the subject) may de facto reveal the credibility of the sovereign's claim.

Generally speaking, this sovereign-subject relationship may therefore be compared to the *principal-agent* one, where the agent is able to more or less explicitly, openly, and willingly reveal – through its professional expertise and thanks to its information, whether or not it is compliant with the principal's orders and sovereign will. Indeed, it is the subject that may, in practice, reveal whether he recognises the sovereign's sovereignty. Empirically, this suggests the possible application of the logic taken from the delegation theory to settle a methodological approach able to grasp the credibility of given claims of sovereignty. Indeed, this allows entering the domain of the concrete functioning of a given polity claiming for its sovereignty and composed of a sovereign-subject relation such a Switzerland itself.

This particularly helps to analyse the subject's compliance within the *implementation*<sup>18</sup> of policies in respect to the sovereign order. Indeed, the implementation of any policy constitutes and represents the ideal fieldwork

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<sup>17</sup> Quoting Croce, Loughlin explains: "Sovereignty, it follows, is the name given to express the quality of the political relationship that is formed between the state and the people, or the sovereign and the subject. This relational aspect of sovereignty is highlighted by Croce. "In the relationship between ruler and ruled, [...], sovereignty belongs to neither but to the relationship itself" (Croce, 1945: 17)" (Loughlin, 2004: 83).

<sup>18</sup> The policy cycle, or policy process, is composed of four phases that are *initiation*, *formulation*, *implementation*, and *evaluation* (Heywood, 2007: 430). Using a dichotomous distinction between a prior moment in which the polity decides to decide, and a following moment during which the decision is made operative, two more general phases of the policy process can be distinguished, or *negotiation* and *implementation*.

in which empirical evidence of the credibility of the claim of sovereignty may be collected. If, as Ilgen states, “Sovereignty is the capacity to make binding decisions in political and social contexts and to assure the implementation of those decisions” (Ilgen, 2003: 10), it follows that the ability to implement what is decided becomes crucial. Indeed, with regards to the Swiss-EU case-study, the implementation of Swiss policies and the way they allow Switzerland to credibly keep having a sovereign say becomes crucial.

In this and other occasions, Switzerland can be assumed to be working to defend the *organised hypocrisy of sovereignty* for lack of counterevidence. Statements like that of Simonetta Sommaruga – where an eminent member of the Swiss government reveals the subject-agent’s discomfort with the request of the sovereign that could perhaps not be applicable and implemented – do not allow for avoiding *différance*. Indeed, the retroactive credibility of a claim of sovereignty could always come to explain how voting again on a same issue would not be a forced choice to exit from a serious embarrassment, but an autonomous sovereign decision. Consequently, the credibility of the Swiss claim of having and keeping a sovereign say within the Swiss-EU BAs can only be tested by neutralising any possibility of the retroactive hypocrisy of sovereignty. Indeed, if the credibility of the Swiss claim of sovereignty takes the concrete shape of “having a say”, unless the ability of “having a say” is refuted, Krasner’s *organised* sovereign hypocrisy applies. This is why events A and B described above are the only ones able to tell something about the non-hypocritical credibility of a claim of sovereignty. In other words, the bilateral agreement strategy can continue to be seen by Switzerland as the panacea to maintain state sovereignty unless the presence of A and B decreases the credibility of the claim according to which BAs allows having and keeping a Swiss sovereign say. Therefore, even if the (implementation of) Swiss-EU bilateral agreements seem to allow claiming the undeniable maintaining of Swiss state sovereignty *until proven otherwise*, it is time to test whether A and B occur within the implementation of BAs I and II<sup>19</sup>.

