

SOVEREIGNTY: MYTH AND REALITY

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SUMMARY AND INTRODUCTION

The issue of sovereignty in Europe is a topical one today. Have we lost sovereignty since joining the European Community? Does the development of the European Union through and after the Maastricht Treaty portend the development of a sovereign super-state that will swallow up the UK and the other member states? If the states lose sovereignty, must the Community or Union acquire it?

Certainly, the origins of the modern state lie in the assertions of sovereignty by or on behalf of Kings and Kingdoms in the middle ages. A law of your own required a sovereign of your own. The French and American revolutions re-asserted a doctrine familiar in Scotland, that the overthrow of monarchs restored sovereignty to the people, who constituted themselves into a state or union of states through adopting a constitution by common consent. The sovereign state or union asserted itself as a nation state, the property of its sovereign people.

So if the sovereign state is a democratic state, concern about sovereignty is apt to present itself as concern for democracy. This is indeed a characteristic fear about loss of sovereignty. Can it be lost without abandoning popular self-government? Can it be lost without breaking faith with democracy? This fear is held in common among British Eurosceptics and recent German petitioners of their constitutional court, challenging the Maastricht treaty as requiring an illegal abandonment of the democratic form of government guaranteed in the

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German constitution. The Court did not agree that the Maastricht treaty had that effect, but it did draw some lines on the sand concerning possible future encroachments on fundamental provisions of the constitution, and it did indicate a readiness to draw lines beyond which decisions of the European Court of Justice would be unacceptable for implementation in Germany.

Perhaps we should not be too ready, then, lightly to embrace the demise of sovereignty as a welcome development. And yet there is another side. The international order of sovereign states of the two postrevolutionary centuries was a bloody one, marked by struggles over the establishment and maintenance of empires. Mere nostalgia for lost sovereignties, or zeal for establishing new ones in the old mode, does not seem of itself a happy posture. It is a serious issue whether it is possible to envisage a world 'beyond the sovereign state' in which new types of legal and political interaction come into being that exclude claims of out-and-out sovereignty either from old states or from new communities devised to re-order economic and political co-existence. Could we advance in peace and prosperity without losing popular democracy?

The key question becomes whether there can be a loss of sovereignty at one level without its inevitable and resultant re-creation at another. Is sovereignty like property, that can be given up only when another gains it? Or should we think of it more like virginity, that can be lost by one without another's gaining it - and whose loss in apt circumstances is even a matter for celebration? I take the latter view. I welcome the prospect of Europe beyond sovereign statehood. The idea of subsidiarity points us to better visions of democracy than all-purpose sovereignty ever did. There is a possible future reality preferable to the past of nostalgic mythology.

My argument depends on a careful analysis of basic ideas. We need first to think about the idea of power, and distinguish political from legal forms of power. Then we can see that sovereignty has both a political and a legal form. We can further distinguish external and internal sovereignty, and in that light reflect upon possibilities of division or limitation of sovereign power. Thus armed we can reflect on the reasons why neither member states nor the European Union of which they are members can strictly be said to enjoy sovereignty. Finally, reflection upon subsidiarity and democracy will help assuage any alarm the conclusion about sovereignty may have aroused.

SOVEREIGNTY, LEGAL AND POLITICAL

'Sovereignty' is a quality conventionally ascribed to states, or to their governing authorities; it is the quality of holding ultimate power in one sense or another. To understand it, we need to understand power. Power as between persons is the ability to take decisions that affect another person's interests regardless of their consent or dissent; this ability so to affect another's interests entails also the ability to give another person reasons for action or inaction which would not otherwise have existed. Thus the exercise of power is often a way of making other people do things, or stop doing them. In a discussion of sovereignty, power so understood has to be differentiated into political power and legal authority; these are two distinct forms of power.

