Conflicting Notions of National and Constitutional Sovereignty in the Discourses of Political Theory and International Relations: a Genealogical Perspective

Hideaki SHINODA

submitted for the degree of Doctor of Philosophy at the London School of Economics and Political Science, University of London, November 1997

ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

Abstract

This thesis presents unexplored aspects of the problematic notion of sovereignty, a major issue in ongoing theoretical debates in international relations. Deploying a 'genealogical' perspective, it clarifies the transformation of ideas of sovereignty which reflect political changes in domestic and international society. Focussing primarily on Anglo-American discourses, it explores the hidden conceptual struggles involved in theories of sovereignty by illuminating its encounter with nationalism and constitutionalism. The national and constitutional forms of sovereignty are used to trace the trajectories of concepts of sovereignty in the fields of political, legal and international studies.

This thesis opens with an explication of the genealogical tools derived from Nietzsche and Foucault and a survey of existing accounts of sovereignty within the international relations literature. The historical research begins by identifying the nature of notions of sovereignty within 'constitutional' traditions in seventeenth and eighteenth century Britain and America. After looking into major Continental theories of national sovereignty in the nineteenth century, the thesis examines the rise of nationalistic theories of state-sovereignty in nineteenth century Britain and America. This thesis argues that a strong strand of 'international constitutionalism' appeared as a result of the Anglo-American victory over Germany in the First World War. In consequence, during the initial inter-war period sovereignty was understood as a principle compatible with 'the international rule of law'. The thesis then explores the dramatic decline of this tendency in the thirties which eventually led to the intrusion of national sovereignty in tandem with the rise of political realism. In the midst of the Cold War and the processes of decolonisation, vigorous advocates of national sovereignty in socialist and Third World countries pushed Anglo-American intellectuals to abandon projects of international constitutionalism in the final quarter of this century. It argues that while old-fashioned international constitutionalism based on an anthropomorphic domestic analogy is no longer valid, it is possible to identify in academic debates and political practices values of constitutionalism such as the protection of human rights which are compatible with international society and the concept of sovereignty.

Acknowledgement

I could not have completed this PhD thesis without the environment I enjoyed for four years. First of all, my supervisor, Mr Mark Hoffman, was a great reader of my drafts and always helped me to develop ideas for this thesis. Although every error, imprecise expression and premature argument are mine only, this thesis is a joint work to which Mark contributed his enormous academic capacity. I do not know how to fully express my greatest gratitude to him.

I also wish to acknowledge helpful discussion with academic staffs at the LSE and other British institutions including Mr Michael Banks, Professor Christopher Hill, Mr John Hoffman, Dr Hidemi Suganami, Dr William Wallace, Professor Shozo Iizima and Professor Hideki Ohata who kindly made comments on my thesis or other works relating to it. I also thank 'Post International Group' at Aberystwyth and 'Critical International Theories Group' of BISA for giving me opportunities to present my ideas of several topics in this thesis.

The writing of this thesis was made possible largely by grants from Ito International Education Exchange Foundation in Japan which supported me for the first two years in London. I am also indebted to Overseas Research Student Awards which helped me to continue my study in the ideal environment in London.

This thesis owes much to institutions in London including the British Library of Political and Economic Science and the British Library. In particular, I shall never forget the stuff of the British Library whose contribution to this thesis is invisible but incredible. Some of them looked with curiosity or even suspicion at an Asian boy who delved into old books. Others were very kind and friendly to the PhD student who kept coming to the Library for years to stay from morning till night. But I know that there are still many whom I have not seen but certainly delivered to me the materials which constitute this thesis.

Finally, I wish to thank my family and friends who have warmly supported me. I believe that without such people anyone would not finish this type of work. This thesis should first be devoted to them.

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Introduction

In the contemporary international system it is difficult to find a political notion more controversial than sovereignty. Since the end of the Cold War, the concept of sovereignty has been identified as a central issue by scholars as well as practitioners. This is because sovereignty is the very principle upon which international relations have long been based. Once international relations begin to change, the concept of sovereignty soon reflects new courses in international relations. At the turn of the millennium, the sense of a historic change has demanded a renewed interest in sovereignty.

It is widely argued that the concept of sovereignty is seriously challenged in present international society. The traditional international system, which is usually characterised as a 'Westphalian' state-centric system, has been in transition. The globalisation of the market economy, the expansion of the activities of international institutions, the development of high technologies, the conflicts of minorities with central governments and the growing concern about human rights are often mentioned as examples which indicate the demise of state sovereignty. Since the end of the Cold-War, while the same set of values based upon liberal democracy has spread all over the world, national boundaries of nation-states seem to have become more and more artificial. It was almost impossible during the Cold War to imagine international operations like the Gulf War and the following intervention for the protection of the Kurds and the Shiites in Northern Iraq. Multinational interventions under the authority of the United Nations took place in Somalia and Haiti as well. It is difficult to apply a textbook theory of sovereignty to Cambodia in the period when the United Nations Transitional Authority in Cambodia supervised and controlled Cambodian administrations. The setting up of the international tribunals for the former Yugoslavia and Rwanda might be considered as violations of state sovereignty. It is claimed that the concept of sovereignty is, if not disappearing, losing its traditional foundation.[1]

[1] A brief look at the titles of recent studies on sovereignty shows this interest. For instance, Walker and Mendlovitz (eds), *Contending Sovereignties* (1990); Camilleri and Falk, *The End of Sovereignty?* (1992); Nordenstreng and Schiller (eds), *Beyond National Sovereignty* (1992); Heiberg (ed.), *Subduing Sovereignty*

In spite of such arguments, the notion of sovereignty still remains solid. Numerous innovative phenomena in international society have not prompted any practitioners to seriously propose abandoning the idea of sovereignty. Many scholars believe that despite the claims against the traditional understanding of sovereignty, it is still an indispensable notion of present international society and shows no significant sign of disappearing. For instance, the notion of sovereignty was the very foundation of the Gulf War, which was justified as an attempt to restore the sovereignty of Kuwait. The UN Security Council confirmed the sovereignty of Iraq when the war was over.[2] In the Cambodian peace process, international agreements declared the Supreme National Council composed of Cambodia's major factions to be the 'source of authority of Cambodian sovereignty', even though the content of the expression was highly ambiguous.[3] It is not the case that there are people who are simply for and against the notion of state sovereignty. The same incidents which show the demise of state sovereignty are often based upon the validity of the concept of state sovereignty.

Recent studies of sovereignty have faced this conceptual predicament. Many contemporary students of international relations have, therefore, recognised that sovereignty has many facets. John Hoffman calls for 'a relational theory of sovereignty'.[4] Cynthia Weber provides certain modes of 'simulating sovereignty'.[5] Despite the polemic about whether sovereignty is becoming obsolete or not, the fact is that viewed from one angle, sovereignty may be eroding; from another, it is constantly developing. Therefore, the questions to be asked are: What are the notions of sovereignty which can be historically identified? In what respect have some of these values of sovereignty declined? In what sense are some of these concepts of sovereignty gaining credibility? What kind of notions of sovereignty accommodate recent changes in international relations?

This thesis aims to contribute to the study of sovereignty by tackling these questions,

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(1994); Thom Kuehls, *Beyond Sovereign Territory* (1996).

[2] See Resolutions 682, 664 and 674 (1990), and 686 (1991) of the United Nations Security Council.

[3] See *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* and *Annex 1. UNTAC Mandate*.

[4] Hoffman, 'Wanted: A Relational Theory of Sovereignty' (unpublished paper).

[5] Weber, *Simulating Sovereignty* (1995), see also Bierstaker and Weber, *State Sovereignty as Social Construct* (1996).

while introducing new methods and documentary evidence. Contributing to 'a reinterpretation of state sovereignty',[6] it points to the possible direction of future changes in the notion of sovereignty without ignoring its historical traditions and present role in international society. All of these need careful consideration. Some scholars hold to their own definitions of sovereignty, but do not analyse the trajectories of concepts of sovereignty which reflect important political realities. They ignore the fact that notions of sovereignty need to be studied, all the more because they express hidden power relationships in domestic and international society. Others claim that sovereignty is too obsolete or confusing or even dangerous. Consciously or unconsciously, they attack the most crude definitions of sovereignty or impose their own specific images on the word. They simply do not know that what they believe to be the true meaning of sovereignty is an assertion of their own understanding of this complex concept.

This thesis does not attempt to offer a definition of sovereignty which it designates to be the most authentic. Instead, this thesis sets out to offer a comprehensive documentary history of notions of sovereignty. It is based upon historical evidence rather than historical speculation. It gives due weight to great thinkers as well as minor writers and speakers. While I seek to identify and analyse the dynamism which notions of sovereignty have experienced, I do not intend to write a narrative of the rise and fall of 'the sovereign state'. The dynamism of *concepts of sovereignty* should be distinguished from the dynamism which '*the sovereign state*' is claimed to have produced. A history of the sovereign state is written only when authors of narratives impose their images of 'the sovereign state' on history. Whether or not 'the sovereign state' existed in a certain age is a matter of clarity of the definition of 'the sovereign state'. 'The sovereign state' is an intangible creature, which can be created by human imaginations. Yet any author's definition does not create notions of sovereignty that existed in the age in which the author identifies the existence of 'the sovereign state' according to his or her own definition. Rather, the author of a historical narrative may conceal the dynamism which people in history actually experienced. The study of sovereignty is the study of an idea. The dynamism of sovereignty does not lie in the history of 'the sovereign state' which the author of a historical narrative creates, but in

[6] Mankinda, 'Sovereignty and International Security' (1996), p. 165.

historical intercourse between the idea that constituted people's behaviour and the reality that determined interpretations of the idea.

