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Sovereignty Past & Present

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The concept of sovereignty provides a capacious port of entry into any number of pressing questions and topics germane to political and legal theory, and international law and relations. The classical unitary conception of sovereignty as the "supreme political (and by implication, legal) authority within a given territory" has been complicated by not a few factors and phenomena: the myriad centripetal and centrifugal forces of capitalist globalization; the development of the United Nations and its ancillary organizations (e.g. the International Labour Organisation); the various charters, conventions, and declarations of human rights; the European Union; the increasing salience of humanitarian intervention; the persistence of nominally sovereign states; and the emergence of international institutions and regimes (international non-governmental and governmental organizations—INGOs and IGOs) engaged in social, economic and political activity on a transnational basis, utilizing novel forms of geo-governance to address equally novel or recalcitrant collective policy problems (e.g. environmental degradation, arms trafficking, nuclear weapons proliferation, epidemics, migration/immigration, technological development, genocide, terrorism, hunger and malnutrition, famine).

Hand-in-hand with *raison d'état*, theoretical conceptions of political sovereignty can be traced back to Grotius, Machiavelli, Bodin and Hobbes. Their political theories, developing out of the Reformation, justified the exercise of a sovereign power no longer inhibited by the institutional and ideological intervention or interference of the Church, the power of coercion here with recourse to the monopolized means of violence, the *ultima ratio* of politics. Early historical legitimation of sovereign authority invoked natural law, divine mandate or right, and hereditary succession, while in the contemporary period this authority is legitimated or justified by its derivation from a body of law or legal system, or formulas that refer to democratic conceptions of "the people" (or a combination thereof).

For Bodin, the early modern state possessed absolute sovereignty (*puissance souverain*), including the untrammelled authority to make and enforce laws. A well-ordered state can only be constituted by a sovereign power strong enough to rein in warring religious sects or factions (cf. the Thirty Years War) of the sort formally and finally subdued in 1648 with the Peace of Westphalia. But Bodin's doctrine of sovereignty is not, in one sense, absolutely "absolutist," for the sovereign ruler (of the *république*, or better, *estat*) is himself subject to the laws of God and natural law. (Philpott 2003) Furthermore, the sovereign is even bound by constitutional rules (*legis imperii*) that, for instance, require him to respect the property of citizens. Indeed, the sovereign is head of state by virtue of his office, and the constitutional legal constraint on sovereignty portends the historical development of democratic constitutionalism.

Formulating his principal ideas in the *Leviathan*, sovereignty for Hobbes is a conspicuously rational solution to an anarchic, dangerous, and anxiety-ridden state of nature governed by a logic of fear and in which life is "solitary, poor, nasty, brutish, and short," inexorably leading to a war of all against all. It is in our rational interest to contract out of this state of nature (or, in the event of sovereignty consolidated by conquest, to acquiesce in the rule of the conqueror) in order to gain the security, order, and peace of a state whose sovereign representative possesses the determinate, ultimate, and omniscient authority to publish and enforce laws that declare "Publicly and plainly what every of them may do and what they must forbear to do." In contrast to Bodin, Hobbes' sovereign is not bound by laws, constitutional or otherwise, for the sovereign reserves the power to override or remove any law. The principle of closure in Hobbes' hierarchical legal system is

performed by the person or persons whose authority originated from the selfsame subjects now obliged by their own interest to obey the sovereign (as Hardin reminds us, Hobbesian government works by 'obliging' us, not through morally obligating us; for we all want an order that will permit us to prosper through our own efforts and through exchange with others, hence the motivational power of self-interest).

Laws that are fundamentally regulative of private interaction temper the sovereign power of the Leviathan, and where the laws are silent, the subjects have considerable freedom, i.e., "private rights of exclusive dominion (over objects and actions) prevail." (Shapiro 1986, p. 29) The Hobbesian state enables the legal protection of private property while being indirectly supportive of market institutions. In sum, the powers Hobbes accords the sovereign state are identical to those later cherished by the libertarian Liberal: "the guarantee of property rights and the rule of law, territorial integrity and a workable currency system, the enforcement of contract and basic criminal sanctions, and the raising of taxes for these limited purposes." (Ibid. p. 66) Hobbes leaves an indelible imprint on the doctrine of sovereignty which, while establishing the supremacy and legitimacy of the state (wherein the people's right to self-government is wholly alienated), delimits political power with the restraints of law it has itself issued and recognized. In the end, Hobbes leaves us with an essentially utilitarian or consequentialist defense of the sovereign state (what economists term 'welfarist').

