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Transovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice

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Abstract

Part I of this Article develops some necessary perspective on transovereignty and its importance to law and ethics by reflecting first on traditional sovereignty. A few competing positivist and anti-positivist theories of the emergence of political and legal systems will be briefly reviewed to reveal significantly different pictures of the possible role played by rights-claims in political development. Part II extends one of those theoretical models to help us describe more fully the nature and importance of the special political phenomenon of transovereignty. Part III examines briefly a particularly strong example of transovereignty at work: the impact of the Catholic Church on local political activities in Poland. Widening the Article's perspective, Part IV speculates briefly on the implications of transovereignty for the legal ethics of lawyers practicing human rights law. The Article addresses the question, for example, of whether lawyers as a professional group, with their shared reverence for the rule of law as a governing political ideal - an ideal of orderliness that they view as a "human right" all its own - are themselves becoming a significant transovereign force.

ARTICLES

TRANSOVEREIGNTY: SEPARATING HUMAN RIGHTS FROM TRADITIONAL SOVEREIGNTY AND THE IMPLICATIONS FOR THE ETHICS OF INTERNATIONAL LAW PRACTICE*

*Timothy P. Terrell***
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INTRODUCTION

Identifying the legal ethics that should be associated with international human rights claims is an interesting challenge — not because the ethics might be murky, but because these rights until recently have always had such a questionable international legal status. Claims based on human rights, unlike traditional international claims, seek to protect individuals rather than

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states, and they seek to do so directly rather than derivatively through the claimant's state.[1] Despite these features (or perhaps *because* of them) many lawyers now profess to "practice" this non-traditional law, raising in turn the general question of whether traditional legal ethics ought nevertheless constrain that practice. This Article will examine that issue by approaching it in an unusual way. It will first focus on a fundamental assumption behind international law — that states emerge distinct from the individuals who comprise them — and demonstrate the challenge presented to that assumption, and hence to our understandings of human rights and legal ethics, by a political force few seem to appreciate: the rise of "transovereignty".

Transovereigns can be summarized as powerful political entities that are less than fully sovereign states, but more than just the individuals who presently comprise them. Examples would include the Catholic Church, the environmental "Green" movement, fundamentalist Islam, international communism, and in many ways the United Nations. As these examples indicate, transovereigns are not "quasi" or "aspiring" sovereigns[2] — they are not immature forms of states, developing toward better or more recognized control over territory and indigenous populations. They ordinarily do not trouble themselves with the delicate and difficult task of actually governing — that is, reconciling conflicting interests within diverse populations. Instead, transovereigns are important today precisely because they are *not* freighted with the responsibilities of nationhood.[3] They are focused entities,

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1. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 59-64, 564-77 (4th ed. 1990); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 330-55 (1991); *see also* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990).

2. *See, e.g.*, BROWNLIE, *supra* note 1 at 64-65, 79-80 (discussing "states *in statu nascendi*" and "insurgent communities").

3. Transovereigns are therefore closely related to, but not the same as, "non-governmental organizations" (or NGO's) that have come under careful scrutiny recently. *See, e.g.*, A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1993); *see also* David J. Bederman, *The Antarctic and Southern Ocean Coalition's Convention on Antarctic Conservation: Introduction and Commentary*, 4 GEO. INT'L ENVTL. L. REV. 47 (1991) (giving another example of a complex NGO at work). Our definition of transovereign will require a more fundamental commitment to an organization's values and agenda than an ordinary NGO would involve. Nevertheless, some organizations that would be labeled as NGO's will be transovereigns, or one or more NGO's may be more specific or evident manifestations of a larger transovereign movement. A possible picture of how complex the interrelationships might be that constitute a transovereign movement at work is

sometimes with a single purpose, that concentrate their energies on particular goals without regard for national boundaries. They have in a sense, then, "transcended" ordinary sovereignty.

Transovereigns are particularly relevant to international law, therefore, because they separate their claims of human rights from traditional sovereignty, attempting to root these rights directly in morality rather than nationality. Furthermore, transovereigns make significant use of human rights in furthering their agendas. The goals of transovereigns are characteristically expressed as a set of fundamental moral propositions — "human rights" from the transovereign's perspective — that motivate the membership to practical political activity. As these transovereigns increase in international importance, the more eroded the traditional foundation of international law in state sovereignty seems to become. In turn, legal ethics — also state-based because of its current confinement to the pronouncements of national bar associations[4] — seems less and less relevant to lawyers who practice on behalf of these entities. Transovereigns thus help bring into sharper focus not only the issues of human rights, but the anomalies of international legal ethics.

Part I of this Article develops some necessary perspective on transovereignty and its importance to law and ethics by reflecting first on traditional sovereignty. A few competing positivist and anti-positivist theories of the emergence of political and legal systems will be briefly reviewed to reveal significantly different pictures of the possible role played by rights-claims in political development. Part II extends one of those theoretical models to help us describe more fully the nature and importance of the special political phenomenon of transovereignty. Part III examines briefly a particularly strong example of transovereignty at work: the impact of the Catholic Church on local political activities in Poland. Widening the Article's perspective, Part IV speculates briefly on the implications of transovereignty for the legal

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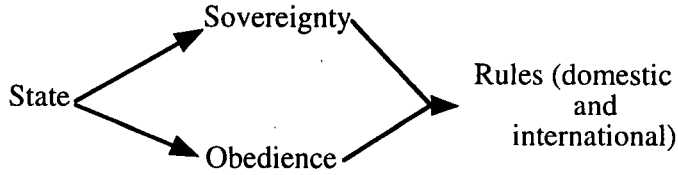
presented in David A. Wirth, *Legitimacy, Accountability and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645 (1991). Our view of transovereigns also distinguishes them from multinational corporations, which, although potentially significant in the international arena, nevertheless lack any noteworthy internal cohesive force other than the pursuit of profit. *See, e.g.*, BROWNLIE, *supra* note 1 at 67-68 (discussing international force of corporations).

4. A recent notable exception is the CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY (1988) [hereinafter EC CODE OF CONDUCT]; *see* John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673 (1992).

ethics of lawyers practicing human rights law. The Article addresses the question, for example, of whether lawyers as a professional group, with their shared reverence for the rule of law as a governing political ideal — an ideal of orderliness that they view as a "human right" all its own — are themselves becoming a significant transovereign force.

I. *SOVEREIGNTY, RIGHTS, AND POLITICAL THEORY*

In its "classic," nineteenth century form, which remains its most familiar and persistent model, international law needed nothing more to anchor or explain itself than the existence of nations with sufficient internal power and control — summarized in the concept of "sovereignty"[5] — to generate obedience to announced rules.[6] Because those rules were not limited to domestic pronouncements, but could include multilateral agreements and recognized international legal principles, nation-states seemingly brought an international legal "system" into existence by decree, a system based on the domestic models with which they were familiar.[7]



In other words, from the formation of a state would simultaneously flow the attributes of sovereignty on the part of government and a corresponding submission on the part of the citizenry, together permitting rules of all sorts to be promulgated.

Many theories of political community have been propounded to supplement this simplistic picture, but this Article reviews and summarizes only a few to give the necessary perspec-

5. *See* BROWNLIE, *supra* note 1 at 78-79, 107-71. This is, of course, a rather general use of this term which ignores for present purposes the nuances of legitimacy from a more complete international legal perspective.