## VI. Sovereign implementation until proven otherwise

Logically, the Swiss claim of sovereignty equally applies to all Swiss policies. In fact, it does not even need to resort to Bodin’s (1962 [1576]) definition of perpetual, indivisible, and absolute sovereignty to understand that the very sovereignty claimed by Switzerland must be the same independently from the observed policy. It follows that the presence of A and B can be

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<sup>19</sup> “Even if bilateralism has undisputed merits for Switzerland today, its longer-term sustainability and usefulness can by no means be taken for granted. In particular, questions remain over the balance sheet of sovereignty and the domestic and foreign-policy vulnerabilities associated with the bilateral approach. The degree of factual sovereignty of Switzerland as a non-member of the EU is declining. In view of its economic dependency on the European market, Switzerland has been forced for two decades to adapt its legislation more and more to EU laws without being able to influence the development of the latter. The instances of “autonomous duplication” (*autonomer Nachvollzug*) or unilateral adaptation of Swiss law to EU law without a legal basis cannot be quantified, but are significant. The bilateral agreements also oblige Switzerland increasingly to adapt community law” (Möckli, 2008).

observed by comparing the implementation of *domestic* and *integrated* policies. This is to say that the presence of A and B can *per se* be subject to the retroactive hypocrisy of sovereignty, but not anymore if A and B vary, *at the same time*, depending on the observed policy. In essence, the synchronicity of the comparative analysis neutralises any possible diachronic hypocrisy. Indeed, the presence of A and B in the implementation of a given policy can still allow claiming for the organised nature of that event. However, it is impossible to claim that the sovereignty expected to be somewhere must be conceived differently from that being elsewhere. Following the same Swiss logic of sovereignty, the latter is expressed in “having a sovereign say”, and this cannot be further qualified depending on the given Swiss policy without losing credibility. Having a say only means having to say, regardless of the individual policy.

Therefore, comparing the presence of A and B, the claim of sovereignty within the implementation of BAs I and II can be compared to those policies in which neither the competence, nor the implementation, are shared or integrated. So doing, the claim of “having a sovereign say” within the implementation of policies falling within the scope of BAs can be compared to Swiss domestic policies.

Indeed, if domestic policies (and their implementation) are by definition sovereign *until proven otherwise*, their level of A and B can be used as a cornerstone to observe whether A and B varies within integrated policies. Given the *incontestably organised hypocrisy* characterising the implementation of Swiss domestic policies, the latter can be taken as the cornerstone to compare what happens within the implementation of integrated policies, such as those of BAs I and II. The implementation of Swiss domestic policy thus represents the “until proven otherwise” *zero level of Swiss sovereignty hypocrisy*. Furthermore, it must not be forgotten that the very reason for having BAs I and II is that they are precisely supposed to enable the sovereign to maintain “having a say” that Switzerland formally has within its domestic public policies.

In order to compare the presence of A and B within the implementation of *domestic* and *integrated* policies respectively, the Swiss subject-agent with knowledge of both cases has been questioned. Statistical data<sup>20</sup> from an expert survey addressed to the Swiss high civil servants<sup>21</sup> dealing with the implementation of the Swiss-EU bilateral agreements reveals a number of relevant findings.

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<sup>20</sup> Statistics are obtained through the analysis of variance (i.e. one-way ANOVAs with both different groups and repeated measures).

<sup>21</sup> See Pusterla (2016) for detailed methods and statistical analysis. The participation in the implementation of BAs I & II was the criterion to eligible participation in the survey, the number of 42 officials was reached and three rounds of the same questions was completed, concerning their concrete activities occurring within: Implementation of Swiss public policies; Implementation of Bilateral Agreements; and Implementation of Bilateral Agreements with Joint Committees. The first kind of implementation cornerstone to compare the second and third that similarly refer to the implementation of already integrated sectors, therefore constituting the BAs – however, they differently implement the BAs with or without the settlement of ad hoc Swiss-EU joint committees.



## VII. Preliminary findings

As a short summary (see Appendix) of the most extensive statistical data – whose articulated collection and important analysis cannot be extensively proposed here but are widely presented and elaborated elsewhere (Pusterla, 2016) and to which the reader is invited to address – shows first that there is overall evidence that policy integration matters.

Indeed, there are so many significant results that it is impossible to claim that the implementation of Swiss domestic policies is the same as that of the BAs. In concrete terms, it means that the Swiss “having a say” within the implementation of BAs I and II – would they be implemented with or without the settlement of Swiss-EU joint committees – clearly changes with respect to that of the Swiss domestic policies. It simply follows that bilateralism and implementation through joint committees factually affects the Swiss “having a say”. Put another way, the “having a say” that the Swiss sovereign may credibly claim within the implementation of Swiss domestic policies or unavoidable lack of counterevidence (see the domestic incontestability of the claim of organised hypocrisy of sovereignty) is not the same “having a say” that occurs within the implementation of BAs.