The Peace of Westphalia achieved on the ground—in practice—what Hobbes and others prescribed with theory: a (at first European) world of sovereign states. Yet Westphalia merely formalized a system of states in gestation since the Middle Ages. And the development of this—now global—system of sovereign states depended upon the prior diminution of the extra-territorial authority of the Roman Catholic Church whose infrastructure reached back to the Roman Empire.

In legal theory, the functionally equivalent final authority to the Hobbesian sovereign is found in Hans Kelsen's conception of a *Grundnorm*, while for H.L.A. Hart, it is the ultimate "rule of recognition." Goldsmith explains: "For Kelsen and Hart, as well as for Hobbes, this final authority is supreme in the sense that any other rule or authority within the system can be overruled or repealed or altered by it (or by the procedure it embodies), whereas it cannot be altered or overruled by any of them. There is no appeal beyond it." (Goldsmith 1996, p. 274) For democratic theorists of Liberal vintage, the *Grundnorm* is ensconced in a constitution, the *de jure* metanorm for the creation of further legal norms or legislation.

From Locke and Rousseau come the necessary ingredients of a doctrinal recipe for "popular sovereignty." Locke envisioned the delegated transfer of legislative and executive rights to the government conditioned upon its ability to preserve "life, liberty and estate." The government's legitimacy is rooted in "consent" granted by the people's representatives. In the event of sustained tyranny or subversion of the proper rule of law, consent is withdrawn and justification for rebellion or revolution may follow. Sovereignty resides in "the people" and their "inalienable rights" (derived from Natural Law). The government's authority is a delegated power held in trust, and therefore liable to withdrawal if the (equal) rights of individuals and the "ends [common good] of society" are not sufficiently respected. Locke never adequately explored or wholly resolved the tension and possible contradictions between the "sovereignty of the people" and a democratic government's institutional role in the making and enforcement of the law. Perhaps unintentionally, his formulations obscure the fact that while "the people" are the ultimate source of political authority, "popular sovereignty does not remove or blur the differences that exist among the various forms of government on the menu from which the people are supposed to choose." (Waldron 1999, p. 255) In other words, we must distinguish between democracy and popular sovereignty, for conceding the power of the latter is no guarantee we will be left in the end with the former. For better and worse, any obscurities, tension or contradictions in Locke's work are theoretically elided by Rousseau who, upon likewise locating sovereignty in the people, *disallows its representation or alienation*. With Rousseau, sovereignty is bound up with "the people:" as such, and once and for all. Sovereignty now risks incoherence or miscomprehension, all the more so if taken literally as, alas, it was by Jacobin revolutionaries in the French Revolution. Given Rousseau's broad if not vague defense of popular sovereignty (and nostalgia for Athenian democracy), could the Jacobins be faulted for failing to know precisely how to determine the "general will," or what institutional or procedural mechanisms best facilitated coming to consensual agreement on the nature of the common good? From the vantage point later provided by democratic theory and practice, the theoretical tensions and gaps in the doctrine of popular sovereignty suffice to render the notion a rhetorical fiction or

perhaps simply a suggestive metaphor (for Max Weber, it was clearly and simply the former). Hardin's conclusion may be apropos: "In typical contexts, popular sovereignty is an empirically and perhaps conceptually incoherent notion." (Hardin 1999, p. 152) Even with the institutions of democratic constitutionalism and the social capital of a vigorous civil society that both enable and constrain democracy, "there cannot be popular control over much of what the government does." (Ibid. p. 153) But appeals to popular sovereignty persist, not doubt sometimes intended to "serve more as rhetorical legitimization than as description of popular government." (Ibid.) As both Hobbes and Locke understood, the notion of *popular* sovereignty serves to account for the transition from the fictional state of nature to the realm of the properly political. Apart from its utility in societies emerging into democratic polities, its relevance can only be resurrected if the structures of democratic governance become corrupt beyond repair or otherwise collapse.