Does this mean that this study is a collection of abstract notions which lack the element of 'power'? The answer is, certainly, no. Rather, this thesis shows that invisible 'power' in history resides in written documents. It does not hesitate to carefully identify power elements in historical documents. The attitude of holding to superficial levels in order to grasp hidden power relations is well explained by Michel Foucault. In discussing 'discontinuity' in history, he argues:

> it is not a change of content (refutation of old errors, recovery of old truths), nor is it a change of theoretical form (renewal of a paradigm, modification of systematic ensembles). It is a question of what *governs* statements, and the way in which they *govern* each other so as to constitute a set of propositions which are scientifically acceptable, and hence capable of being verified or falsified by scientific procedures. In short, there is a problem of the régime, the politics of the scientific statement. At this level it's not so much a matter of knowing what external power imposes itself on science, as of what effects of power circulate among scientific statements, what constitutes, as it were, their internal régime of power, and how and why at certain moments that régime undergoes a global modifications.[7]

This approach is called 'genealogy', which Foucault defines as 'a form of history which can account for the constitution of knowledges, discourses, domains of objects etc., without having to make reference to a subject which is either transcendental in relation to the field of events or runs in its empty sameness throughout the course of history.'[8]

A mistaken view as regards Foucault's approach is to interpret a genealogical method as a direct challenge to 'the sovereign state'. This thesis is not concerned with the story of the 'discovery' of 'non-sovereign' forces behind 'the sovereign state'. Instead, it seeks to identify those 'régimes' in which notions of sovereignty were embedded. Neither the denial nor the affirmation of 'the sovereign state' can question the historical formations of the politics of notions of sovereignty.

I shall mention political, economic and social contexts in each time frame in order

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[7] Foucault, *Power/Knowledge* (1980), pp. 112-113.

[8] *Ibid.*, p. 117.

to clarify the historical logic of 'régimes', while refraining from writing a history of my understanding of 'the sovereign state'. The state and sovereignty are invisible entities. They do not exist in the physical world. This means that *the* history of 'the sovereign state' is a product of the imagination of writers of such a history. Whether defending or attacking 'the sovereign state', it is impossible to write a history of 'the sovereign state' without imposing our own definitions of sovereignty upon history. In order to avoid reproducing our own images of sovereignty, it is imperative to focus only on notions of sovereignty that were actually pronounced by people in history. This is the only method to identify the element of power in history without inventing what we would like to discover. This standpoint is necessary, if we really wish to trace the relationship between reality and ideas, between power and knowledge in actual history.

Previous studies of sovereignty have not paid enough attention to this methodological point. The two most prominent contemporary theorists of sovereignty, F. H. Hinsley and Alan James, agree that sovereignty is an idea. But adopting very different approaches, they do not explore concepts of sovereignty which reflect historical realities. Hinsley represents a conventional historical approach. He defines the idea of sovereignty as 'a final and absolute political authority in the political community . . . and no final and absolute authority exists elsewhere.'[9] According to Hinsley, the idea of sovereignty emerges when the needs of the state are identified with those of society. The concept depends on whether the state overcomes 'the resistance of the customary society'. The determining point is the completion of the process in which stateless society becomes the society ruled by the state. Hinsley argues that the difference between the former and the latter is as qualitatively decisive as the difference between a man and a cockroach![10]

Hinsley's approach involves a kind of eurocentric historical determinism. If stateless society and the society ruled by the state are completely different, we may say that it would be as difficult to prove that the former is a primitive form of the latter as to prove a cockroach evolves into a man. Hinsley's argument easily leads to the assumption that 'African stateless societies' are premature forms of modern European states. In the

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[9] Hinsley, *Sovereignty* (1966), p. 26.

[10] See *ibid.*, pp. 15-26.

hypothetical process of the historical evolution of stateless society into the sovereign state, modern European states claim to be the most advanced type of society. Is it a universal truth that the idea of sovereignty must always and everywhere emerge when the interests of the state and society are identified, but they always and anywhere cannot exist without that identification? What is missing is the question of whether the spread of the modern states system was due to natural evolution or more political, economic and social circumstances. The spread of political principles from Europe to non-European regions does not prove that there has been a unitary development of the political community and international society.

This 'eurocentric' result is predetermined when Hinsley formulates his abstract definition of sovereignty. He emphasises that sovereignty is a Western concept. But he confuses the lack of the idea of sovereignty with the lack of 'sovereignty' in reality. Hinsley's definition must assume that while 'non-sovereign' Chinese states during the *European Middle Ages* had no coincidence of interests with Chinese society, 'sovereign' Chinese states in the twentieth century have had the complete coincidence of interests with Chinese society. If this assumption is not nonsense, it is certainly *a*historical. The history of the emergence of the sovereign state is tied to the history of Europe. In other areas there was only the adoption or the imposition of the idea of state sovereignty. The universalisic nature of his definition leads Hinsley to consciously or unconsciously believe that the development of sovereignty is a historical law rather than a product of Western politics and power.

Alan James adopts a formalist approach to the problem of sovereignty. By defining sovereignty as 'constitutional independence', he clarifies how to use this concept to determine 'sovereign statehood'. Unlike Hinsley, James is mainly concerned with the content of the idea of sovereignty corresponding with the reality of twentieth century international society. But he says that his 'inquiry is about the basis of international relations, and not its *dynamics*.'[11] His inquiry to clarify the basis of international society does not focus on historical trajectories of notions of sovereignty.

What is missing in James's approach is the intercourse between ideas and reality. He uses 'real' examples to reinforce his definition of sovereignty. Regardless of conceptions

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[11] James, *Sovereign Statehood* (1986), p. 8.

of sovereignty which people had in mind in reality, his analysis is acute only when it explains how relevant his definition is to his examples. It is true that his definition is excellent in the sense that it survives the challenges of many examples of international relations; his study is beautiful from the purely academic point of view. But it does not show anything about notions of sovereignty which determine and are determined by reality. His study is a good primer for people who want a clearer concept of sovereignty. But it does not analyse the chaotic reality of notions of sovereignty.

We find a different tendency among more recent approaches to the issue of sovereignty. Given the ambiguity of the content of sovereignty, some students have tended to leave the notion of sovereignty undefined. Jens Bartelson's *Genealogy of Sovereignty* is one such example. However, it is doubtful whether he has succeeded in tracing the historical dynamism of notions of sovereignty. While asserting that 'sovereignty has no essence', Bartelson commits himself to a specific *function* of sovereignty by saying that the discourse on sovereignty functions according to the same logic as the *parergon*.[12] In consequence, Bartelson writes a genealogy of sovereignty composed of theorists whom he picks up in accordance with his *definition of the function* of sovereignty. The definition is not a perspective to simply sort out numerous discourses on sovereignty, but a criterion to identify the existence of the theory of sovereignty. Bartelson focusses on writers including Machiavelli and More who did not theorise or even mention 'sovereignty'.

Bartelson also formulates the categories of 'mytho-sovereignty' and 'proto-sovereignty', referring to secondary sources in which scholars in the twentieth century search for the elements of sovereignty according to their own notions of sovereignty. But how can we understand 'mytho-' or 'proto-' sovereignty without defining a concept of sovereignty? Why should we analyse discourses of contemporary scholars rather than historical documents in a genealogy of sovereignty? What kind of 'deconstruction' is it that blindly accepts conventional interpretations of the notion of sovereignty without a criterion?

In rejecting a definition of sovereignty, Bartelson's genealogy discovers the function of sovereignty which he sets out at the beginning of the book. This predetermined grand

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[12] Bartelson, *A Genealogy of Sovereignty* (1995), pp. 48-52.

*a*historical narrative relies eventually on the most conventional views of the history of sovereignty. For instance, his narrative ends with Hegel and reinforces one of the most *a*historical doctrines, that of the 'end of history'.[13]

A Foucauldian approach to the problem of sovereignty is adopted by Cynthia Weber. Her *Simulating Sovereignty* is an innovative study of sovereignty, which exposes the historical contingencies involved in conceptions of sovereignty. Weber succeeds in showing that discourses on sovereignty have been the product of the deliberations of political leaders linked to their political needs. What is notable about her investigation is the manner in which she successfully connects diplomatic documents to her theoretical framework derived from Foucault and Baudrillard. But her usage of Foucauldian approaches is problematic. She transgresses the Foucauldian notion of power in the name of the Baudrillardian concepts of seduction and simulation.[14] In so doing, she misses the importance of power in the Foucauldian analysis. She justifies this on the basis of Baudrillard's contention that for Foucault power is still 'a reality principle and a very strong truth principle'. As a result, Weber ambiguously uses both Foucauldian and Baudrillardian approaches in her analysis of the Reagan-Bush Administrations, while she resorts to only a Foucauldian approach in her analyses of the Concert of Europe and the Wilson Administration. Does this mean that the postmodern age of simulation only began in the United States in the 1980s? What is so different about the invasions in Grenada and Panama in the context of the discourses on sovereignty?