Political power is interpersonal power in a human community or society; that is, the power to take effective decisions on whatever concerns the common wellbeing of the members, and on whatever affects the distribution of the economic resources available to them. The taking of such decisions has important bearing on the reasons that guide the actions of people. The state is of central interest to those interested in political power, being itself a locus for the exercise of power, a maker of decisions, and the primary political community for most human beings in the contemporary world. The state is a political community of a special kind. It is a territorially organised political community, within which power is exercised over the territory with respect to the resources available in it, and to the use of force in inter-personal relations. The state acts through individuals and organised groups of people who take and implement decisions in the name of the state and who, in their deciding, purport to be the state's officials or organs.

Legal authority is a special kind of power. It is what is sometimes called 'normative power'. This is the ability to change what a person ought to do in the framework of an institutional order. Authority, or normative power, is itself conferred through law. Legal authority is the power conferred by law to take decisions that affect another person's legal position regardless of their consent or dissent. Particular examples are the power to make general rules or particular executive decisions imposing duties or conferring powers on other persons, and the power to pass judgement on alleged breaches of such rules, or on the validity or invalidity of other acts that purport to exercise legal power.

So there is a clear conceptual distinction between political power and legal authority. Political power is power *de facto*, legal power is power *de jure*. Power in its political sense concerns what one can actually bring about by

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one's decisions in relation to the interests of other persons or of a community as a whole. Authority, or power in its legal sense, concerns the legal changes one can bring about in a legally valid way. Legal power is of course exercised with a view to bringing about changes in action through changes in the legal position. But it does not always work. The validity of a legal change is no guarantee of the actuality of a behavioral change. The United States once prohibited the manufacture or consumption of alcohol for what were coyly described as 'beverage purposes', and the prohibition was constitutionally valid. But it did not actually stop people drinking. Conversely, there can be exercises of actual political power that are legally invalid, even legally wrongful. The elections in Russia brought about by President Yeltsin in 1993 might be a case in point. The conceptual distinction between legal authority and political power marks a practically important difference.

The point of a constitutional state, what our German friends call a *Rechtsstaat*, or 'state-under-law', is that in it political power is subordinated to legal authority. There is no naked power in such a state. On the other hand, for a political organisation to be viable as a state, the governing authorities must wield effectual power in the face of actual or probable challenges from within or without the state. The balance between power *de facto* and power *de jure* must always be a delicate one either way.

Thus it has to be said that there are certain all-important connections between our two conceptually distinct forms of power. Political power, to be sustained over time, requires legitimacy. Law is a significant source of legitimacy. So legal authority comes to be a practically essential component of viable political power. Legal authority, again, is empty without general acceptance in a society of the decisions taken by those in authority. Without the backing of political power this cannot practically be achieved. So political power is a necessary adjunct of legal authority.

With these clarifications in mind, we may turn to the question of sovereignty.

Sovereign power, as already stated, is ultimate power; power which admits of no superior power or higher authority. Since we have two relevant concepts of power, we must have two of sovereignty - ultimate political power or ultimate legal authority. And so it is. Political sovereignty is ultimate political power, *de facto* territorial power that is not subject to limitations imposed by superior power. Legal sovereignty is ultimate authority in law, not subject to limitations imposed by higher legal authority. Since sovereignty belongs in or to states, it is essentially territorial; it is ultimate power or authority in respect of a certain territory. A political sovereign enjoys ultimate political power,

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without any higher constraining power, over a certain territory; a legal sovereign enjoys the ultimate legal authority, without any higher constraining legal authority, in respect of a certain territory.

The very existence of law is often said to rest upon some exercise of sovereignty. Behind any true law, it is said, must lie the will of some sovereign person, sovereign body, or sovereign people.

The classic English version of this view subordinates the legal to the political. Bentham and Austin defined law and legal authority as dependent on the fact of political sovereignty, or supreme political power. Law for them was essentially the command of a political sovereign. But constitutional lawyers and legal theorists have rather convincingly rejected this view. A.V. Dicey's classical work on the Law of the Constitution, published around the beginning of the twentieth century, accused Austin of confusing the legal and the political. Dicey, by contrast, put forward the doctrine of the sovereignty of Parliament not as a fact about political power but as itself an ultimate norm of constitutional law. In due course legal theorists like Hans Kelsen (1945) and H. L. A. Hart (1961) showed how to unpick the implicit confusion of the legal and the political to be found in Austin and Bentham. One way or the other, they suggest that legal authority always has to be grounded in some presupposed rule or norm of law. Hart, like Dicey, in effect grounds this in accepted constitutional custom and usage, which is itself normative. Kelsen argues that a by-and-large effective constitution grounds normative order through a juristic pre-supposition of the basic norm that normativizes the constitution. We have ourselves already taken note that legal authority and thus law depend to an extent on the support of political power; but it is a distortion of the truth to say that law is simply the creature of sovereign political power.