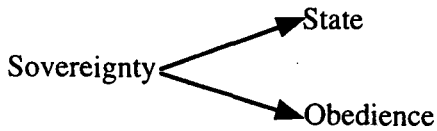
6. The fact that international law may be closely tied to "the will of states," does not mean that it is doomed to a derivative and secondary status. SCHACHTER, *supra* note 1 at 9. It has certainly shown an ability to take on a life of its own. *See id.* at 9-15; H.L.A. HART, THE CONCEPT OF LAW 208-31 (1972).

7. *See* BROWNLIE, *supra* note 1, at 32-57.

tive on the emergence of transovereignty. Conveniently available for this purpose is a well-known "debate" of a sort in a series of works by three legal theorists, whose focus was primarily on domestic legal systems, but whose approaches nevertheless translate usefully to the international context. It is appropriate to begin with John Austin,[8] not because his approach is especially commendable, but because of the improvements made to his realist/positivist analysis by H.L.A. Hart.[9] A modern anti-positivist perspective is next presented through the criticisms of Professor Hart offered by Ronald Dworkin.[10] Each of these theorists can be conveniently summarized around a few basic factors in various combinations and sequences, those summaries illustrating the disagreements that plague legal and political philosophy. Viewed from this perspective, transovereignty does not resolve these disagreements; it may complicate them further.

A. *Austin*

Austin's realism put power and control — more specifically, orders backed by threats — at the origin of the analysis of legal systems, with nationhood and obedience following together:[11]



An understanding of law (and hence legal ethics) from Austin's perspective must begin with the simple fact of social control, which later develops into *legitimate* control when power is exercised by an organized government over an obedient population.[12] This depiction is so simplistic, however, that little can be

8. JOHN AUSTIN, *The Province of Jurisprudence Determined*, *in* 1 LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (Murray ed., 1885) [hereinafter LECTURES ON JURISPRUDENCE]; JOHN AUSTIN, *Lectures on the Philosophy of Positive Law*, *in* 1 LECTURES ON JURISPRUDENCE (Murray ed., 1885).

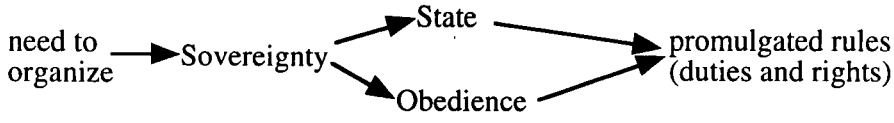
9. HART, *supra* note 6.

10. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter TAKING RIGHTS SERIOUSLY]; RONALD DWORKIN, LAW'S EMPIRE (1986).

11. *See generally* LECTURES ON JURISPRUDENCE, *supra* note 8, Lectures I, IV, V, VI, *The Province of Jurisprudence Determined*, at 79-103, 140-338; LECTURES ON JURISPRUDENCE, *supra* note 8, Lectures XXII, XXIII, *Analysis of Pervading Notions*, at 443-57.

12. LECTURES ON JURISPRUDENCE, *supra* note 8, Lecture VI, *The Province of Jurisprudence Determined*, at 219-338.

said in its defense, except to repair it somewhat by adding factors it seems to assume at both ends. For example, something must motivate people in the first place to organize toward a powerful government, and something must result from the creation of a state with an obedient population. Thus, a more complete picture might include a "need to organize" at the beginning, and, at the end, a set of practical, governing outcomes that demonstrate that a viable political entity has been established:



B. *Hart*

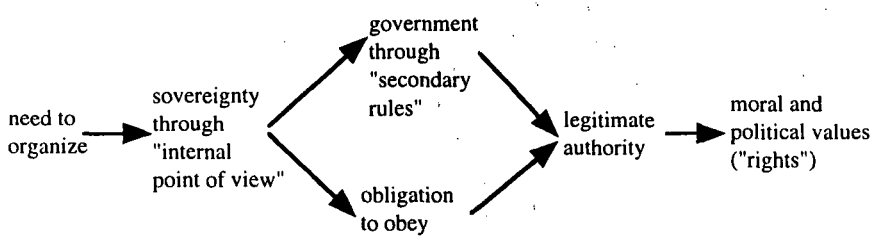
Professor Hart's famous response to this model was not so much to reorganize it as to add sociological depth and sophistication to it. For example, he replaced Austin's heavy-handed approach to sovereignty (consisting merely of control through raw power) with a version based on a more complex, special kind of community that had developed within itself, in effect, a respect for itself.[13] Hart identified this socio-psychological phenomenon as an "internal point of view," in which the group's members internalize the community's basic social rules as legitimate guides to their behavior.[14] This represents a critical step, since social rules in this kind of community are not merely acquiesced to as a means of avoiding punishment or reprisal. Instead, they are accepted by the population as *authoritative* of the morally correct thing to do.[15]

Hart then suggests, consistent with the basic Austinian model on which he is building, that within this community, two further developments can now take place together. One step involves the emergence of a "state," better understood from Hart's perspective as the formation of an effective government:[16] The social rules that have arisen thus far are made more efficient and effective through another layer of rules Hart called "secondary

13. *See generally* HART, *supra* note 6 at 83-86 (setting forth Hart's concept of law).
14. HART, *supra* note 6, at 86-88.
15. *Id.* at 87-88, 99-100.
16. *Id.* at 91-96.

rules,"[17] or the constitutive social rules of government.[18] Because of the internal point of view from which they spring, however, these rules form a government that speaks with the degree of "authority" that all regimes hope to achieve — influence that does not depend upon coercion or raw power, but a deeper acceptance by the population. The other development in this community, then, is the simultaneous evolution within the populace of that deeper, "internal" feeling of connection to the system of rules now being formulated. As Hart puts it, people do not believe they are simply "obliged" to follow these rules in order to avoid punishment, as in Austin's view; they are instead motivated by a stronger sense of "*obligation*" as citizens to obey them.[19]

From this combination of government and justified obedience could then emerge legitimate political authority, and in turn legal rules that could embody the community's moral and political values. A summary depiction of his analysis could look like this:



Note, however, that Hart left intact Austin's basic order of events. Hart posited that communities would form because of the pragmatic needs of personal and social survival, not because of any key moral imperatives.[20] To the extent morality played a role in the development of this political community, it would be as an outcome of other, previous psychological and sociological

17. *Id.* at 91.

18. *Id.* at 91-96.

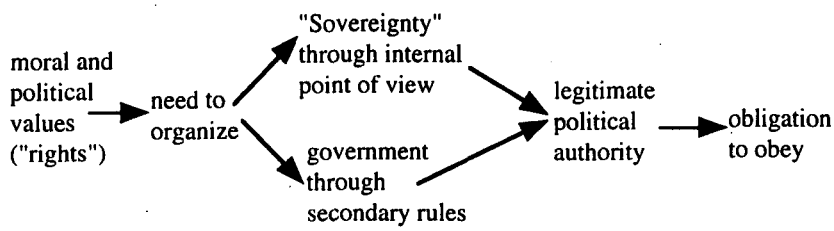
19. *Id.* at 79-88, 96, 99-100.