On the one hand, Weber's argument is insightful when she attacks an erroneous presupposition of 'statism', namely, the idea of sovereignty conceived as an unchangeable fact. Sovereignty is embedded in the web of practices of states and non-state actors in international relations. With the expansion of the activities of numerous international actors, it may be correct to assert that 'sovereignty is simulated'. On the other hand, Weber's account seems to be exaggerated. She contends that 'In the Panama invasion discourse, "sovereignty" and "intervention" cease to function as dichotomous terms.' She observes that in the case of Panama everyone seems to have a legitimate

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[13] See *ibid.*, pp. 88-136, 215-220.

[14] Weber, *op. cit.*, pp. 34-39.

claim to sovereignty and everywhere there seem to be acts of intervention. She then concludes that 'if sovereignty and intervention are everywhere, they are nowhere.'[15] But is it really true that if sovereignty and intervention are not always dichotomous, they are everywhere and nowhere? Sovereignty and intervention may be found in many places in contradictory terms, but they are certainly not 'everywhere' or 'nowhere'. Multiple interpretations of sovereignty may coexist at a critical time, but this is hardly a striking discussion in international relations.

Weber claims that in the Panama invasion 'sovereignty is transformed from a meaningful referent represented by various signified (monarchical authority or the will of the people, for example) into mass where meaning is absorbed.'[16] But did we really not know that sovereignty was an ambiguous notion in international society? In international relations multiple (sovereign or non-sovereign) actors compete without a world government. They may fight each other, but they may still comply with a set of rules. And the struggle for desirable interpretations of a set of rules is highly competitive. Sovereignty is an indispensable rule, but subject to this struggle. Of course, it is true that there have been quite arbitrary interpretations of international rules. It is also the case that there is no universal legislative body which unequivocally determines the nature of sovereignty. There are forces that do and do not adhere to established rules. However, all these constitute the very aspect of international society in which people struggle for various values. This is the dimension of power. Even 'simulation' is part of the complex dimension of power.

To end an analysis by simply saying sovereignty is simulated is not satisfactory. Baudrillard and Weber believe that the insight into simulation goes beyond the Foucauldian concept of power, which they claim remains within the sphere of representation. However, simulation is not immune from power. Foucault's concept of anonymous power penetrates simulation as well. Power is there, because what makes simulation is power. When simulation takes place, power is always there to constitute simulation. How can the process of simulation go on without any kind of power? What word other than power can we use to signify something which makes simulation? As

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[15] *Ibid.*, p. 121.

[16] *Ibid.*

long as simulation takes place, a certain type of power is there. This notion of power has nothing to do with a simplistic understanding of power in discourses like conspiracy theories. Power is there, even if we are not committed to assertions like 'the United States governs the world' or 'great powers decide the meaning of sovereignty'. Power is there, even when we cannot see any subject of power.

Weber's analysis is not as radical as she implies. She ends up with a rather uncontentious conclusion. She writes:

> In such a system of symbolic exchange, sovereignty is no longer something to be represented but something to be accessed through simulation. Sovereignty becomes a code. It is a bundle of practices which, when performed, grant specific rights and responsibilities to a nation-state. . . . What become important are the signs of sovereignty - the ability to access the code of sovereignty (obtain diplomatic recognition as a "sovereign" state or membership in the United Nations) and the ability to simulate the foundation of sovereign authority (the people).[17]

She points out that sovereignty is 'a code' embedded in 'a bundle of practices'. This contention is almost tantamount to saying that sovereignty is one of the numerous principles of international society. It should be noted that Weber's main target is the 'conventional' theories of international relations, namely, 'scientific behavioural and traditional analyses of sovereignty and intervention'.[18] But the repudiation of 'the conventional theories' may not be so shocking outside the discipline of International Relations as it is for scholars inside of it. Most practitioners in international society would not deny that sovereignty is a 'code' which is constituted in 'a bundle of practices'. Weber describes in refined terms what many people have already known.

As we shall observe in the following chapters, there is a point of which Weber's analysis has a certain historical resonance. There was a time in which sovereignty was understood as something real and existing by itself. We shall identify this phenomenon in the age of nationalism in a broader sense by calling it the *reification* of sovereignty. But we shall furthermore trace and highlight the existence of different notions of sovereignty. To a certain extent, what Weber identifies as the phenomenon of

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[17] *Ibid.*, p. 127.

[18] Weber, 'Reconsidering Statehood: examining the Sovereignty / Intervention Boundary' (1992), p. 216.

simulation of sovereignty in current international relations overlaps with the aspects of what will be characterised as constitutional sovereignty in the international field in this thesis.

The approach I shall take in this thesis is different from any of the other approaches outlined above. I call it a genealogical approach in the sense that it is based upon the method originally explained by Friedrich Nietzsche and Michel Foucault.

Genealogy as Methodology

Genealogy seems to be understood in a rather broad way in the discipline of International Relations. Sometimes it is meant to be a 'post-positivist' approach in the context of a challenge to mainstream international relations theories. It may be associated with 'deconstruction' or even the 'structuration' theory as a critique of 'statism'.[19] For the purpose of this thesis, suffice it to say that the study of the history of 'sovereignty' differs from that of the emergence of 'the sovereign state'. Genealogy is not intended to explain the emergence of what we understand as the modern international system. Genealogy is a method through which we historicise and identify the ideological nature of our 'scientific' approaches. Instead of describing reality according to some contemporary jargon, it investigates those ideas that actually existed in reality. In other words, it seeks to trace the trajectories of interaction between ideas and reality, which have been actually imprinted in documents but seldom examined. Thus the genealogist should rather be sceptical of endless projections of infinite images of the 'sovereign state'.

The starting point for genealogical analyses is Nietzsche's dictum: 'only that which has no history is definable'.[20] This does not mean that we should ignore definitions. What is required is, instead, to recognise that behind definitions there is an enormous sphere of human evaluations. Genealogy demands that descriptions of ideas be those of human evaluations. The Nietzschean genealogist differs from 'English moralists',

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[19] See Bartelson, *op. cit.*, pp. 12-52. See also James Der Derrian, *On Diplomacy* (1987); Steve Smith, 'The Self-Images of a Discipline: A Genealogy of International Relations Theory' (1995); Richard Devetak, 'Postmodernism' (1996).

[20] Nietzsche, *On the Genealogy of Morals* (1887), II-13.

whom Nietzsche criticised for their wrongful search for the origin of values. Nietzschean genealogy has nothing to do with origins. It is a history of the human evaluation of ideas: a methodological reduction of ideas to value-relations.

More specifically, genealogy is defined in two ways. First, it is a philology of the history of human evaluations. Second, it is a practical strategy for searching for human possibilities. On the one hand, because Nietzsche believed in no transcendental or universal criteria, genealogy is a philology which treats everything equally. It is 'a respectful art' aiming to describe origins, incidents, emergence, thoughts, etc. On the other hand, as genealogy is based on the necessity of evaluations in the world of becoming, it is inevitably a practice of evaluations. It is not a science of discovering the absolute truth; it is an art of practising a genealogical evaluation by means not of asserting a certain value, but of scrutinising details of history. It is, therefore, said that 'genealogy occupies a space between the interpretative demands of both philological attention and perspectival creativity.'[21]

Foucault explains that in Nietzsche's works there is an opposition between the origin (*Ursprung*) and the emergence or the descent (*Entstehung* or *Herkunft*). Foucault makes it clear that Nietzsche fought against a standpoint that glorifies the origin, i.e. 'the metaphysical aftershoot that breaks out when we mediate on history and makes us believe that what stands at the beginning of all things is also what is most valuable and essential.'[22] The origin is an invention of human beings. Thus the word, the descent or the emergence, is more adequate than the origin as the object of genealogy.

Citing Nietzsche's words, Foucault says that truths are man's 'irrefutable errors',[23] because they were 'hardened into an unalterable form in the long baking process of history.'[24] History is full of *forces*, or in Nietzsche's term, 'the will to power' at a deeper level. There are qualities, degrees, depth, etc, of forces. It is the genealogist's task to discern the struggle of forces. Genealogy records the history of interpretation which shows the surreptitious interaction of forces. In Nietzsche's view even the distinction between cause and effect is *human, all too human.* Acceptance of a given story of cause

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[21] Alan D. Schrift, *Nietzsche and the Question of Interpretation* (1990), p. 180.

[22] Nietzsche, 'The Wanderer and His Shadow', 3, in *Human All Too Human* (1880).

[23] Nietzsche, *The Gay Science* (1882), 265.

[24] Foucault, 'Nietzsche, Genealogy, History' in *Language, Counter-Memory, Practice* (1977), p. 144.

and effect is tantamount to accommodating a given dominating force. For Nietzsche, there are only effects in this world.[25]

This genealogical perspective presupposes the interrelationship between ideas and reality in two ways. First, it assumes that the world is full of forces. Ideas, constituted by human evaluative practices, are understood to exist as part of the world. The genealogist approaches ideas not as something distinct from reality, but as non-physical objects that are constitutive of reality. Second, refraining from assertive value judgements, however, genealogists also practise their own evaluations through their genealogical acts. In a world of forces, we cannot avoid value practices; we need not speculate how to practise evaluations. Our inquires into ideas cannot be anything but a practice in the real world. In other words, while it is not expected to be a philosophy of history, it has as its goal 'a curative science':[26] an art of diagnosing the problems of ideas.

Given these general features of the genealogical perspective, I shall now specify more particular methods in this thesis. There are eight points that methodologically characterise this thesis. First of all, this thesis refrains from imposing any definition of the *concept* of sovereignty as well as that of the *function* of sovereignty. This includes any practice of the evaluation of concepts of sovereignty. The methodological principle in this thesis is to focus on documents that contain the word 'sovereignty' (*souveränität*, *souveraineté*).