Internal sovereignty refers to the state's political and legal supremacy with respect to affairs within its nation-state territorial borders, while *external* sovereignty entails the state's status as equal to and independent of other sovereign states expressed, for example, in its capacity to enter into economic agreements, military alliances, or treaties with other states. Arguably, the precise locus of internal sovereignty is not always easy to determine: "The U.S. Constitution purports to vest sovereignty in itself, but that seems incompatible (a) with the fact that the constitution can be amended, (b) with the fact that, unless someone can enforce the constitution, it is without coercive power." (Scruton 1984, p. 441) Roger Scruton has here touched upon a tension in the notion of sovereignty at the heart of the Liberal tradition in as much as it is seen as combining the constitutional tradition of Locke and Kant with conceptions on the genesis of "the political" derived from Machiavelli and Hobbes. The notion of sovereignty intrinsic to liberal constitutionalism, in which the power of the state is limited and bound by legal norms (the *Rechtsstaat*), "presupposes...the establishment of the power monopoly of the state" or the *Machtstaat*: in other words, after the Enlightenment, sovereignty conjoins the exercise of authority on behalf or in the name of liberty. (Slagstad in Elster and Slagstad 1988, pp. 108-109) How one conceptualizes the creation of the Hobbesian power state may be determinative for defining the locus of sovereignty (and that, in turn, is perhaps parasitic upon one's conception of 'the political'). Where, in short, are the *metanorms* that define who has the power to change the law? Who or what is the ultimate source of those metanorms? Do "the people" generate these metanorms (recalling here that 'social contract' theorizing of Locke, Rousseau, Kant, and Rawls, is a *hypothetical* thought experiment)? Can they create new ones (e.g., throw out the constitution and compose another one)? Do we locate sovereignty at the point of genesis or in the metanorms (or constitution) themselves?

Answers to such questions hinge in some measure on how (or even if) one makes sense of the notion of *popular* sovereignty. But if sovereignty is not, as some have recently suggested, an "all or nothing" affair, that is, if its various components can be "unbundled" and, furthermore, if it refers to a period *after* the moment of original (political) choice or *beyond* the state of nature, these questions would be put a bit differently, at the very least they would lack the urgency or significance they might otherwise have. (Keohane 2003; Buchanan 2004) If sovereignty signifies a set of powers, claim-rights, liberties, and immunities, it may be both possible and frequently desirable to "unbundle" these attributes. In cases of autonomous, intrastate self-government, for instance (e.g., the Basque region of Spain; or the weaker version proposed by the Dalai Lama for Tibet), we might speak of specific attributes of sovereignty accorded a polity that falls short of being a full-fledge nation-state. The same could apply to those polities emerging, like Kosovo, through secession. For it may be best (or prudent), from the perspective of international law, to grant partial, transitional, and thus *conditional* sovereignty (i.e., some of its attributes), "pending sufficient progress in building the institutions of justice that warrant full recognition." (Buchanan 2004, p. 281):

On the one hand, given the massive violations of their rights that have occurred, it would be unreasonable to expect Kosovar Albanians to remain subject to the authority of Yugoslavia until they can develop institutions capable of providing equal protection for all, including the Serbian minority. (Moreover, there is little reason to believe they would be allowed to develop them if they remained subject to Yugoslavian sovereignty.) But on the other hand, an unqualified recognition of Kosovo's independence would be irresponsible given the potential for further persecutions of Serbs (and Roma) by the Albanian majority. (ibid., p. 280)

And of course an unbundled conception of sovereignty should prove useful for explaining the current situation in Iraq: it is implausible to view the transfer of power—sovereignty—from the U.S. led coalition to the interim Iraqi government as one of the passing of sovereignty as such from one governing body to another, for the Iraqi caretaker regime hardly possesses the full panoply of power, privileges, and rights one associates with a traditional conception of sovereignty.

International law is a *de jure* constraint on external sovereignty, while geopolitical power and economics relations serve as *de facto* constraints on both internal and external sovereignty. Rapid decolonization illustrates a poignant case of the latter, as it resulted in many *quasi-* and *failed* states that, having obtained *de jure* recognition in the international community, nonetheless proved lacking in the requisite political and economic resources for effective democratic governance (hence the widespread poverty, civil wars, genocide, famines, and endemic corruption that plagued many of these states in the southern hemisphere). *De jure* sovereignty is no assurance of freedom from economic dependency or political vulnerability.

The international system of sovereign states based on the Westphalian model began to break down after World War II. Essentially, this meant that disputes were settled privately (between the relevant states), and often by force. States aggressively pursued their own "national interests," with minimal cooperation between or among states. The Social Darwinian logic of *Realpolitik* was (and is) sanctioned with ritualistic appeals to "realism" and *raison d'état* of the kind familiar to Plato's Thrasymachus. Justifications for "dirty hands" in the international arena come easy, and Machiavelli's "necessary immorality" is a ready-made apologia (for others, a Weberian 'ethic of responsibility' will suffice). The presupposition here is an arguable divide between private and public morality. This doctrine of double standards, that is, one for the individual in his private life and intimate realm, another for political life and collective conduct, has been defended in our own time by Reinhold Niebuhr, and more recently by Michael Walzer. Moreover, "realist" philosophers and political actors alike "concentrate upon the particular act that will require dirty hands and ignore the contingency and mutability of the circumstances that have given rise to it. Yet it is precisely these circumstances which most often deserve moral scrutiny and criticism, and the changes which may result from such criticism can eliminate the 'necessity' for those types of dirty hands in the future." (Coady 1993, p. 379)