20. *See* HART, *supra* note 6, at 151-207 (discussing necessary distinction between morals and law in the two chapters of THE CONCEPT OF LAW that he devotes to the topic). The only concession he makes to the possibility of some content to the concept of pre-existing "natural law" is his list of five "truisms" concerning human circumstances in general (such as "human vulnerability") that make a few basic tenets of law (such as prohibitions against murder) pragmatically inevitable in any society. *Id.* at 189-95.

forces of much more immediate and practical import. Authority, therefore, in Hart's political community would be established *before* the identification of the community's moral and political values, other than the basic pragmatic values necessary for social survival.[21] "Rights" would also then be a possible, but not a *necessary*, product of the exercise of that authority.

C. *Dworkin*

Although difficult to define precisely on some of these points, Ronald Dworkin[22] has developed an anti-positivist critique of Hart that suggests an important reordering of portions of the Austin-Hart model of political/legal development. This reordering is necessary to understanding the nature and significance of transovereignty. Professor Dworkin challenges us to imagine that practical political development could be *preceded* and indeed *prompted* by moral and political values, and hence by a commitment to some version of "rights."[23] Rather than being merely the outcome or product of government, these values or rights could put philosophy rather than, say, sociology, at or very near the head of the sequence, and correspondingly make the outcome of the process a fully legitimated obligation to obey the rules promulgated by this system:



It is unclear, however, whether Professor Dworkin's fully detailed theory would imagine the origin of national development to be rooted in concern about values and rights, or whether the theory begins more mundanely and sociologically in a need to

21. *Id.* at 189-95 (discussing values arising from "truisms" of the human condition).

22. *See generally* TAKING RIGHTS SERIOUSLY, *supra* note 10 (concerning Professor Dworkin's approach as a whole to political and legal theory rather than specific, isolated sections).

23. *Id.* at 82-130.

survive physically rather than morally.[24] But for present purposes, that detail is not critical since it is at least clear that Dworkin imagines that values will, and certainly should, matter within political entities much earlier and more fundamentally than either Austin or Hart had suggested. If values do precede, and indeed initiate, every other step in developing legitimate government, then Dworkin can be understood as an example of a classic natural law theorist. If, on the other hand, the values develop later in the process once the group has some sense of itself — perhaps even after some preliminary efforts at government have been attempted — then Dworkin may not be so easily labeled.

Nevertheless, his alternative view of the significance of moral and political values is important to the alternative view of international human rights being developed here in relation to the phenomenon of transovereignty. Assuming for the moment the more extreme interpretation of Dworkin that posits some set of basic values or a preliminary sense of rights as initiating the process of political development, then the people in this community committed to these values or rights are nonetheless confronted immediately with the pragmatic need to organize themselves in order to protect or effectuate those rights. The moral values in the background of this social group, however, allow it quickly to become both the *social* community Hart envisioned

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24. *Id.* Professor Dworkin's so-called "rights thesis," which is at the core of the analysis of law and legal systems, imposes on judges an ambitious responsibility to determine the rights of parties in litigation in "hard cases" by reference to a community's fundamental political morality. *Id.* Note, for example, the following passages:

> Individuals have a right to the consistent enforcement of the principles upon which their institutions rely. It is this institutional right, as defined by the community's constitutional morality, that [the judge] must defend against any inconsistent opinion however popular.

Id. at 126. And in the next paragraph:

> [The judge's] theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community.

Id. These and other arguments in the book sometimes seem to suggest that a few fundamental moral principles preceded the formation of community and provided the core around which the community's "laws and institutions" could then form—for instance, where Professor Dworkin discusses the foundational moral values of "human dignity" and "political equality." *See, e.g., id.* at 198-99. At other times, however, Professor Dworkin seems to say that the community simply formed itself, one way or another, and the judge's job is then to examine those actual historical roots carefully, even if that endeavor yields morally painful results. *See, e.g., id.* at 326-27.

(with the necessary, legitimating "internal point of view" about basic social values) as well as the *political* community he had in mind (with the establishment of a set of secondary rules that will govern the community).

But there now appears another subtle, and again very important, difference between the models of political development suggested by Hart and Dworkin. While Hart seemed to imagine that the "internal point of view" necessarily entailed a fully realized "obligation to obey" the rules of an established political community, Dworkin seems to reserve this powerful idea of moral obligation until later. Dworkin suggests that while the internal point of view and governmental secondary rules may generate legitimate political authority to govern, the population being governed in this model will only have an obligation to obey in the strong sense once the edicts of this government are critically compared to the moral and political values that started the enterprise.[25] In other words, if the values that lie behind this political community are to be taken seriously, then the population's fully internalized obligation to obey the rules of the government will only be established when the rules are shown to manifest those background values. Thus, the obligation to obey seems more a product of these steps than a factor that is itself initially helping to establish the community's government. Political authority in its fullest sense, then, under this understanding of Dworkin's approach, is established by the combination of a value-based community and a morally purposeful government.

II. *TRANSOVEREIGNTY*

These different versions of political and legal development provide a basis on which to appreciate the place of transovereignty in the international arena. Transovereigns exemplify the kind of "values-first" approach to political theory that Professor Dworkin espouses.[26] Whatever "need to organize" is experienced by the membership of a transovereign, it is clearly

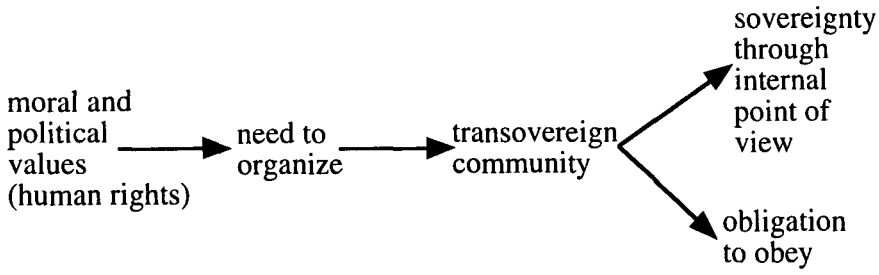
25. *See, e.g., id.* at 184-222 (discussing possible legitimacy of civil disobedience).

26. The "values-first approach" to political theory seems to be at the foundation of older natural law-based theories of international law as a whole, such as that of Hugo Grotius. *See, e.g.*, HUGO GROTIUS AND INTERNATIONAL RELATIONS (Hedley Bull et al. eds., 1990).

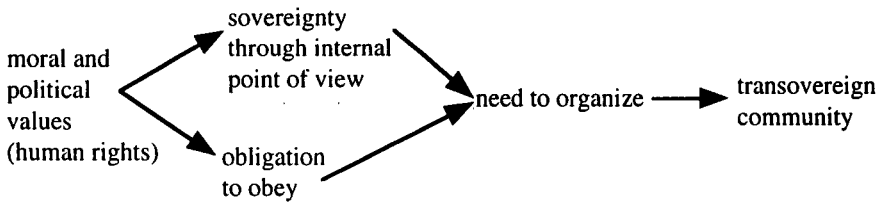
prompted by the urge to further the values-based goals that brought these people together in the first place.

However, concerning these "needs," one crucial difference from the earlier models of political development must be noted at the outset. Although the membership of a transovereign will face practical problems in becoming organized, one of the difficulties they will *not* confront is the responsibility of effectively governing any particular territory. Thus, the move to legitimated "community" can be quick and straightforward, for the sense of community at work here is moral rather than pragmatic, and this political entity can therefore be much looser and more difficult to identify than those ordinarily associated with effective political action.