Second, instead of pursuing a definition of sovereignty, this thesis aims to identify the struggles of evaluation that took place over notions of sovereignty.[27] It seeks to reproduce past practices of the evaluation of sovereignty by presenting the arguments, ideas and debates of major theorists together with those of minor or even unknown publicists. The aim is 'gray, meticulous, and patiently documentary'.[28] The scope of this thesis is thus quite broad in one way. But it is narrow in another; for it excludes thinkers like Machiavelli who did not discuss sovereignty but is conventionally seen as an object

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[25] See Nietzsche, *Beyond Good and Evil* (1886), 21; *On the Genealogy of Morals*, I-13.

[26] Foucault, *op. cit.*, p. 156.

[27] In this thesis, 'notions', 'concepts', and 'ideas' are used interchangeably to cover a broad range of the discourses on sovereignty. 'Theories' of sovereignty represent theoretically systematic understandings of sovereignty.

[28] *Ibid.*, p. 139.

of the study of sovereignty. It also excludes any practices of 'the sovereign state'. The state defined as the sovereign entity is conceivable only when we define what we mean by sovereignty. 'The sovereign state' is a product of ideas. It becomes an object of this genealogical study only when it appears to relate to evaluative practices of the concept of sovereignty.

Third, while this thesis is open in principle to any discourses on sovereignty, it deals only with state sovereignty. The word 'sovereignty' has been used metaphorically to denote different things. The discourses on the sovereignty of God and of reason will be touched upon in this thesis only in connection with state sovereignty. As we shall see later, a theoretically rigid application of this methodological principle demands that the study of notions of sovereignty concentrate on the modern age. The notion of sovereignty appeared in Europe in order to represent the privileged status of rulers. It was much later that the problem of sovereignty was discussed automatically in connection with state personality. The concept of the state in international law is a juristic person which includes not only a government, but also 'a permanent population', 'a defined territory' and 'the capacity to enter into relations with other states'.[29] Scholars in the disciplines of International Relations, Political Science and Sociology often use the term 'the state' as equivalent to a government. But the modern usage of the phrase, the state, must include the other meaning, namely, a juristic person. State sovereignty in this sense could not exist prior to the emergence of the abstract concept of the state.

Fourth, this thesis deals mainly with discourses on sovereignty in the modern age, which I define, following Foucault's argument, as the period since the latter half of the eighteenth century. This time frame corresponds to the articulation of a distinctive logic of sovereignty *of the state*. But it is also derived from the concern with the conventional history of sovereignty. The problem of sovereignty is conventionally understood as that of Bodin, Hobbes and the Peace of Westphalia of 1648. At best, the history of sovereignty ends with Hegel, as in Bartelson's genealogy. Such approaches raise the question of whether the history of the idea of sovereignty since the eighteenth century or Hegel has been merely a continuation, or corruption, of old theories. Especially when viewed from the genealogical perspective on conflicting notions of sovereignty, the

[29] Article 1 of the Montevideo Convention on Rights and Duties of States 1933.

modern age, full of political turmoil, seems to deserve more attention in relation to the concept of sovereignty.

Fifth, it is necessary to limit the scope of this thesis geographically. It is simply impossible to deal with discourses on sovereignty in every part of the world. So it concentrates on the development of concepts of sovereignty in Great Britain and the United States.[30] The selection is made for political reasons. These have been the most important countries in modern international relations. Practical incentives for developing theories of sovereignty have presumably been very high in these countries. I recognise that they have had two distinct political systems, but they have still shared core values such as constitutionalism and liberal democracy. In order to better illustrate the characteristics of discourses in the two countries, I shall also look at the development of concepts of sovereignty in other countries for the purposes of comparison. The basis for selection of discourses in Germany and France before the Second World War and those in communist and Third World countries during the Cold War is that they constitute counter-discourses to Anglo-American notions of sovereignty.

Sixth, my demarcation of historical stages is based on Foucault's conceptions of *episteme*, the historical mode of knowledge. I call this a *diachronic* perspective. The definition of the modern age originates from Foucault's argument in *The Order of Things*. I shall discuss this point later.

Seventh, my genealogical investigation has another pillar. I call it a *synchronic* perspective, which is inspired by Nietzsche's argument in *On the Genealogy of Morals*. It constitutes two conflicting modes of evaluation to sort out numerous discourses on sovereignty and grasp dimensions of the conceptual struggle. I shall return to this point later as well.

Finally, it is noted here that this thesis is a piece of an interdisciplinary research. The issue of sovereignty currently attracts greater attention in the discipline of International Relations. But current disciplinary divisions hold true only when we look into discourses on sovereignty since 1945. It is desirable, or rather inevitable, in a historical investigation like this thesis to have an interdisciplinary perspective.

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[30] Scholars in other English-speaking countries in the twentieth century will be included for their inseparability with Anglo-American academics.

I shall explicate three points among others in detail: the historical connection of the problem of state sovereignty with the modern age, the Foucauldian diachronic and the Nietzschean synchronic perspectives.

State Sovereignty and Modernity

The notion of state sovereignty cannot be properly examined without recognising its importance in the historical context of modernity. I mean by 'modernity' the mode of knowledge and practices that emerged in modern Europe, or *post-Christendom* Europe in a broader sense. In particular it is characterised by the 'death of God' in intellectual activities. Under the premises of modernity human ideas and practices become autonomous and independent of 'God'. It can be noted in this context that the emergence of theories of sovereignty corresponds with the decline of the validity of Christendom as a value system. I do not deny the fact that the emergence of the idea of sovereignty had much to do with the knowledge of Christendom. What I find in modern Europe is, therefore, *post-Christendom* knowledge. Following Foucault, I define 'the modern age' narrowly as the period since the latter half of the eighteenth century. But I do not exclude a broader conventional usage of the word, 'modernity', as its manifestations reflecting the 'death of God' emerged earlier than the modern age.

Although we can find old words from which the term, 'sovereign', was derived, some authoritative commentators think that sovereignty in the strict sense was born in modern Europe. Bertrand de Jouvenel explains that as in the Middle Ages men lacked the idea of abstract thinking, the word, 'sovereign', was used not in the modern sense. The word meant 'superior', and any superior was sovereign.[31] What happened in later periods to the English word, *souerein*, or *soverayne*, which had derived from *super*, was that it acquired the letter *g* which had to do with *reigning*.[32]

In order for 'state sovereignty' to appear, the modern usage of the word, state, had to be acknowledged. Before the sixteenth century, the word, *stare*, or *status*, in Latin indicated a standing or condition, and *estat* in old French suggests its relevance to

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[31] See Jouvenel, *Sovereignty* (1957), p. 171.

[32] See Walter W. Skeat, *An Etymological Dictionary of the English Language* (1924), p. 584.

estate.[33] Quentin Skinner stresses that the concept of the state as 'a form of public power separate from both the ruler and the ruled, and constituting the supreme political authority within a certain defined territory' is distinctively modern. According to him, the state used 'in a more abstract and recognisably modern sense' was first used by 'the heirs of the Italian humanists, especially in sixteenth-century France and England'.[34]

There is another type of scholars who find elements of sovereignty before the sixteenth century. There is an interpretation which identifies the supreme power theorised by Aristotle as modern sovereignty.[35] Although Charles H. McIlwain objects to such a view, he remarks that Cicero's conception of the state as a collection of men has 'all the elements of the modern legalistic conception of sovereignty'.[36] According to Hinsley too, there was a rise of the concept of sovereignty in the Roman Empire that disappeared in the period of Christendom.[37]

Yet Ewart Lewis recognises 'strong tendencies' in the direction of the complete theory of legislative sovereignty in the Middle Ages. He says that Marsiglio of Padua who asserted the primacy of law-making over all other expressions of state power 'had the essential elements of a theory of sovereignty; only the theory itself was lacking.'[38] Michael Wilks insists the Pope was the sovereign, if not of the state, at least of Christ in the later Middle Ages. The Pope 'becomes the human expression of the sovereign entity, and thus acts as the *Ecclesia* or Christ himself.' So Wilks contends that the ideal of Papal writers like Augustinus Triumphus represents 'in an unfamiliar form what a modern writer would immediately recognise as a theory of State-sovereignty.'[39]

It seems true that the modern notion of sovereignty has historical connections with the Roman idea of state personality and with the ideal of the Christian community in the Middle Ages. Although the scholars I have cited have different conceptions of sovereignty, it would be almost impossible to say that there was no element of state

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[33] See Andrew Vincent, *Theories of the State* (1987), pp. 16-19.

[34] Skinner, *The Foundations of Modern Political Thought*, vol. 2 (1978), pp. 353-354.

[35] See Franz Susemihl and R. D. Hicks, *The Politics of Aristotle* (1894), p. 381.

[36] McIlwain, *The Growth of Political Thought in the West* (1932), pp. 80-81, 118.

[37] See Hinsley, *op. cit.*, pp. 27-60.

[38] Lewis, *Medieval Political Ideas* (1974), pp. 28-30.

[39] Wilks, *The Problem of Sovereignty in the Later Middle Ages* (1963), pp. 41-42.

sovereignty in pre-sixteenth century Europe. However, another important fact is that before the sixteenth century the idea of sovereignty was not established as a principle of the political community, and of international society. Only in the process of modernity did people *consciously* understand it as such. It was in this process that the idea of state sovereignty took shape in people's mind and constituted their thoughts and behaviours. What characterises the process of modernity is this conceptualisation of abstract notions. This may explain the historical connection of the notion of sovereignty with the decline of God. The lack of God in the modern age was substituted by the existence of abstract notions like sovereignty which were expected to sustain autonomous human activities.