Secondly, this relevant record is followed by a further possibility to consider whether A and B occur within the implementation of BAs. Indeed, the first record reveals how the “Swiss sovereign say” varies depending on either the *domestic* or *integrated* nature of the policy implementation. It is now interesting to see in which way it changes. Accordingly, a greater number of results seem to suggest that this change is due to, and led by, at least in part, the external influence coming from actors that are not necessarily domestic (e.g. EU experts, interest groups, etc.). Indeed, the Swiss subject-agent (in this case the Swiss high civil servants participating in the survey) indicate the clearly varying ability of the Swiss sovereign to revoke and correct the implementation itself without putting into question the entire framework upon which bilateralism is based. In particular Swiss-EU bilateralism reduces the Swiss ability to always revoke incorrect implementation decisions. This now corresponds to A and B and to an associated difficulty in saying that this implementation is taking place as the sovereign wanted and at the same time also makes it difficult to claim in the future that such a situation was anyway planned.

## VIII. Conclusion

To conclude, the Swiss claim of sovereignty cannot be credibly claimed and taken as same within the implementation of either Swiss domestic or Swiss-EU integrated policies. This relevant point helps to better grasp the deeper meaning of claiming sovereignty through the adoption of Swiss-EU bilateralism. The theoretical and empirical originality of this discussion certainly suggests a prudent interpretation of these overall results. However, a general trend also suggests the overall pertinence of questioning whether Switzerland is actually the organiser of the hypocrisy of sovereignty as it claims to be, particularly with respect to forms of integration such as Swiss-EU bilateralism. In terms of communication and in particular concerning

the real possibility of claiming that Swiss-EU bilateralism – as part of the broader strategy of Swiss *Alleingang* – allows the Swiss people to unequivocally claim sovereignty appears to be arguable. The lesson that can be taken from this record is that, once breached the resistance made to scientific research by a hypocritical epistemology like that conceding state sovereignty as an organised hypocrisy, it is both empirically and methodologically possible to overtake the formalist position “sovereign until proven otherwise” and the credibility of states’ claims of sovereignty can be established.

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## Appendix: Survey Results<sup>22</sup>

	Independent variables			
	Bilateralism		Joint committees	
	Different Groups	Repeated Measures	Different Groups	Repeated Measures
<b>Implementation's events (Dependent variables)</b>				
My Swiss supervisors always revoke the incorrect implementation decisions. You brief your head of unit.	Decrease*	Decrease*	Decrease*	Decrease*
Implementation is suspended until new legislation is created.			Decrease*	Decrease†
My supervisors always have sufficient technical competences to evaluate my activity.				Decrease†
Swiss national interests dominate the work.	Increase**	Increase *		Increase†
It is easy to defend Swiss interest.	Decrease**	Decrease*		
Contact with Swiss civil servants.	Decrease†			
Non-Swiss collaborators or experts propose to adopt decisions.				Increase *
Non-Swiss collaborators or experts investigate, prepare, and explain things.			Increase†	Decrease**
Non-Swiss collaborators or experts promote their proposal.				Decrease†
Non-Swiss collaborators or experts give initial inputs.				Increase†
Contact with EU Member States/EU institutions.	Increase**	Increase*		
Events - External advisors to the federal/cantonal administration may help to find solutions.	Decrease**	Decrease***		
Non-Swiss collaborators or experts adapt in advance proposals to accelerate decision making.		Increase*		
My mandate is coordinated with some interest groups.			Increase†	Increase*
Technically correct statements and positions are regularly accepted				Increase*
The most important thing is to find technically correct solutions.		Increase*		Increase†
Citizens and media may ask for information concerning the implementation activity.	Decrease†			
<i>Scale of potentially sovereignty erosive contacts</i>	Increase†	Increase**		
<i>Scale of sovereignty erosive events</i>		Decrease*		

Source: Author<sup>23</sup>

<sup>22</sup> Legend for significance: † p < .1; \* p < .05; \*\* p < .01; \*\*\*, p < .001.

<sup>23</sup> Items and scales included in the survey questionnaire were developed by referring to the existing literature on survey methods and to previous surveys on the EU comitology. See Pusterla (2016).