Law has to be explained in other terms. Law is an institutional system of rules or norms involving both duties which are required of legal subjects and powers vested in legal institutions with legislative, executive and judicial power. Here, I have simply to assert that a satisfactory analysis of law as institutional normative order is available, and that Professor Weinberger (1986) of Graz in Austria and I have made progress in elucidating this. Legal systems so understood do not only and do not necessarily exist in states. But of course states do have legal systems, characterised by possessing a territorial sphere of validity and being supported by political means of law-enforcement within the relevant territory, or its main part. This should not blind us to the fact that there are also non-state systems of law. In the present context, it is particularly significant to refer to Canon law, public

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international law, the specialist international law represented by the European Convention on Human Rights, and the law of the European Union; there are other significant forms of non-state law. A satisfactory theory of law as institutional normative order is one that can account both for systems of state-law and for international law as well as for other forms of law altogether.

Again, we see the importance of holding apart the concept of state as political community and law as institutional normative order. For we are then able to see that state-law is but one kind of law, just as the *Rechtsstaat* is but one kind of state.

If we reject the idea that law must depend on a political sovereign, and if we find it possible to explain law in terms other than as a sovereign's command, it will be easy to see how different kinds of law are really different species of a single genus. In turn, we will find ourselves asking if legal sovereignty is any more essential to defining law than is political sovereignty.

We have now reached the point for differentiating external from internal sovereignty. This is a crucial distinction involving the idea of the state as a territorial political order.

External sovereignty characterises a state which is not subject to superior political power or legal authority in respect of its territory. Politically, this enables us to distinguish a fully or substantially independent state from a mere satellite or client state which, even if legally independent, has no effective independent power of decision. In a legal sense, it is the authority granted by international law to each state to exercise legal control over its own territory without deference to any claim of legal superiority made by another state, coupled with the right under international law to be free from the exercise of military power or political interference by other states.

Internal sovereignty is legal or political power inside a state that is subject to no internal checks and controls. This can exist legally if a constitution grants to (for example) a Parliament or a Monarch the power to make law on any subject with no constraint of substance limiting the validity of the sovereign's law-making acts. (According to Dicey's theory of the British constitution, the United Kingdom Parliament enjoys legal sovereignty in just this sense.) In federal states like Germany or the United States of America, there is no representative organ of government to which sovereignty in law can be ascribed, though it can perhaps be said to be retained by the people as a whole, who founded the constitution and retain in some form the power of amending it in all or most of its provisions.

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Politically, there is internal sovereignty if some person or group (or, perhaps, party-elite) backed by military force can in fact exercise supreme power, regardless of any theoretical limitations imposed by law. We have seen many examples of such political sovereignty in the twentieth century, none of them attractive.

One thing is now obvious: there is not an identity between external and internal sovereignty. Even where a state's constitution denies to any governmental organ full internal sovereignty (as federal constitutions normally do), that state may nevertheless enjoy sovereignty in the external sense. A 'sovereign state' is one which is not subject to legally valid external control, even if none of its internal organs of government is legally free from limits on its power as regulated by the constitution. A state is externally sovereign in the political sense to the extent that it is not subject to superior external power.