Two things must be distinguished. On the one hand, some *elements* of state sovereignty may be found in pre-modern Europe or possibly non-European regions. On the other, it was not until the sixteenth century that the *principle* of sovereignty emerged. It was only in Europe that the *principle* of state sovereignty evidently constituted the rule of political communities and international society. What expanded from Europe to other areas was not 'the sovereign state' in the sense that we may find *elements* of 'the sovereign state' in pre-modern non-European regions. Instead, modern Europe spread all over the world the *principle* of state sovereignty. We should distinguish between the reality that we can understand in terms of our definition of a notion and the reality that has been constituting and constituted by a certain principle.

What is really important in the study of notions of sovereignty is its long history of constituting and being constituted by reality. For instance, conceptions like 'agency', 'structure', and 'structuration', which people in the seventeenth century did not know, are the creation of academics in the twentieth century. But the principle of sovereignty has long influenced an enormous number and range of people, just as other Western political concepts like 'liberty', 'democracy', and 'rights' have. It has made one of the most dynamic interrelationships between ideas and reality throughout modern times.

It is safe to say that the notion of sovereignty was a product of the reality that existed in the sixteenth and seventeenth centuries. But the concept of sovereignty has since then continued to constitute reality, for people conceived it to be indispensable regardless of its practical applicability. It is the principle of sovereignty understood in this way that

is the object of this thesis.

The Foucauldian Diachronic Perspective

Having examined the problem of sovereignty in the context of modernity, I shall now explain what I mean by the Foucauldian diachronic perspective. In *The Order of Things* Foucault formulates 'the history of the order imposed on things'.[40] In order to understand Foucault's 'archaeological' models, it is necessary to look into his three periods of *episteme*: the Renaissance, the Classical, and the modern ages.

The Renaissance of the sixteenth century is a time of resemblance. Language represents things and has been set down in the world. This inseparability of language and things is possible as language is the locus of revelations and to be included in the area (symbolised by the Scriptures) where truth is both manifested and expressed. '[S]uch an interweaving of language and things, in a space common to both, presupposes an absolute privilege on the part of writing.'[41]

The second period is the Baroque or Classical. It is the time during which language has entered a period of transparency and neutrality. The Classical *episteme* conceives relations between beings in the form of order and measurement, but with this fundamental imbalance, that it is always possible to reduce problems of measurement to problems of order. A certain number of empirical fields formed and defined for the first time rely for their foundation upon a possible science of order. They are dependent upon analysis in general and the system of signs in particular.[42]

A clue to understanding the complex and difficult discourses of Foucault can be found in 'the place of the king'.[43] The king (the agent of God) formerly governed space from outside as the transcendental subject. God or the king governed everything. According to Foucault, in Classical thought the king became absent from his position. The existence of the king was no longer vital to Classical knowledge. The space of

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[40] Foucault, *The Order of Things* (1966), p. xxiv.

[41] *Ibid.*, pp. 36-38.

[42] *Ibid.*, p. 57.

[43] *Ibid.*, pp. 307.

representation contains the king within itself; the autonomous space in Classical knowledge governs itself. This observation has a significant implication in the history of concepts of sovereignty. It is now helpful to see how 'the place of the king' changed by looking at some representative theorists in each *episteme*.

Jean Bodin's work on sovereignty, published in 1576 during the Renaissance, was almost the first attempt of theorisation of sovereignty in history. Bodin's famous definition of sovereignty is 'the absolute and perpetual power of a commonwealth (*republique*).'[44] It is widely known that despite his absolutist definition, Bodin never subordinated divine and natural laws to secular power. He says 'as for divine and natural laws, every prince on earth is subject to them'.[45] For Bodin there is no contradiction between absolute secular power and divine and natural laws. Rather, there is no absolute power which contradicts divine and natural laws. The prince is above positive law because he is expected to act in accordance with the higher law. The prince is the sovereign, because 'it is the law of God and of nature that we must obey the edicts and ordinances of him to whom God has given power over us', and princes are 'His lieutenants for commanding other men.'[46]

What is striking in Bodin's theory of sovereignty is the existence of 'the majesty of God, who is the absolute lord of all earthly princes'.[47] God's divine authority lies not outside the scope of the theory of sovereignty, but at the very centre of it. It is easily observed that there is an intrinsic relationship between the places of God and the sovereign prince, for the knowledge of the Renaissance is governed by resemblance. For instance, 'Contempt for one's sovereign prince is contempt toward God, of whom he is the earthly image.'[48] The absolute power of the 'earthly image' of God is founded upon the logic of resemblance. Bodin says: 'Just as God, the great sovereign, cannot make a God equal to Himself because He is infinite and by logical necessity two infinites cannot exist, so we can say that the prince, whom we have taken as the image

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[44] Bodin, *On Sovereignty* (1576), p. 1.

[45] *Ibid.*, p. 13.

[46] *Ibid.*, pp. 34, 46.

[47] *Ibid.*, p. 35.

[48] *Ibid.*, p. 46.

of God, cannot make a subject equal to himself without annihilation of his power.'[49]

Thomas Hobbes, who represents the theory of sovereignty in the Classical age, has a different logic. Hobbes's theory in *Leviathan* published in 1651 is characterised by his social contract theory. In order to establish a common power to end the state of nature, Hobbes stresses the necessity of a covenant of every man with every man,

> in such manner, as if every man should say to every man, *I Authorise and give up my Right of Governing myself, to this Man, or to this Assembly of men, on this condition that thou give up thy Right to him, and Authorise all his Actions in like manner.* This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in Latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of the *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence.[50]

The word 'authorise' is important, because autonomous authorisation is a condition of self-sufficient commonwealth. Hobbes mentions God, but he no longer needs divine authority to sustain the Classical *episteme* of order. There is no intrinsic relationship between the 'Mortall God' and the 'Immortall God'. What is symbolic is that the 'Mortall God' is at the same time 'an Artificiall Man', 'in which, the *Soveraignty* is an Artificiall *Soul*, as giving life and motion to the whole body'.[51] Hobbes's method of constructing political order is not the logic of resemblance. The 'Artificiall Man' represents a mechanistic order that brilliant natural scientists in Hobbes's age identified even when they analysed a human body. God has disappeared from behind 'the place of the king', although the order he constructed remains the foundation of the state. The state as an 'Artificiall Man' has obtained the place of God behind the king.

It is usually asserted in the discipline of International Relations that Hobbes is a 'realist' or even 'statist'. But he surely belongs to the tradition of Classical rationalism. Mechanistic order is a product of the rational choices of individuals. What is most important in Hobbes's theory is the retreat of God and the theory of authorisation that makes possible the emergence of an autonomous state. Almost the same point applies to the so-called Westphalian system. The Peace of Westphalia in 1648 is usually

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[49] *Ibid,*. p. 50.

[50] Hobbes, *Leviathan* (1651), p. 227.

[51] *Ibid.*, p. 81.

defined as a landmark in the emergence of the modern sovereign state system. But the analogy between Hobbes's conception of the state of nature and the Westphalian system is obviously mistaken. What looks like the state of nature is pre-Westphalia Europe in the midst of religious wars. The Peace of Westphalia rather corresponds with a 'covenant of every man with every man'. Mutual recognition or 'authorisation' of the rulers, which guaranteed their autonomy and necessitated the retreat of God or Christian authorities, was the very foundation of the Westphalian system. It was that foundation upon which the principle of sovereignty was solidified.

What is the *episteme* of the modern age that arose after the Classical age? In the latter half of the eighteenth century 'man' appeared in the absent place of God as the subject who constitutes the world. 'Man' in the modern age is no longer artificial. He belongs to the world with his body, and he is defined and confined by the world. Foucault explains: 'Before the end of the eighteenth century, *man* did not exist . . . He is a quite recent creature'.[52] In order to grasp what Foucault means by modernity, it is helpful to look at one of his examples, the birth of economics in the modern period through the analysis of wealth in the Classical period.

Mercantilism represents the Classical age, in which the exchange function became a foundation for metal and price. The Leviathan-artificial man has a system of circulation of money within its 'body'. But at the end of the eighteenth century a historic change began. Adam Smith maintained that labour revealed an irreducible, absolute unit of measurement. Wealth represented not the object of desire, but labour. Foucault regards Ricardo as the initiator of the second phase of modernity. For Ricardo, the quantity of labour makes it possible to determine the value of a thing, not only because the thing was representable in units of work, but first and foremost because labour as a producing activity is 'the source of all value'. Henceforth the theory of production must always precede that of circulation.

The birth of economics signifies the appearance of 'man' who labours as a living entity. Man in the Classical age had a privileged position of analysing and representing order. But he himself was absent from the system of representation. In the case of Leviathan, individuals authorise the system of an artificial man. But man who actually

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[52] Foucault, *op. cit.*, p. 308.

has a body, labours and speaks did not exist in Hobbes's mechanistic system. Hobbes's individuals were part of the mechanistic order of the physical world, which God still guaranteed despite his absence. Modern science founds itself upon the existence of man who actually and autonomously has a body, labours and speaks. There will always be a gap between scientific knowledge and man who actually lives. But modern science dares to face that gap. Man is now not only a scientific researcher; he is at the same time the object of science. The place of God is given to man who actually lives. But he lives in the system that the occupier of the place of God must sustain. In the modern age, man must sustain the world by himself, while trying to know the world that he himself must sustain.