To return to the schematic summary of political development we have been using, the sequence of factors that might be at work here, then, could be a simple modification of Professor Dworkin's model:



Yet the difference between transovereigns and ordinary political communities is greater than this modification suggests. The depiction above omits an important element in the nature of transovereigns by leaving the strong, internalized "obligation to obey" — and hence, the closely allied concept of "authority" — as a final outcome of the process that produces the organization. Transovereigns are instead characterized by a membership that is committed to the values of the group more deeply and more quickly than ordinary political development would produce. Indeed, transovereigns seem to organize *because* of a sense of responsibility toward the common values that unite the members. Thus, a better picture of the sequence at the foundation of these entities would be this:



A transovereign, then, has the luxury of being able to act politically at its very inception from the strength of a *pre-existing* "internal point of view" — an authority to speak and act — concerning the basic purposes of the organization. No effective government of the membership is actually necessary to keep the organization vital and politically significant, so long as the underlying values that formed it remain identifiable and significant to the membership.

Transovereigns will not, of course, be of a single type or character, for the underlying factors of "internalization" of values and "obligation" to follow and participate can vary widely. The political force they embody, however, is much more than the occasional attachment people can feel to an interest group dedicated to a narrow topic.[27] Instead, a transovereign is more pervasive in its influence — it is an entity that is ultimately recognized by its members or adherents as having the authority to define basic values themselves, perhaps even the nature of right and wrong, and then to seek the membership's help in implementing those conclusions. The transovereign's ambition could reach well beyond regulating the lives of its members; it could see its mission as spreading the influence of its values to a wider audience. Indeed, the development of a transovereign can become circular: having come together because of shared values, the members can allow those values to take on a life of their own in the form of the transovereign entity, to which the people then turn for guidance concerning the values that created it.

Transovereigns retain their special, non-traditional character, however, only by remaining connected and committed to the core values that generated them, and only if the members feel a common bond among themselves in these shared values.

27. Tarlock, *supra* note 3 at 65 (describing NGO's as example of narrow topic interest group). We have in mind, however, entities both more fundamental and more ambiguous than the NGO's analyzed by Tarlock.

With those factors, the result is an identifiable community, often with significant political power, but one very different from those assumed by the tenets of international governance.

Transovereignty is therefore a political force that derives a significant part of its strength from the fact that it exists in a world of traditional sovereignty. Other political entities of varying structure, depending on the cultures that produce them, perform the actual tasks of governing — handling all the problems and challenges that diverse populations can present, and that competing versions of justice and order can generate. Transovereigns can therefore focus their energy on certain values because they do not ordinarily have to make hard, practical choices among competing values. They exist because their memberships have already made those choices, and seek to have their views implemented within the political frameworks offered by traditional sovereigns. Or, in extreme cases, they might seek to replace existing sovereigns with other governments friendlier to their agenda.

Because transovereigns are therefore parasites on, rather than examples of, sovereignty, the sequence of factors we have suggested as behind the formation of transovereigns should not be understood as an endorsement of Professor Dworkin's political and legal theory, even though his values-based model of political development provides the closest comparison or analogue for them. Traditional sovereigns may or may not have fundamental moral and political values at their origin, although the United States, with its historical background of local covenants, compacts, and charters, and finally the U.S. Constitution, may be a good example of what Professor Dworkin has in mind.[28] Nevertheless, one could conclude that *if* a particular nation-state had certain identifiable values at its core — that is, if such values form a perspective from which all its national actions should be appreciated and interpreted — then that country ought to have particularly interesting relationships with transovereigns, both positive and negative. If that nation's underlying values are consistent with those of a particular transovereign, that nation probably would have a very cozy and cooperative relationship with the transovereign, since the voices of authority of the govern-

28. *See generally* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 13-50 (1988).

ment and the transovereign should complement and reinforce each other. On the other hand, if that nation's foundational values are markedly different from those of a certain transovereign, then that nation's government would probably have a much more tense and competitive relationship with the transovereign, the voices of authority speaking to the population now being discordant.

An example could help make these theoretical propositions real.

III. *THE CATHOLIC CHURCH AS TRANSOVEREIGN IN POLAND*

During the past fifteen years, the world has witnessed one of the more obvious exercises of power by a transovereign in conflict with a traditional sovereign. This example — the struggle over the soul of the government of Poland — actually involves two transovereigns of very different types, one highly structured and steeped in history and tradition, the other little more than an idealistic theory. Both, however, exert the force of ideology.

Religious faith is an archetype of the internal point of view on which transovereignty can be based.[29] The Catholic Church exhibits far more, however, than just the faith of its individual members — it is an organization with its own laws, dogma, and rites that establish and clarify membership, and create obedience without coercive enforcement.[30] Moreover, the Catholic Church has both a history and a tradition of moral leadership beyond the walls of its churches, extending itself directly into political struggle from time to time. The Papal Revolution of

29. On the nature and historical significance of faith systems to Western culture and political structure, *see* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983) [hereinafter LAW AND REVOLUTION]; HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION (1993) [hereinafter FAITH AND ORDER].

30. The Roman Catholic Church has defined a specific set of values about the relation between mankind and God, along with the implications of the relationship for human existence and personal salvation. People have identified with these values and have ultimately chosen whether they accept the Catholic Church as a legitimate embodiment and teacher of those values. Having accepted those values and their manifestation in the Church as legitimate, the follower defers to the Church, as a transovereign, in defining particular aspects of those values. Excommunication might be seen as a form of "coercion," but only in the sense that it impacts negatively someone who has already voluntarily committed himself or herself to the faith and its values and rites.

Gregory VII,[31] for example, in the Eleventh Century made the Church's attitude toward politics clear. Rather than continue to permit local monarchs to influence or determine local Church matters, Pope Gregory turned the relationship around. The Pope sought to establish the Church's primacy by claiming for the Church the swords of both spiritual and temporal power, the latter being given back to kings by the Church. Thus, the Church was entitled — indeed, had a duty — to influence political events, while political leaders were to keep their hands off the Church.

This attitude has continued to the present. During the Second Vatican Council in Rome, for example, the Church reaffirmed its determination to act in the world. Although the Council reiterated that the Church should not be active in the traditionally secular realms of politics and economics, it did proclaim that its

> religious mission can be the source of commitment, direction, and vigor to establish and consolidate the community of men according to the law of God. In fact, the Church is able, indeed it is obliged, if times and circumstances require it, to initiate action for the benefit of all men, especially of those in need, like works of mercy and similar undertakings.[32]

As a transovereign, the Church not only has a strong, identifiable policy, it also has a two-tiered system for promulgating its message. To its members in general it has the pulpit, and to traditional sovereigns it has the Vatican's diplomatic arm, the Holy See, which has gained recognition in international contexts even though it is not considered to represent a state.[33]

The Church's opposition to communism began almost immediately after that political ideology's appearance. Only six years after the *Communist Manifesto* was published, Pope Leo XIII used strong language to condemn

> that sect of men who, under various and almost barbarous names, are called socialists, communists, or nihilists, and who, spread over all the world, and bound together by the closest ties in a wicked confederacy, no longer seek the shelter of

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31. *See* LAW AND REVOLUTION, *supra* note 29, at 23, 94-102.

32. *The Conciliar and Post Conciliar Documents, in* VATICAN COUNCIL II 942 (Austin Flannery, O.P. ed., Liturgical Press 1984).

33. *See* BROWNLIE, *supra* note 1, at 65-66.