Can there be divided or limited sovereignty? The theorists of the nineteenth century were anxious to argue that nothing which is supreme power can co-exist with a rival supreme power in any stable way within a single legal or political order. From their point of view, it was certainly misleading to say that the organ or institution which has the ultimate power of decision over a certain range of topics is sovereign over those topics, while other organs and institutions are sovereign for other purposes. The doctrine of sovereignty was a doctrine of the unity of states and of the unity of governmental functions within them. As such, it was a significant element in the drive towards modernisation and the development of unified nation-states in place of the more fragmentary feudal forms of ancient kingdoms and empires. For the same reason and in the same way, they were unenthusiastic both analytically and politically about the idea of limited sovereignty. The present analysis, in defining sovereignty as ultimate power either in a political or a legal sense, shares the analytical view of these clearheaded nineteenth century scholars.

Nevertheless, the distinction of external and internal sovereignty shows that even such a strict analysis permits a sense of divided or limited sovereignty. The point is that a state which is sovereign in the external sense may have a constitution which confers no full sovereign power on any organ of state. The external sovereignty of the state may be, so to say, internally distributed among organs of state in such a way that none legally exercises plenary power, or competence finally to define its own competence. Each such organ is effectively limited by checks and controls exercised by another. Where that is so, and where constitutional stability has engendered a political system in which the limits laid down in the constitution are well-respected, we can

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predict that there will be no internal political sovereign; and yet, externally, the state may be as sovereign as it is possible to imagine. The United States, Canada, Australia, Switzerland all provide rather good examples of this.

A final conceptual point to be made about sovereignty concerns the issue of 'popular sovereignty', 'the sovereignty of the people'. There are various constitutional and political traditions which promote this idea. It has played a powerful role in Scottish constitutional history, from Arbroath through Buchanan to ancient and more modern Claims of Right. Its appeal is to the principle that all political and legal power ought to rest upon the will and consent of those among or over whom power is exercised. The principle in question is a principle of political morality. It has two applications. One is in the context of an established constitutional order, and here the claim is that the constitution must always be subject to adoption, confirmation, or revision by processes involving the whole people. The other is where a group or community of people seeks to exercise self-determination by constituting itself into a legal and political rather than simply a cultural or ethnic or religious community. In either application, the principle belongs to the theory of democracy as a basis for ideal constitution-making, to some greater or lesser extent achieved in the actual constitutional experience of different peoples.

BEYOND THE SOVEREIGN STATE

The argument so far has tried to elucidate the ideas of sovereignty, legal and political, and of the sovereign state and sovereign people. The next point is to discuss the relevance of contemporary developments to these concepts. I particularly wish to consider their relevance and usefulness in the context of the developing European Union evolving from the Paris and Rome Treaties, and through to the Union Treaty of Maastricht and beyond.

Since at least 1964 (*Costa v ENEL*, case 6/64), it has been the doctrine of the European Court of Justice that the Communities, now 'Community', constitute a new legal order, neither a subordinate part of the laws of the member states, nor simply a sub-system of International Law. From the point of view of a soundly pluralistic theory of law as institutional and systemic normative order, there is no difficulty about accepting this self-characterisation of Community Law as a distinct legal order. It owes its origin, certainly, to treaties binding under general international law; and, from the point of view of member-state legal systems, the ground of validity of provisions of Community Law in the processes of domestic law-application lies in acts of

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ratification or adoption by appropriate modes of decision-making determined by the state constitution in question. But the institutionalisation of legal order under the foundation treaties, in particular the establishment of organs for law-making, for executive action, and for judicial law-application, and the efficacious operation of these organs over a considerable period of time, are properly recognised as bringing a distinct legal order into being.

Within that legal order and from the point of view of Community organs and persons working within Community law, the criteria for recognition of the validity of Community legal provisions are now internal to this legal system. The system has acquired what Niklas Luhmann (1989) or Günther Teubner (1993) would characterise as self-referentiality. As a system, it differentiates itself from other systems by whose distinct criteria of validity Community legal provisions are also valid and applicable. This is the case within the legal orders of member states, each of whose organs acknowledge Community provisions as valid and applicable in relevant situations, in a manner coordinated with, and justifiable by reference to, the member state's own internal criteria of validity. 'Community-validity' is a relevant fact when it comes to assessing member-state validity. 'Member-state validity' is a relevant fact for some purposes of Community law. The situation is one of differentiation of systems subject to mutual overlap. There are institutional arrangements to resolve potential conflicts of norms or of their interpretation.