Foucault's modern age begins at the time of the French Revolution. For the purposes of our study, it is most helpful to look at the theory of sovereignty expounded by Jean-Jacques Rousseau, whose masterpiece, *The Social Contract*, was published in 1762. Rousseau at once stands at the end of the Classical age and at the beginning of the modern age. On the one hand, Rousseau is still under the influence of the Classical mode of thought. Social contract theory deduced from the conception of state of nature is a typical method of political theory in the Classical age. On the other hand, Rousseau challenges achievements in the past century. In contrast with Montesquieu who admired English constitutionalism, Rousseau famously told that, 'The people of England . . . is free only during the election of members of parliament. As soon as the they are elected, slavery overtakes it'.[53] He holds in contempt contemporary political theorists who attempt to divide sovereignty into force and will, into legislative and executive functions, etc. They make the sovereign 'a fantastic being'.[54] What is important for Rousseau is not the balance or order of political society; it is the realisation of the freedom with which man was born.

According to Rousseau's social pact, 'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.' Then Rousseau formulates a revolutionary synthesis. He proclaims that 'this act of association creates a corporate

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[53] Rousseau, *The Social Contract* (1762), p. 240.

[54] *Ibid.*, p. 21.

and collective body (*un corps moral et collectif*) . . . This public person, so formed by the union of all other persons, formerly took the name of *city*, and now takes that of *Republic* or *body politic*; it is called by its members *State* when passive, *Sovereign* when active, and *Power* when compared with others like itself. Those who are associated in it take collectively the name of *people*, and severally are called *citizens*, as sharing in the sovereign authority, and *subjects*, as being under the laws of the State.[55] All these terms denote the same thing, although used differently in different situations. The people are the state; subjects are the sovereign.

This miracle is possible only under the theory of the general will. Rousseau asserts: 'Sovereignty, being nothing less than the exercise of the general will, can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself.' 'Sovereignty, for the same reason as makes it inalienable, is indivisible; for will either is, or is not, general.'[56] The will of all is not the general will. While 'neither is nor can be any kind of fundamental law binding on the body of the people as a body - not even the social contract itself', he notably remarks that 'whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free'.[57]

If Hobbes was proud of the refined order of his artificial man, Rousseau attacks its artificiality. Mechanistic order was the very object in magnificent natural sciences in the Classical age. But Rousseau searches for something real behind political mechanisms. While the mechanistic order that led to the artificial Leviathan previously sat in the place of God behind the king, now the general will is there. The state lives and wills. The object of political theory is not refined mechanistic order, but man who lives and wills as an inalienable and indivisible part of the state.

At almost the same time as Rousseau, Vattel candidly expressed the international implications of modern knowledge. In *The Law of Nations* published in 1758, Vattel notably equates 'nations' with 'states or bodies politic, societies of men united together'. Such a society 'becomes a moral person, having an understanding and a will peculiar to

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[55] *Ibid.*, p. 175.

[56] *Ibid.*, pp. 20, 21.

[57] *Ibid.*, pp. 14, 15

itself'.[58] He proclaims that the law of nations is '*the science of the law subsisting between nations or states, and of the obligations that flow from it.*' No theorist before Vattel more clearly enunciated the principles of 'nations'. 'Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, nations, or sovereign states, are to be considered as so many free persons, living together in the state of nature.' Vattel remarkably proclaims the effect of social contract theory on the law of nations. Even after 'all men being naturally free and independent' surrender their privileges to the sovereign, 'the body of the nation, the state, remains absolutely free and independent with respect to all men, or to sovereign nations'.[59]

If nations are 'naturally' free and independent as 'moral persons', it is no longer difficult to conceive a 'natural' society of such persons. Vattel declares: 'Every nation that governs itself . . . is a *sovereign* state. Such are moral persons who live together in a natural society, under the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient if it be really sovereign and independent'.[60] Sovereignty, 'that public authority, which commands in civil society, and orders and directs what each is to perform, to obtain the end of its institution', is frequently trusted to a senate or a single person.[61] But such matters of the '*constitution of the state*' by no means change the fact that nations composed of naturally free and independent men always remain free, independent and sovereign in a 'natural society' of nations.

The Classical age with its rational order provided the foundation for the emergence of the theory of state personality. But only in the latter half of the eighteenth century did the state, now identified with people and nation, obtain its own real will. Sovereignty is no longer an artificial soul; it is an expression of the real will of a nation. Under the premises of the modern age, the study of sovereignty ceases to be a science of the form and function of political society; it becomes a quest for the nature and will of the nation-state.

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[58] Vattel, *The Law of Nations* (1758), p. 1.

[59] *Ibid.*

[60] *Ibid.*, p. 10.

[61] *Ibid.*, p. 19.

The Nietzschean Synchronic Perspective

I shall now turn to the synchronic perspective, which is a conceptual tool to demarcate the multiple dimensions of concepts of sovereignty in the same time frame. Every concept of sovereignty has its own dimension; or that multiple dimensions reside even within a person's idea of sovereignty. Nevertheless, it is also fair to say that there are certain traditions that can be identified within history. No theorist approaches sovereignty without knowing what others have said about it. Consciously or unconsciously, no one is free from the tradition of ideas. Given that binding of traditions, the synchronic perspective seeks to identify patterns of the relationship between certain types of viewpoints of sovereignty.

Again, we can say that an almost infinite number of traditions are traceable. However, in this thesis I shall adopt a perspective that highlights two traditions of thought. It is the method adopted by Nietzsche when he traced the struggle of two types of human evaluation of morals in *On the Genealogy of Morals*. I stress that this thesis is not intended to search for pure theories of two ideal types. In a way, no single concept of sovereignty completely satisfies one ideal type against the other. In another way, however, the theoretical characteristics of many conceptions can be measured according to their distance from the two traditions of thought.

I shall use the words 'national' and 'constitutional', to demarcate two traditions of the concept of sovereignty. These concepts are deployed for two reasons. First, nationalism and constitutionalism are the two major political ideologies that have determined the modes of the principle of sovereignty in the modern age. Second, nationalism and constitutionalism, although not always contradictory, have conflicting influences upon the principle of sovereignty.[62]

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[62] This relationship is similar to that of the two concepts of liberty formulated by Isaiah Berlin in 'Two Concepts of Liberty' (1957). Positive liberty is being one's own master, liberty *to*. Negative liberty is being without interference, liberty *from*. The desire to be governed by myself is the positive conception of liberty. It is the quest for my 'higher' or 'real' or 'ideal' or 'autonomous' self that should dominate my 'lower' self. It is common that the 'higher' self is found in the state among other forms of the 'social whole'. The premise of negative liberty draws a frontier beyond which no interference trespasses on the area of the individual. For the sake of the liberty of the individual, the theorist of negative liberty prohibits public authority from interfering with the individual. Nationalism is one of the most powerful positive liberty doctrine in the modern era. In order to achieve a 'higher' and 'realer' self, man must incorporate himself into his nation. Constitutionalism is an attempt to set up rules for the protection of negative liberty. In order to protect individual rights, there must be fundamental rules that any

The two dimensions of the notions of sovereignty are implicitly discussed in terms of the transition from the Classical to the modern ages. The modern conception of sovereignty is characterised by the rise of man and an organic entity to express his collective will, the nation. National sovereignty is the concept of sovereignty that aims to realise the true will of a nation. It may do so under the presupposition that the will of a nation has priority over formal rules.

The Classical age foreshadowed constitutional sovereignty, even though Hobbes's absolutist theory does not entirely fit in with it. We shall discuss the representatives of this tradition of the concept of sovereignty in Chapter 1. Suffice it to say here that the gist of the type lies in the rationalism of the Classical age. Grotius, Locke and Montesquieu represent 'constitutional' elements in the rationalist age. This school of thought is called 'the Grotian tradition' in international studies, which is above all characterised by 'the subjection of the totality of international relations to the rule of law'.[63] The rule of law, a broad interpretation of which is a synonym of 'constitutionalism', does not simply mean the existence of the law-producing sovereign. In domestic and international society, the idea of the rule of law is the belief in the higher or fundamental laws that rule even sovereigns. The rationalists in the Classical age do not admit 'reason of state', for state is not a mystical organic person, but a collection of individuals who are all under the rule of law. This school of thought does not take the notion of sovereignty to extremes, whether it is the power of the king or the people. They put the notion of sovereignty within legal frameworks or constitutional rules. This tradition persisted throughout the modern age despite the movement of national sovereignty. In particular, it is said that 'the English-speaking peoples have developed their political traditions more steadily in a constitutional direction and have

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political power cannot override. What I mean by national sovereignty is a logical conclusion of positive liberty. When man pursues his 'higher' and 'realer' self, the nation appears to be the highest 'social whole'. It is a moral claim that the nation be the supreme holder of state sovereignty. When individual liberty is strongly protected, constitutional rules function to restrain any kind of public power. It is then a legal claim that constitutional rules have priority over the principle of sovereignty. Just as the two concepts of liberty coexist, the two types of sovereignty coexist in certain ways in fact. It is possible that one helps the other against common enemies like absolutist princes. However, we can always trace tensions between the two belief systems, even if the purest forms of each are not always present.