> secret meetings, but, openly and boldly marching forth in the light of day, strive to bring to a head what they have long been planning — the overthrow of all civil society whatsoever.[34]

The Church reacted this way because it saw in communism direct challenges to some of its most basic values: denying the existence of God and a person's personal relationship with God;[35] promoting or fostering the dissolution of families and marriage;[36] denying the natural right of private property;[37] and denying individual human dignity generally by denying that each individual has sacred value.[38] Because communism put the state rather than the individual and his or her relationship with God at its center, the Church attacked communism as an inherent violation of human rights. As Pope John Paul II described the situation in retrospect:

> If we then inquire as to the source of this mistaken concept of the nature of the person and the "subjectivity" of society, we must reply that its first cause is atheism. It is by responding to the call of God contained in the being of things that man becomes aware of his transcendent dignity. Every individual must give this response, which constitutes the apex of his humanity, and no social mechanism or collective subject can substitute for it. The denial of God deprives the person of his foundation, and consequently leads to a reorganization of the social order without reference to the person's dignity and responsibility.[39]

In effect, the Church recognized that communism was, like Roman Catholicism, a transovereign, and that the struggle between them should therefore be understood as nothing less than the battle over the soul of mankind.

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34. Pope Leo XIII, *Quod Apostolici Muneris*, (Dec. 28, 1878), *reprinted in* THE PAPAL ENCYCLICALS 1878-1903, at 11 (Claudia C. Ihm ed., McGrath 1981).

35. *Id.* at 13.

36. *Id.* at 14.

37. Pope Leo XII, *Rerum Novarum*, (May 15, 1891), *reprinted in* THE PAPAL ENCYCLICALS 1878-1903, at 241-44 (Claudia C. Ihm ed., McGrath 1981). The Church also proclaimed that there is a "right of economic initiative." John Paul II, *Sollicitudo Rei Socialis*, *reprinted in* ON SOCIAL CONCERN, at 25 (St. Paul ed. *year*).

38. John Paul II, *Centesimus Annus*, (May 1, 1991), *reprinted in* ENCYCLICAL LETTER OF JOHN PAUL II: ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM, at 20-21 (St. Paul ed. *year*).

39. *Id.* at 21.

The Church's opposition to communism in Poland was particularly important because that country's population, despite the official atheism of the government, had remained almost entirely Catholic and active in their faith.[40] The Church's message about communism, then, served as an unusually strong method to help the people define their opposition to the government, not in terms of temporary economic or political concerns, but in terms of fundamental values. The Church's message was, in essence, that all people are made free by the grace of God, and any system that denies freedom of conscience is inherently adverse to God's will and basic human rights.[41] Communism was also based on economic determinism, which the Church rejected as fatalistic.[42] The Church embraced instead a philosophy in which people can have a better life through exercise of their free will.[43]

Thus, the battle in Poland was archetypically transovereign in character, for it was at base a contest about the proper relationship between the individual and sets of fundamental values. It also concerned the most basic political loyalty — the internal point of view — of the people. And because it was abstract rather than pragmatic at its foundation, it was a battle often waged around symbols rather than specific policy issues.

The single most important symbol was probably the election of the first Pope of Polish heritage, John Paul II, in 1978. In his first trip away from Rome, the Pope returned to his homeland in 1979, which represented the first trip to an Eastern European country by a Roman Pontiff.[44] Through him, the Polish Church was suddenly a direct, personalized competitor with the official government, for it had as its spokesman a man who was in many ways a living Christian allegory for the Polish people. Pope John Paul II had lived under communism, struggled against it, and through steadfast beliefs had ultimately passed from its control. And this Pope never backed away from an opportunity to link the Church with the opposition movement. In his first encycli-

40. Zygmunt Nagorski, *A Church Signal To Poles*, N.Y. TIMES, Mar. 5, 1984, at A17.

41. Pope John Paul XXIII, *Pacem in Terris*, (Apr. 11, 1963), *reprinted in* THE PAPAL ENCYCLICALS 1958-1981, at 108 (Claudia C. Ihm ed., McGrath 1981); *see also*, Pope John Paul II, *Redemptor Hominis*, (Mar. 4, 1979), *reprinted in* THE PAPAL ENCYCLICALS 1958-1981, at 261 (Claudia C. Ihm ed., McGrath 1981).

42. Pope Leo XIII, *Libertas*, (Jun. 20, 1888), *reprinted in* THE PAPAL ENCYCLICALS 1878-1903, at 169-70 (Claudia C. Ihm ed., McGrath 1981).

43. *Id.*

44. John Darnton, *60 Days that Shook Poland*, N.Y. TIMES, Nov. 9, 1980, § 6, at 39.

cal, the Pope focussed on the importance of the Church in promoting human rights and how totalitarian regimes violated those rights.[45] Shortly after the Pope's 1979 visit, the Solidarity labor movement emerged, and John Paul II responded with a series of encyclicals in the early 1980's endorsing labor unions, rejecting the theory of class struggle, and even embracing as consistent with Catholic teaching the use of strikes as a means of securing rights.[46] The Pope's messages often seemed to be directed specifically at his homeland:

> Other nations need to reform certain unjust structures, and in particular their *political institutions*, in order to replace corrupt, dictatorial and authoritarian forms of government by *democratic* and *participatory* ones. This is a process which we hope will spread and grow stronger. For the "health" of a political community — as expressed in the free and responsible participation of all citizens in public affairs, in the rule of law and in respect for the promotion of human rights — is the *necessary condition and sure guarantee* of the development of "the whole individual and of all people."[47]

After Solidarity was outlawed in December 1981 under the decree of martial law,[48] its leaders, Church leaders in Poland, and the Polish people continued their efforts to bring about change, and the Pope maintained his attack.[49] John Paul II denounced the actions of the Polish government: "[u]nder the threat of losing their jobs, citizens are forced to sign declarations

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45. Pope John Paul II, *Redemptor Hominis*, (Mar. 4, 1979), *reprinted in* THE PAPAL ENCYCLICALS 1958-1981, at 260 (Claudia C. Ihm ed., McGrath 1981).

46. Pope John Paul II, *Laborem Exercens*, (Sept. 14, 1981), *reprinted in* THE PAPAL ENCYCLICALS 1958-1981, at 299 (Claudia C. Ihm ed., McGarth 1981). John Paul stated that popular labor unions were needed to give the people a voice and maintain their dignity in relation to the government. *Id.* at 319. He discussed the importance of unions in securing the interests of the workers. *Id.* at 318-19. He rejected the theory of class struggle and embraced the use of the strike as a means of securing rights as specifically in line with Catholic teaching. *Id.* at 319-20. Later, in *Centesimus Annus*, Pope John Paul II proclaimed that all have a "right to establish professional associations of employers and workers, or of workers alone." *Centesimus Annus*, *supra* note 38, at 13.

47. John Paul II, *Sollicitudo Rei Socialis*, *reprinted in* ON SOCIAL CONCERN, at 84 (Daughters of St. Paul ed., 1987) (emphasis in original).

48. Vladimir Bolshakov, *'Pravda' on Western Reaction to Events in Poland*, BBC, Dec. 22, 1981, pt. 1 *available in* LEXIS, Nexis Library, BBCSWB File; *Despite Crackdown in Poland, 'The Human Spirit Remains,'* U.S. NEWS & WORLD REP., Jan. 25, 1982, at 32.