The application and enforcement of rights and obligations under Community law remain matters for implementation by the authorities of member-states. To that extent, Community law is both normatively and politically dependent on law and practice in member states. So far as concerns the validity of national legislation, legislators within state systems are now limited by the requirement to avoid conflict with valid Community law. Community decisions of various kinds can change law within state-systems regardless of the operation of the normal internal legislative process. Yet the making of Community decisions depends at the highest level on the joint action of state authorities of member states acting in the EC Council. Politically and economically, there are powerful reasons deterring states from unilateral defiance of Community norms or (a fortiori) unilateral renunciation of membership (which would clearly be invalid as a matter of Community Law, though possibly valid or validable by the law of the member-state).

Given that, and given our earlier discussion of sovereignty whether as a legal or as a political concept, it is clear that absolute or unitary sovereignty in the internal sense is entirely absent from the legal and political setting of the European Community. Neither politically nor legally is any member state in

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possession of ultimate power over its own internal affairs; politically, the Community affects vital interests, and hence exercises political power on some matters over member states; legally, Community legislation binds member states and overrides internal state-law within the respective criteria of validity. So the states are no longer fully sovereign states externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they any unimpaired political sovereignty. The Community on the other hand is plainly not a state. Nor does it possess sovereignty as a kind of Federation or Confederation. It is neither legally nor politically independent of its members. The German Constitutional Court in the recent important decision I mentioned before has stressed that the Union or Community and their organs of decision lack the ultimate legal competence to determine their own competence. This precludes sovereignty.

In one highly important sense, sovereignty has not been lost in this process. In international law, no state outside the Union has any greater power over member states individually or jointly than before. Thus there is a kind of compendious legal external sovereignty towards the rest of the world; and politically it seems that the scale of the Community enhances the independence of action of its members collectively and perhaps even individually for some purposes. To the extent that the terminology of 'divided sovereignty' is found valuable rhetorically or even analytically, it can be applied here - the sovereignty of the Community's member states has not been lost, but subjected to a process of division and combination internally, and hence in a way enhanced externally. But the process of division and combination has taken us 'beyond the sovereign state' (MacCormick 1993); indeed, well beyond it. Despite the rhetoric of politicians, it cannot be credibly argued that any member state of the European Union remains politically or legally a sovereign state in the strict or traditional sense of these terms. Yet it is to their traditional sense that the political rhetoricians make implicit appeal when they harangue party conferences.

DEMOCRACY AND SUBSIDIARITY

Western Europe's successful transcendence of the sovereign state and of state sovereignty is greatly to be welcomed. It has been and will be a condition for the security of peace and prosperity among us. Yet many are conscious of a residual unease concerning popular sovereignty. At least, in a sovereign state, with some internal sovereign organ of government, and with unimpaired external sovereignty, the target for democratic activism is clear. Provided there is real popular control of sovereign government, with fair conditions for

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full and equal participation by all citizens, or all citizens who wish to involve themselves, democracy can be realised. There is no room for relapse into rule by a virtuous few, whether a bench of supreme court judges, or a council of ministers deliberating in private, or a bureaucracy of highly trained experts.

If such are the alternatives to, and perhaps the deepest enemies of, democracy in the contemporary world, then indeed the progress of Europe beyond the sovereign state has plunged the peoples of Europe further than ever into democratic deficit. Combined and divided state-and-community sovereignty seems the enemy of popular sovereignty. There are real grounds for concern here.