[63] Lauterpacht, 'The Grotian Tradition in International Law' (1946), pp. 19-20. See also Bull, 'The Importance of Grotius in the Study of International Relations (1990).

thereby become the leaders of modern constitutionalism.'[64]

It may be reasonable to assume that 'sovereignty as a conception is at variance with the logic of constitutionalism.'[65] Constitutionalists usually do not cherish an ideal of absolute sovereignty. But as we shall see later, they seldom go so far as to abolish the principle of sovereignty. Constitutionalism is a political expression of the orientation towards 'the golden mean', which stands between absolutism and anarchy, absolute state sovereignty and world government.[66] It desires political powers to be restrained. But it never favours a total ban on conventional political authorities. Especially in the modern age, without the sovereign authority whose function is to authorise constitutional rules, constitutionalism never achieves its aims.

It can be noted that this holds true in domestic as well as international contexts. The gist of domestic constitutionalism is the sovereign authorisation of constitutional law that restrains public power in domestic society. The possibility of 'international constitutionalism' lies in the same sovereign authorisation of international rules that restrain public power in international society.[67]

This is a political meaning of constitutional*ism*, i.e. the respect for a set of certain political values. The gist of constitutional*ism* is the belief in the rule of fundamental laws. By 'fundamental laws' I do not mean only written constitutional laws. For instance, the protection of individual rights from abuses of public powers is a core value of constitutional*ism*, whether or not it is a provision of a certain constitutional law. This basic orientation applies to the international field as well. Legalisation of international relations is an attempt to establish a system of fundamental rules of international society. In this sense it is not difficult to find constitutional elements in international studies. Constitutionalism does not mean the existence of a written constitution. The UK has a long history of constitutionalism, but does not have a written constitution. The fact that there is neither international constitutional law nor an international legislature has

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[64] Carl J. Friedrich, *Constitutional Government and Democracy* (1968), p. 26.

[65] *Ibid.*, pp. 19-20.

[66] See Martin Wight's description of 'Western values' as 'the constitutional tradition' and the principle of 'the golden mean' represented by many Anglo-American thinkers, in 'Western Values in International Relations' (1966), pp. 89-91.

[67] The phrase, 'international constitutionalism', was employed by Carl J. Friedrich. He refers to the Covenant of the League of Nations, the Charter of the United Nations and the Universal Declaration of Human Rights of 1948, although he points out the limits of the implementation of them. See *ibid.*, p. 31.

nothing to do with the mode of thought, i.e. constitutional*ism* as an ideology. So the word 'constitutional' denotes a theoretical orientation towards the establishment of a set of fundamental rules that have priority over the principle of sovereignty. Constitutional sovereignty is the notion of sovereignty that exists within constitutional rules.

The conceptual premise of constitutionalism resides in the distinction between two concepts of the state. One is a political community as a whole. The other is the government that organises but exists within the community. What constitutional rules can restrain is the latter sense of the state. Under the premise of constitutionalism, what the government can do is to *exercise* state sovereignty. The fundamental authority remains in the whole community; any power derives from the *source* of state sovereignty that can *authorise* the exerciser of sovereignty.

Although we do not deal with Grotius as a theorist of sovereignty in the following chapters,[68] his distinction of the two subjects of the highest power (*summa potestas*) is useful to systematise the logic of constitutionalism. Grotius calls them the common and the proper subjects. While the proper subject is one or more persons, according to the laws and customs of each country, the common subject is the state (*civitas*), that is, 'a perfect society'.[69] Grotius's conception of *civitas* does not possess its own 'will' like the modern nation-state. It is merely a juristic person. Indeed, Grotius adds that *civitas* is not a nation. This formal notion of the common subject interpreted as 'a perfect society' as a whole corresponds with the source of sovereignty. The particular subject, namely, government, with the exerciser of sovereignty.

This distinction marks a point at which the theories of national and constitutional sovereignty profoundly separate from each other. In the quest for a true expression of the will of a nation, it is vital to synthesise the two subjects in the name of the nation. As national sovereignty is inalienable and indivisible, it is a derogation from sovereignty to conceptualise its two subjects. A nation as a whole is a community in itself. It has a national government that is the natural organ of its sovereign power. Both are the same from the point of view of the theory of national sovereignty. Yet, is it really possible to identify a government with a community as a whole? Genuine nationalists

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[68] As shown above, this thesis mainly deals with Anglo-American theorists who used the word, sovereignty.

[69] Grotius, *The Illustrious Hugo Grotius* (1654), pp. 84-86.

would answer that even if it may seem difficult to attain, it must or at least ought to be pursued.

By contrast, however, candid scepticism would be expressed by constitutionalists. The identification of the two subjects is not an attainable goal. Or at least it does not deserve painful efforts. Constitutionalism attributes the authority of sovereignty mainly to the common subject. But under the premise of constitutionalism, its existence is highly formal. It is indispensable to authorise a constitutional system, according to which any state organs function domestically and internationally. But it is not expected to act in reality, nor is it pursued as an object of political ideals. The exerciser of sovereignty and the holder of the title, the sovereign, is greatly limitable under constitutional rules. What is crucial is a well-designed constitutional system, in which the source and the exercisers of sovereignty have vital roles but are in no way absolute.

Before moving to Chapter 1, I wish to point out major elements of the concepts of national and constitutional sovereignty. These will help us to identify 'national' or 'constitutional' elements of concepts of sovereignty in historical documents, although they do not constitute any privileged and transhistorical definition of sovereignty. Under the banner of national sovereignty gather nationalist values: national unity, the identification of the source and the exerciser of sovereignty, that of state and society, supremacy of the public over the private, that of politics over economy, positive liberty, national self-determination, inalienable and indivisible sovereignty, sovereignty of will over law, and sovereignty as collectivist ideal. The premises of constitutional sovereignty include: constitutional order, the constitutional distinction of the source and the exerciser(s) of sovereignty, that of state and society, the protection of the private from the public, that of economy from politics, negative liberty, non-interference without constitutional sanctions, flexible (divisible and limitable) sovereignty, sovereignty within the rule of law, and sovereignty as a formal rule. All these are conceptual tools to map out the historical dimensions of the relationship of the national and constitutional notions of sovereignty. I stress again that this thesis does not pigeonhole every notion of sovereignty into the two categories. They are not intended to construct any transhistorical definition of the notion or function of sovereignty. But I do seek to show in the following chapters that these conceptual tools are useful in order to describe a history of conflicting notions of sovereignty.

In Chapter 1, I shall explore classical examples of constitutional notions of sovereignty in Great Britain and the United States. The constitutional theories of John Locke and other British publicists, and the arguments of the Federalists and other intellectuals in the founding periods of the United States provide the constitutional tradition of sovereignty. The chapter also shows that the concept of international relations based on the principle of national sovereignty did not fully develop in the Classical age. Chapter 2 traces the development of theories of national sovereignty in nineteenth century France and Germany. This chapter shows that the theory of national sovereignty attained its highest expression in nineteenth century Germany, which made a strong contrast with classical Anglo-American political theories. Chapters 3 and 4 deal with notions of sovereignty in nineteenth century Britain and America respectively. These chapters argue that in both countries the phenomenon of the *reification* of sovereignty became evident towards the end of the nineteenth century. In Britain as nation-wide democratic movements and the process of imperialism advanced, traditional constitutional notions of sovereignty were replaced with the doctrine of absolute sovereignty of the Imperial Parliament and more organic notions of national sovereignty. In America the severe experience of the Civil War led publicists to emphasise the national unity of the American nation. The characteristics of international law in Britain and the United States are also examined in these chapters.

Chapter 5 focuses on the debate on the establishment of the League of Nations. As a result of the Anglo-American victory over Germany, the plans for a future international order revitalised the constitutional traditions in Britain and the United States. I shall characterise this tendency as 'international constitutionalism'. Chapter 6 covers the interwar period, in which 'international constitutionalism' rose and fell. The chapter analyses changes in notions of sovereignty in the period in which the optimistic prospect for international order among Anglo-American intellectuals declined in the face of serious economic and political crises in the 1930s. Chapter 7 follows the discourses on sovereignty after 1945 up to the end of the 1960s. In this period, the rise of political realism implanted the vigorous theory of national sovereignty in the Anglo-American countries. Reluctant acceptance of the theory of national sovereignty during the Cold War led Anglo-American publicists to ignore and eventually formalise the notion of sovereignty. I shall look into post-war theories of sovereignty in communist and Third

World countries in Chapter 8. This chapter shows that during the Cold War and the process of decolonisation, the constitutional understanding of sovereignty was attacked by ideological opponents in communist and Third World countries. This explain the historical reasons for the decline of international constitutionalism in the post-1945 Anglo-American world. I turn to notions of sovereignty in Britain and the United States in the 1970s and 1980s in Chapter 9. The new tendency of a revival of traditional constitutional values in these countries, which I call 'a new international constitutionalism', is a main theme of this chapter. The conclusions express a summary of the thesis and prospects for contemporary debates on the notion of sovereignty.

Chapter 1 Classical Constitutional Notions of Sovereignty

This chapter examines classical constitutional notions of sovereignty in Britain and in the United States from the seventeenth to the beginning of the nineteenth century. In the first section, we shall briefly explore political thoughts in seventeenth century England in order to identify the archetype of the constitutional tradition of the notion of sovereignty. The second section deals with modern modifications of classical constitutionalism in the latter half of the eighteenth century. After examining the implications of these notions in international relations, we shall formulate theories of sovereignty that appeared in the process of the establishment of the United States of America.