49. Henry Kamm, *Solidarity and Martial Law Bring Church and Poland's Intellectuals into an Alliance*, N.Y. TIMES, June 6, 1982, § 1, at 14.

that don't agree with their conscience and their convictions."[50] The Pope continued by saying that the violation of conscience does "grave damage to man" and that "[i]t is the most painful blow inflicted to human dignity. In a certain sense, it is worse than inflicting physical death, of killing."[51]

Shortly thereafter the Pope used his weekly blessing of the crowd in St. Peter's Square to ask for prayers "for my fatherland."[52] He stated: "I want to assure my fellow nationals that their wishes are mine as well."[53] The Pope went on to quote a pastoral letter issued by Archbishop Josef Glemp, the Primate of the Polish Church, and the episcopate: "The bishops speak of the restoration of normal functioning of the state, of the speedy liberation of all the internees, of an end of pressure for ideological reasons and of dismissals from work for people's beliefs or membership in the union."[54] He quoted the bishops: "[i]n the name of liberty, we believe firmly that the right to organize in autonomous and self-governed unions must be restored to workers, and to young people the right to organize in associations of their choice."[55] In retrospective comments on the importance of these statements of support, Lech Walesa, the founder of Solidarity, told the Pope: "You were and are the symbol of the spirit of this nation, of a nation that never accepted a system of enslavement."[56]

The political struggle involved more than just the words of the Pope, of course. Turmoil erupted, for example, when the government, under the theory of separation of church and state, ordered the removal of crucifixes from public buildings and schools.[57] Mass demonstrations, especially by students, protested the action,[58] which many found quite predictable. One priest noted that: "[t]he students are 100 percent Catholic, and this is

50. *Pope Denounces Polish Crackdown*, N.Y. TIMES, Jan. 11, 1982, at A9.

51. *Id.*

52. Henry Kamm, *Pope Backs Polish Primate's Call on Human Rights*, N.Y. TIMES, Jan. 25, 1982, at A8.

53. *Id.*

54. *Id.*

55. *Id.*

56. Stephen Engelberg, *Pope Visits a Non-Communist Poland*, N.Y. TIMES, Jun. 2, 1991, § 1, at 3.

57. John Kifner, *Student Protest Swells in Poland; Return of Crucifixes is Demanded*, N.Y. TIMES, Mar. 9, 1984, at A1.

58. *Id.*

an insult to their religious sensibilities."[59] The assault on the symbols of the Church were quite apparently understood as an assault on the basic values of the people themselves, and challenged directly the internal point of view the people had toward the Church rather than the government. Reverend Stanislaw Binko put it most succinctly: "There is no Poland without a cross."[60]

Local clergy often used their pulpits to challenge the government, and thus demonstrate that the Church had legitimate authority to define the issues at stake. For example, when the Polish government offered jailed Solidarity leaders and other dissidents their release from prison if they would accept exile from Poland, Reverend Jerzy Popieluszko preached to a congregation of over 10,000 people that the government had no right to deny a "man a right to his homeland."[61]

The Church not only allied itself with the people against the government, it also became a force in settling political problems by acting as a mediator between Solidarity and the government. During a strike by members of the outlawed labor union, the Polish bishops appointed mediators that facilitated negotiations between the government and the workers.[62] Despite what might have appeared to be a neutral stance, the head of the striking workers publicly thanked the bishops for their "support."[63] Furthermore, the Church gave the workers the physical means to continue the strike by delivering food to those who refused to leave the job-site.[64] Although the strike ended without a clear victory for either side, the striking workers left their positions carrying a wooden cross, pictures of Pope John Paul II, and pictures of the icon of the Black Madonna of Czestochowa, a national symbol and most holy artifact in Poland.[65]

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59. *Id.*

60. *Id.*

61. *Polish Priest Defends Solidarity From Pulpit*, N.Y. TIMES, Oct. 31, 1983, at A13.

62. John Tagliabue, *Poland's Bishops Name 5 Mediators in Labor Conflict*, N.Y. TIMES, May 5, 1988, at A1. This strike protested the Government's raising of food prices as part of economic reform. The strike in part demonstrates that economic change was not the only motivation for the revolution in Poland — that freedom to choose one's own destiny was also central. The Church embodied that message.

63. *Id.*

64. John Tagliabue, *Gdansk Workers End 9-Day; Key Demand Unmet*, N.Y. TIMES, May 11, 1988, at A1.

65. *Id.*

The government certainly understood the force that opposed it, but could do little more than attempt to cast doubt on its legitimacy. Prime Minister General Wojciech Jaruzelski told a national conference of the Communist Party: "Deep distaste is aroused by the courting of the church and the misuse of its prestige by various mysteriously 'converted' and morally edified ones who try to turn the temples into rallying places or exhibition halls and to ply politics in churches."[66] He went on to say that there were priests who "have confused the pulpit with the Radio Free Europe microphone."[67] The government occasionally used more than just words to combat the Church, since several priests were murdered during this period.[68] But in the competition between the inconsistent sources of moral and, inevitably in Poland, political authority, the government found itself left with only coercion as a means of social control. Having had any chance of developing an internal point of view blocked by this transovereign, the government was doomed to eventual failure.

IV. *TRANSOVEREIGNTY AND LEGAL ETHICS*

The Catholic Church is but an example of the larger phenomenon of transovereignty. If the purpose of this Article were to prove the existence of such entities and to identify all their common salient features, it would be necessary to examine in similar detail the efforts of other purported transovereigns, like the "Green" movement and Amnesty International and so on, in other political contexts. But the goals in this Article concerning transovereignty are necessarily more limited, for there is the additional responsibility here to link this discussion of political development and authority to the more particular topic of the ethical responsibilities of lawyers.

This task is either very easy or very difficult. It is easy if the lawyer's relationship to the transovereign follows the ordinary

66. John Kifner, *Polish Leader Assures and Warns the Church*, N.Y. TIMES, Mar. 17, 1984, § 1, at 3.

67. *Id.*

68. Stephen Engelberg, *Evolution in Europe; Figure in Slaying of Polish Priest Hints at Involvement of Superiors*, N.Y. TIMES, July 15, 1990, § 1, at 6. This point is all the more dramatic when linked to the rumors that later surfaced of the KGB's possible involvement in the assassination attempt on Pope John Paul II. Michael Wines, *Upheaval in the East: 1980 Soviet Defector Emerges with an Account of K.G.B. Plots*, N.Y. TIMES, Mar. 3, 1990, § 1, at 6.

lawyer-client pattern that is at the heart of traditional Western legal ethics, and the representation occurs within a recognized domestic legal system. In that situation, although a lawyer may have some obstacles to overcome, the usual expectations imposed on lawyers by either domestic or emerging international ethics codes ought to apply without significant complication. However, relating legal ethics and transovereignty will be quite a challenge where the traditional form of lawyering is not present — where either the transovereign is not a "client" in any meaningful sense or the representation has little to do with any legal system. Legal ethics would apply here only in the form of a generalized moral code that a legal professional perhaps ought, but need not necessarily, heed.