On the other hand, the record of the sovereign unitary state is not so very bright either. The highly centralised version of the sovereign state presented by the United Kingdom in its classical phase itself deserves scrutiny. Here we had a proclaimedly sovereign Parliament dominated by a system of political parties with strong internal party discipline, and with an absence of proportional representation in the electoral system. This certainly did not foster anything approximating to an ideal system of popular government with fair equality of participation for all citizens or all points of view. Nor did it prevent the growth of bureaucracy, nor the enhancement of power of the executive branch of government in the modern period. So far as democracy depends not only on formal allocation of voting power to each adult citizen, but some guarantee of civil and political - perhaps also economic and social - rights to each person, to ensure continuing opportunity of participation on fair terms with others, the UK's accession to the European Human Rights Convention was a decisive step, and yet one which diminished external sovereignty. The growth of a pluralism of law and institutions in Western Europe has been in some ways problematic for democracy, but in other ways advantageous; and, to the extent that the Union Treaty formally adopts human rights standards, the advantage is enhanced.

There is another potential advantage. Concentrations of power can create opportunities for what might be called monolithic democracy. That is, if all legal or political power is concentrated at the level, say, of a single assembly with complete power over all matters in a large territory, then decisions affecting localities within the whole are as much subject to majority decision by the totality as decisions which have a broader, or even a holistic, scope. But the majority of the totality may be at odds with the majority in any particular locality. The traditional theory of internal sovereignty considers any decision-making power at local level to be the mere creature and delegate of central sovereign power. Hence it is a matter of political choice for the

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central power, and behind that for the holistic majority, whether to allow local-level democracy on the basis of local majority opinion, or to override local opinion and impose the solution favoured by the holistic majority.

In this light, if there is a sense of popular sovereignty ('sovereignty as self-determination', perhaps) which calls for recognition of the rights of significant groups or communities within larger wholes, the state-sovereignty version of popular sovereignty can be itself an enemy of other democratic rights. In general, any form of popular government or majoritarian democracy inevitably poses the questions: 'Who are the people? Of what group must the majority be a majority?'

The great problem of nationalism in the modern world is perhaps revealed at just this point. It is graphically and tragically revealed by the strife and slaughter in former Yugoslavia. If the sovereign state is taken as the self-evident and only available framework for democracy, it becomes vital to struggle over boundaries and membership, vital to define the 'nation' as possessor and master of the sovereign state, the nation-state. Inevitably there are minorities, even 'national minorities'. In Spain there are Catalunya and the Basque Country and others; in Belgium there are Flanders and Wallonia; in the United Kingdom, there are England, Scotland and Wales, and the itself internally contested province of Northern Ireland. In the UK, the English majority is normally the majority of the whole.

The end of the sovereign state creates an opportunity for re-thinking of problems about national identity. The nation as cultural, or linguistic, or historical, or even ethnic community is not co-extensive with the (former) sovereign state, the traditional 'nation-state'. The cases I have mentioned all make this obvious in the highest degree. The suppression of national individualities is wrong in itself and almost inevitably a cause of bitterness and strife. But if the ideological unity of the traditional sovereign state is abandoned, new possibilities are opened.

At least one reading of the already-contested concept of 'subsidiarity' points the way here. If the idea of a pluralistic legal order advanced here is an acceptable one, then it is capable of generalisation and extension to what is sometimes called the 'regional' level within Europe, although many people in some of the so-called regions find it important to characterise their own region and others as 'nations'. There can then be a basis on which to recognise further levels of system-differentiation and partial mutual independence. The doctrine of subsidiarity requires decision making to be distributed to the most appropriate level. In that context, the best democracy - and the best

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interpretation of popular sovereignty - is one that insists on levels of democracy appropriate to levels of decision-making. And the tendency to over-centralise at the level of member states is as much to be countered as is any over-centralisation towards Brussels. The demise of sovereignty in its classical sense truly opens opportunities for subsidiarity and democracy as essential mutual complements. It suggests a radical hostility to any merely monolithic democracy.

This is not a party political article. I wish therefore deliberately to abstain from concluding about, far less arguing for, any particular version of constitutional change here aimed at implementing democracy under the principle of subsidiarity. But I do want strongly to suggest that this is a better framework for pursuing our concerns about democracy than the present myth or past reality of sovereignty as classically understood. At a time when the Scottish question again rises on a political agenda from which it has never been absent in a quarter of a century, at a time when it may be important for similarly inclined if not wholly like-minded persons and parties to seek some common ground, there is perhaps here a way of rethinking the framework principles of that agenda.

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