International law is based on the Westphalian model as defined by the following elements:

1. States are legally equal.
2. Every state enjoys the rights inherent in full sovereignty.
3. Every state is obligated to respect the fact of the legal entity of other states.
4. The territorial integrity and political independence of a state are inviolable.
5. Each state has the right to freely choose and develop its own political, social, economic, and cultural systems.
6. Each state is obligated to carry out its international obligations fully and conscientiously and to live in peace with other states. (Griffiths and O'Callaghan, pp. 296-97)

Political leaders and policy makers, academics and intellectuals, as well as bureaucrats and civil society activists are challenging the Westphalian model on many fronts. The policy-making prerogatives of the state, be they domestic or foreign, are confronted with institutions that constrict or preempt such prerogatives. Neoliberal (the 'Washington consensus') economic principles and (often 'structural adjustment') programs that have been implemented around the globe through the investment strategies of multinational corporations and such institutions as the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO), represent internationally binding economic policy prescriptions and imperatives that target states ignore at their peril.

Sovereign states remain the principal actors in the international arena, yet it has now become difficult for rights-abusive regimes to take cover behind the mantle of internal sovereignty (China's place on the U.N. Security Council plays no small part

in its being a notorious exception to the rule), as human rights has become entrenched as a matter of international concern and law, although enforcement provisions and mechanisms are at an incipient stage and thus rather weak. Still, "as President Slobodan Milosevic learned, state sovereignty no longer necessarily shields a perpetrator of genocide from either military intervention or courtroom punishment." (Power 2002, p. 503) The European Court of Human Rights, the European Court of Justice, the International Criminal Court, and the International Court of Justice, along with INGOs, IGOs, and NGOs, are emblematic of the development of institutions that increasingly alter the terms and conditions of *de jure* and *de facto* sovereignty. Both enabling and restricting with respect to internal and external sovereignty, these new terms and conditions can achieve such "public goods" as respect for human rights, sustainable economic development, and environmental protection. The term "pooled sovereignty" has been coined to characterize these developments.

It is clear that a sharing of sovereign powers between states—regionally and globally—is both necessary and desirable, and that it is now a structural feature of the international system of states and *the* predominant structural feature of the European Union. It is not a foregone conclusion that this somehow entails the loss of (meaningful) internal sovereignty; indeed, in the end, it may ensure the survival of nation-states and the international system to which they belong. Even national security and defense policy, heretofore the heart of the Leviathan, is increasingly formulated along cooperative lines, yet further evidence of the viability and vitality of pooled sovereignty. Creative forms of global governance are sustained by an increasingly polycentric legal order, often with cosmopolitan pretensions. In the European Union, sovereignty is not only pooled, it is "complex" (or divided) as well insofar as it is parceled and diffused across a range of legal authorities and government officials managing the monetary system, formulating foreign policy, or regulating the labor market. This polycentric legal order at once depends upon, traverses, and supersedes municipal legal systems and international law. The European Union and the European Court of Justice represent, in the words of law professor and Scottish National Party Member of the European Parliament, Neil MacCormick, the workings of a "polycentric, pluri-systemic, multi-state legal order" that is neither a subordinate part of the laws of member states, nor a subsystem of international law. (MacCormick 1999, p. 105)

The analytic utility of the notion of popular sovereignty *simpliciter* is suspect and often otiose, and earlier conceptions of sovereignty do not suffice to explain current events in international relations. However, recent conceptions of *pooled*, *complex*, and *unbundled sovereignty* help us trace the contours of contemporary political challenges and changes across the globe, while further fortifying and legitimating various legal orders: international, municipal, and otherwise. And yet despite new conceptions of sovereignty and the political facts "on the ground" to which they refer, the international system of nation-states remains firmly in place. Finally, and recent neo-imperialist ventures notwithstanding, the impact of globalization upon the system of sovereign nation states may have structurally strengthened the capacity for member states to evolve in a globally cooperative democratic direction, that is, provided we view the emergence of a polycentric legal order described by MacCormick as emblematic of processes of democratization.

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