Given this basic problem of trying to address a range of possible scenarios between these extremes, this Article will focus on connecting legal ethics and transovereignty in relation to three topics. First, because transovereigns are founded on internalized moral values, Part A below will discuss the tension a lawyer-member of a transovereign may feel between those values and the ethical obligations of independence and objectivity that lawyers are traditionally required to put at the foundation of their professional relationships and their professional advice. Second, because traditional legal ethics is based on the lawyer's responsibilities to an identifiable client, Part B will examine the ethical implications in the areas of conflicts and confidentiality for a law practice that purports to represent or further transovereign "causes" rather than the interests of a particular client. Third, because politically significant transovereigns can form around any internalized moral values, Part C will discuss whether lawyers themselves have become a transovereign in their own right due to the faith they typically place in the rule of law as the most basic of all governing values.

A. *Transovereigns and Lawyer Independence*

It is an open question whether lawyering is at its best when it is passionate or when it is dispassionate. Passion generates enthusiasm and unflagging hard work, but it can warp one's perspective so much that the advice one gives may become shortsighted and dangerous — one ends up saying what one wants to say rather than what one should. Dispassion helps keep a lawyer

focused on the client's agenda rather than confusing or conflating it with his or her own, which will help guarantee that bad or unwelcome news will be delivered when it should; on the other hand, the lack of personal commitment to a client's interests may disguise a lawyer's unspoken commitment to other social interests in competition with the client's.

American legal ethics codes[69] have almost nothing to say about passion, although they certainly expect lawyers to be "zealous"[70] in their representation of their clients and single-minded and undistracted in their advice to their clients.[71] The implication, then, is that devotion to a client's values is probably consistent, rather than inconsistent, with appropriate legal representation. The codes do acknowledge that dangers can arise to a client's interests that stem from a lawyer's own personal interests, but these are understood as interests that might pull the lawyer away from, rather than toward, the client. For example, the ABA's Model Rules admonish lawyers to avoid representations in which "the lawyer's own personal interests" may "materially limit" the representation.[72] The Comments to this Rule, as well as its context, make clear that the drafters had in mind an interest *adverse* to the client's, not an interest in apparent *harmony* with the client's.[73] Likewise, the ABA's older Model Code re-

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69. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES).

70. MODEL CODE, *supra* note 69, at Canon 7. Canon 7, for example, admonishes lawyers to "represent a client zealously within the bounds of the law," an idea then repeated in Ethical Consideration ("EC") 7-1. *Id.* The MODEL RULES more moderately require a lawyer to "act with reasonable diligence and promptness in representing a client." MODEL RULES, *supra* note 69, at Rule 1.3, but the Rules then go on to note that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES, *supra* note 69, at Rule 1.3, cmt. [1].

71. MODEL CODE, *supra* note 69, at Disciplinary Rule ("DR") 5-101, 5-105, 5-107; MODEL RULES, *supra* note 69, at Rule 1.7, 1.9.

72. MODEL RULES, *supra* note 69, at Rule 1.7(b).

73. Comment 6 to Model Rule 1.7 reads:

> [t]he lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for a lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

quires lawyers to decline a representation where "the exercise of [their] professional judgment on behalf of [their] clients will be or reasonably may be affected by [their] own . . . personal interests,"[74] those interests being further generally described as "*compromising* influences and loyalties."[75]

The same general approach seems to be behind one example of an international legal ethics code: the Code of Conduct for Lawyers in the European Community.[76] The first of the "General Principles" it lists as a basic value reflected in the Code is "Independence,"[77] and because the Code's language implies other considerations to which this Article turns in a moment, the relevant section is worth quoting in full:

> 2.1.1 The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.[78]

Note that the second sentence relates independence to impartiality, suggesting that a passionate commitment to a client's cause may not be professionally healthy. In other words, the kind of independence this section has in mind seems to include a form of dispassionate objectivity — specifically, objectivity required by the "process of justice" rather than the client's immediate goals. This impression is reinforced by the third sentence which differentiates a lawyer's "professional standards" from merely pleasing the client.

Similar admonitions in the American ethics codes also require lawyers to place any client's interests within the prior, and controlling, context of the judicial system in which they are be-

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MODEL RULES, *supra* note 69, at Rule 1.7, cmt. 6.

74. MODEL CODE, *supra* note 69, at DR 5-101(A).

75. MODEL CODE, *supra* note 69, at EC 5-1 (emphasis added).

76. EC CODE OF CONDUCT, *supra* note 4.

77. *Id.* at Rule 2.1.

78. *Id.* at Rule 2.1.1.

ing pursued.[79] This perspective, along with that of the EC Code, reflects the underlying fundamental principle of legal ethics that lawyers have a fiduciary responsibility to their clients.[80] Although the full substance and practical details of this responsibility cannot easily be articulated, its basis in the client's dependence on the lawyer's professional expertise — the client's vulnerability in the legal realm — suggests that part of this duty must be some measure of distance between lawyer and client that allows the lawyer to add a perspective to the situation that the client cannot easily supply itself.

For lawyers who represent transovereigns, this may present a problem worth considering. By definition, transovereigns generate the passion of commitment — their members have internalized and now act upon the values the transovereign embodies. Lawyer-members of these transovereigns, then, when acting in their professional capacities on behalf of the transovereign, face the challenge of tempering their commitment with objectivity. In turn, this may be more than an internal, personal struggle, for other members of the group may find a perspective based in objectivity to be inconsistent with the transovereign's values and agenda. Pressure might then be put on the lawyer to conform professionally as well as personally.

A second, related concern for lawyer-members is that they must recognize that the transovereign is not merely a particularly pushy or demanding client.[81] If lawyer-members internalize the values of the transovereign, then these values become a separate, significant source of authority in their lives, perhaps even a source strong enough to challenge the basic values embodied in the laws and legal system of the jurisdiction in which they practice. In that circumstance, the urge or tendency to give less than fully reflective and objective advice will be particularly strong.

B. *Transovereigns as Clients: Conflicts and Confidentiality*

The strength of the moral pull on the lawyer-member of a transovereign also raises a cluster of related ethical concerns.

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79. *See, e.g.*, MODEL RULES, *supra* note 69 at pmbl., ¶ 1, Rule 3.3; MODEL CODE, *supra* note 69 at EC 7-1, 7-19-39, DR 7-102.

80. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 145-48 (1986).

81. Timothy Terrell et al., *Rethinking "Professionalism,"* 41 EMORY L. J. 403, 414-15 (1992) (discussing special modern problem that client dominance of lawyers has become).

The most obvious are those involving conflicts between the interests of the transovereign and the interests of others to whom the lawyer may owe some duty, and those involving confidentiality of information obtained in the course of assisting a transovereign in pursuing its goals. Both of these, however, are largely a function of the more basic issue of identifying exactly who the client is in this human rights context.

Identifying the client is a critical initial issue, of course, because virtually all other aspects of legal ethics flow from it. As cynics would like to put it, lawyers need clients in order to transform themselves from "merely" bad *persons* into bad *lawyers*. And because client service is the essence of a traditional law practice, identifying the client is not usually a serious challenge. Problems most frequently arise when the lawyer attempts to serve more than one client regarding a common matter. In these circumstances, keeping straight in one's mind exactly who the client is — who is entitled to the lawyer's loyalty, diligence, and so on — is the lawyer's principal method for avoiding trouble.

Imagine, for example, a lawyer who is asked by Amnesty International ("AI") to assist a particular prisoner in a country that AI believes to have a government involved in widespread human rights violations. Once the lawyer becomes involved, however, she learns that a unique and narrow legal avenue is available that will likely lead to this prisoner's release, but to the release of no one else, and that this legal technique has nothing to do with the wider legal and social conditions that caused this and other prisoners to be incarcerated in the first place in the conditions they are now enduring. Yet the lawyer also knows that AI is counting heavily on the publicity concerning this prisoner to provoke important world reaction against the actions and policies of the incarcerating government. Any debate about the lawyer's ethical duty here would have to turn on some confusion about the identity of the client. Under American legal ethical principles, the lawyer either has a single client — the prisoner — although her fee may be being paid by a third party (AI), or the lawyer has two clients whose interests now conflict, forcing the lawyer to choose between them or withdraw altogether.[82] In either event, if the

82. *See* MODEL RULES, *supra* note 69, at Rule 1.7; MODEL CODE, *supra* note 69, at DR 5-105.

prisoner *is* a client, then it would be inappropriate under standard rules of confidentiality for the lawyer even to inform AI of the unusual legal avenue she has discovered while working on behalf of the prisoner, unless the prisoner gives his consent for her to do so.[83]

The only factor that makes this scenario interesting is the one discussed earlier: the special, separate loyalty the lawyer may feel toward the transovereign that has as its agenda issues of much greater moment than the circumstances of one individual who might appear to be the lawyer's client. The lawyer is forced to choose, then, between the authority of the principles of legal ethics and the authority of the moral imperative of alleviating human rights abuses — one is supposed to guide her as a professional, the other as a human being. As an additional difficulty, legal ethics would not necessarily permit the lawyer to make this choice in private. If the lawyer is honest enough with herself to recognize the conflict she faces, but she nevertheless believes her representation of the client or clients will be unaffected, American legal ethics would require her to *reveal* the conflict to the parties involved.[84]

The situation is murkier and less obvious, but still the same, in the circumstance in which the transovereign is not an identifiable organization, but a movement of like-minded individuals. If the values of this movement — protecting some aspect of the environment, advancing some form of religion, whatever — are a strong source of moral authority for the lawyer, the lawyer must recognize and reveal to any affected clients the internal conflict this competing loyalty creates.

C. *The Cult of Lawyering as a Transovereignty*

It is not easy to determine which organizations or movements are appropriately given the transovereignty label. The key

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83. MODEL RULES, *supra* note 69, at Rule 1.6; MODEL CODE, *supra* note 69, at DR 4-101. The information developed by the lawyer in the course of representing the prisoner would be confidential information protected by ethical responsibilities not to disclose it without the client's consent. MODEL RULES, *supra* note 69, at Rule 1.6; MODEL CODE, *supra* note 69, at DR 4-101.

84. MODEL RULES, *supra* note 69, at Rule 1.7; MODEL CODE, *supra* note 69, at DR 5-105(C). The revelation is necessary because the representation in this circumstance can only continue with the client's informed consent. MODEL RULES, *supra* note 69, at Rule 1.7; MODEL CODE, *supra* note 69, at DR 5-105(C).

here is substance, not form. A transovereign is any entity, whatever structure it may have or not have, that embodies important moral and political values that function as a strong guide for the behavior of its members or adherents. Given this description, lawyers themselves, because of similarities in their systematic training, their shared belief in certain core values and their important social function, may have become a kind of transovereign all their own.

Lawyers are naturally committed to several key principles that they would probably classify as pragmatic rather than moral: order, rationality, consistency, impartiality, and similar concepts that are the usual characteristics of traditional legal systems. The emphasis here is on "system" — lawyers by training and experience, and usually by preexisting inclination, have no interest in the unpredictability of either anarchy or unfettered power, but are instead drawn to social patterns and forms that will make lawyers useful, and hence powerful. One label for this favorable state of affairs is "the rule of law," by which is usually meant systematic, institutionalized social control that will depend in part on expert guides, rather than control through occasional, random, self-serving edicts that will reward luck as much as ability. Lawyers can be counted on to oppose and resist instability in favor of stability, to reform disorganization into structure, to squeeze order out of chaos.

Lawyers do so with the faith that the systems they create that benefit *them* benefit *society* even more. Thus, the argument here is not that a lawyer's devotion to the establishment and preservation of the rule of law is merely based in self-aggrandizement, a thirst for power, greed, or anything of that kind. Instead, lawyers have accepted and internalized the basic moral values that order and stability themselves represent. For lawyers, then, order carries its own moral authority, an authority that does not need elaborate, continuing justification. And as that subtle authority motivates lawyers to protect the systems in which they practice, and to help other communities develop the stability in which lawyers can operate to be of service to those communities, lawyers have quietly but successfully formed a transovereign movement of international significance.[85]

85. One interesting example is the massive effort mounted by the American Bar Association over the last few years to supply legal assistance to groups in Eastern Euro-

The importance of this legal transovereign is as subtle as its underlying authority. As believers in order and structure, lawyers are usually a strong voice in any community against violent, sudden, uncontrolled change. They do not necessarily oppose change itself, just certain techniques by which it might be accomplished. Lawyers are therefore a force of moderation and reflection in circumstances in which those values are often discounted.[86] They might then be understood, perhaps, as a transovereign dedicated to blunting the power of *other* transovereigns that would seek more immediate and dramatic success in their aims. In fact, lawyer-members within these other transovereigns may act as a subversive internal counterweight tempering the actions of such entities. One can legitimately wonder, therefore, whether lawyers in this situation are acting under the cloud of what would otherwise be labeled an "unethical" conflict of interest.[87]

Lawyering, like transovereignty, is therefore a more intriguing phenomenon than most seem to assume or realize. The general public in this country, with its well-known penchant for lawyer-bashing, has apparently sensed some of the implications of the cultishness of the profession even if the profession has not. In fact, much of the criticism directed at lawyers seems to involve instances of failure to live up to the implicit values of order and structure — rather than greed and power — that lie at the heart of the profession.

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pean countries and the countries of the former Soviet Union involved in drafting new constitutions: CENTRAL AND EASTERN EUROPEAN LAW INITIATIVE (CEELI LAW PROJECT) (American Bar Association Project ed., 1993). *See* Ken Myers, *East-West Scholar Cooperation Becoming a Booming Business*, NAT'L L.J., Oct. 15, 1992, at 4 (discussing CEELI project).

86. Another interesting aspect of the legal transovereign movement is the creation of organizations of lawyers focused on helping to free lawyers in other countries who have been incarcerated because of their activities on behalf of human rights or establishing the rule of law. The best known of these groups is the Lawyer-to-Lawyer Network, which is an adjunct of the Lawyers Committee for Human Rights. LAWYER-TO-LAWYER NETWORK (Lawyers Committee for Human Rights, ed. 1994)

87. The inclination of lawyers as a group toward procedural values, like consistency, stability, and political participation, rather than substantive values, like freedom of sexual preference, gun control, or abortion, reflects the simple fact that the human rights ideologies of the transovereigns and other groups of which lawyers may be members are often in conflict. A lawyer's "internal point of view" is ordinarily therefore pulled in several different directions, the only clear common ground among them being the basic procedural values.

CONCLUSION

This Article introduces and skims the surface of the concept of transovereignty and its possible implications for legal ethics in the international arena. The purpose has been to suggest a different perspective from which international lawyering, particularly involving organizations dedicated to human rights activities, might be assessed. Although no specific conclusions have been reached about any particular rules or circumstances of legal ethics that must now be overhauled or reformed in light of the influence of transovereigns of which lawyers might be members, perhaps this effort has provided a basis for further discussion that might yield the more fulsome guidance that practicing lawyers deserve.