Discourses on Sovereignty in Revolutionary England

Politics of the Fundamental Law

The seventeenth century in England is often characterised as a transitional period from royal to popular sovereignty. This conventional view argues that even if the subject of sovereignty was transferred from the king to the people, the meaning of sovereignty did not change. Yet such a simplistic view overlooks complex developments of the notion of sovereignty in the revolutionary era.[1]

Before the outbreak of the Civil War there were, mainly, three ideological principles: the divine right of kings; government by consent; and the ancient constitution.[2] It is

[1] In examining a broad range of historical documents in sixteenth and seventeenth century Europe, Julian H. Franklin points out that 'Bodin's account of sovereignty was also the source of much confusion, since he was primarily responsible for introducing the seductive but erroneous notion that sovereignty is indivisible.' As Franklin suggests, the 'erroneous' doctrine of Bodin's notion of indivisible sovereignty was influential, but vigorously criticised in the Classical age. Franklin, 'Sovereignty and the Mixed Constitutions: Bodin and his Critics' (1991), p. 298.

[2] J. P. Sommerville, *Politics and Ideology in England, 1603-1640* (1986), chapters 1, 2, 3.

noteworthy that the main issue was not the location of sovereignty, but how to accommodate 'civil government' (an antonym of 'ecclesiastical government') with the age of reason. For instance, the divine right of kings is derived from the idea that natural law ordained men to be governed by governor(s). Even King James I admitted the 'designation' of the 'consent of the Kingdom'. Accordingly, the theory of the consent of the people was not the same as the modern doctrine of national sovereignty. It was neutral and could justify monarchical sovereignty. What is most important is that Stuart England experienced an intellectual movement of common law theory. Common lawyers advocated that 'the ancient constitution' was binding upon any rulers. They believed that positive laws in violation of the common law of customs and reason could be void.

These three ideologies in the Classical age had their own complete systems of political society governed by a certain set of rules, in which God was not irrelevant but played no active role. The notion of sovereignty constituted a part of the systems, but was by no means omnipotent. For instance, the hero of the common law tradition, Judge Sir Edward Coke, spoke in the debate on the Petition of Right, 'I know that prerogative is part of the law, but "sovereign power" is no Parliamentary word in my opinion. It weakens Magna Carta and all other statutes, for they are absolute without any saving of sovereign power'.[3] Coke never attempted to abolish the sovereignty of the king. But he did not conceive it to be above law. His statement represents the main theme of the notion of sovereignty in the constitutional tradition: sovereignty within law. Common law theory was not a revolutionary doctrine, while it defended individual rights. Hedley Thomas, common lawyer, remarked on the inviolability of private property: 'this ancient liberty of the subject in England is that which doth and always hath maintained and upholden the sovereignty of the king and maketh him able to stand of himself whithout the aid of any neighbor princes or states and so to be an absolute king which dependth immediately upon God'. He praised the balanced constitution, i.e. 'This so ancient, honourable and happy state, so prudently compact of the sovereignty of the king and the liberty of the subject.'[4] Sovereign power is needed, but only within the system of

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[3] Robert C. Johnson and others (eds), *Commons Debates 1628* (1977), p. 495.

[4] Elizabeth Read Foster (ed.), *Proceedings in Parliament 1610* (1966), pp. 195, 197.

common law.

We shall not examine the details of political turmoil after the outbreak of the Civil War. Suffice it to say that what was conceived to be violated in 1642 was the rule of those fundamental laws, i.e. the ancient constitution and the principle of consent of the governed. To be sure, there were those who spoke of 'the sovereign power of parliament' as well as the advocates the sovereignty of the king. For instance, Robert Filmer developed his patriarchal theory of absolute monarchy, which represented the notion of absolute and indivisible sovereignty.[5] But English history leading to the Glorious Revolution of 1688 shows that extremism of both the right and left, namely, absolute sovereignty of the king and the people, did not gain ground. It is what Martin Wight calls the 'constitutional government' or the principle of 'the golden mean' which represented the theoretical significance of the Revolution and determined the nature of the British political tradition.

The 'constitutionalist' view in the middle of the seventeenth century is represented by George Lawson. His theory of sovereignty is innovative, while deeply rooted in the traditions of Classical English political thought. Referring to the predecessors of post-Bodinian public lawyers, Lawson distinguishes between 'personal sovereignty' and 'real sovereignty' or majesty.[6] While the king possesses personal sovereignty, real sovereignty to 'form a state, where there is none, and if after a form once introduced, the order be not good, . . . alter it' is in the community. It is 'the power of constitution' in the sense that the consent of the community is the foundation of a commonwealth. In so saying, Lawson rejects the absolute sovereignty of the king, parliament and even a mixed government. He emphasises that 'we must not judge of states according to the manner of administration'. There is 'a free state, a popular state, a republic, or the republic, and may be the best state of all others, where *majestas* is *tota in toto*, yet there may be several kinds of this manner of government'. He continues that 'where the whole power is wholly in the whole, there *populus*, that is, king, peers and commons, are the proper subject of majesty in the constitution'.[7]

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[5] See Filmer, *Patriarcha and Other Writings* (1680), p. 151.

[6] See George Lawson, *Pacta Sacra et Civilis* (1660), pp. 45-46.

[7] *Ibid.*, pp. 45-49, 97-98.

It is this English version of the two subjects of sovereignty that explains the foundation of classical constitutionalism. There may be disputes on the location of 'the proper subject' of sovereignty. But the common subject of sovereignty in the community stands still and provides a constitutional foundation that any political powers must obey. This logic might look similar to the theories of popular and national sovereignty. But 'the whole' community is distinct from such living entities as people and nation. It is not expected to be identified with the proper subject. It does not exceed its own constitutional role; it only creates and checks the government. On other occasions the community dissolves into a body of 'subjects'. The crux of the matter is a constitutional structure that can be justified only by an authority higher than any other political powers. Political theories that overwhelmed Filmer's textbook theory of sovereignty were not merely concerned with the location of sovereignty, but its constitutional nature.

The Lockean Model

In the age of the Glorious Revolution there appeared the most important theorist in the English constitutional tradition: John Locke.[8] It is sometimes said that Locke did not elaborate the theory of sovereignty *per se*. But sovereignty was a central issue in his 'First Treatise' of *Two Treatises*, in which he vigorously denied the patriarchalism of Filmer. He repudiated the sovereignty of Adam and its theoretical offsprings, which was a major theoretical task in his time. Locke mentioned 'sovereignty' even in the 'Second Treatise', when he confirmed his denial of Filmer's patriarchalism.[9] When read as coherent articles, each treatise of *Two Treatises* appears to represent the negative and the positive sides of Locke's rejection of the conventional notion of sovereignty: the criticism of the absolute notion of sovereignty and the creation of the two supreme powers. These could be called the theoretical foundation of modern constitutionalism.

In the second treatise, Locke develops a theory of an autonomous political society by

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[8] As regards 'sovereignty in the Lockean tradition' which includes Lawson and the American federalists in contrast with 'sovereignty in Bodin, Hobbes, and Rousseau', Julie Mostov, *Power, Process, and Popular Sovereignty* (1992), pp. 52-72.

[9] See Locke, *Two Treatises of Government* (1690), pp. 326-327.

establishing two supreme powers. On the one hand, Locke asserts that even after consenting to make one community, 'there remains still *in the people a Supreme Power*'. According to Locke, 'the *Community* perpetually retains *a Supreme Power* of saving themselves form the attempts and designs of the Body, even of their Legislators'.[10] Individuals never give up their right to property, which all political powers are set up to secure. Furthermore, they have the right to the appeal to 'Heaven', namely, the right to resistance and revolution when government abuses its power. The authority of 'the Supreme Judge', 'God in Heaven', meets the fear of the lack of the final judge expressed by absolutists like Filmer.[11]

On the other hand, Locke also notes that although the community is 'always the Supreme Power, but not as considered under any Form of Government, because this Power of the People can never take place till the Government be dissolved.'[12] While Locke divides the governmental power into three - legislative, executive, and federal powers - he described the legislative power as the supreme power.

It is evident that the avoidance of the word, sovereignty, is by no means accidental. It is striking that the result is the coexistence of *two supreme powers*, with which the absolute notion of sovereignty cannot be easily reconciled. Locke's theory is not a simple advocation of popular sovereignty against royal sovereignty. Nor is it merely a theory of legislative sovereignty. The theory of two supreme powers is possible, because he distinguishes between 'the *Dissolution of the Society*, and the *Dissolution of the Government*.'[13] One supreme power reigns in society, while the other represents the supreme power of government. There is no power relationship, but a constitutional relationship between them, for the latter is restricted by its end, 'the good of Mankind'.[14] One commentator calls this 'the distinction between constituent and ordinary power'.[15]

The two supreme powers do not conflict with each other, at least under the premises of the natural law tradition, because each has its own constitutional role. The

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[10] *Ibid.*, p. 385.

[11] *Ibid*, p. 445.

[12] *Ibid.*, p. 385.

[13] *Ibid.*, p. 424.

[14] *Ibid.*, p. 435.

[15] Julian H. Franklin, *John Locke and the Theory of Sovereignty* (1978), p. 124.

community always represents the constitutive power of political society and remains a basis for the protection of individual rights. The government always organises the ordinary power of political society, which the people ought to obey except in time of resistance. The former may be said to almost exclusively exercise supreme *power*, while the latter is the foundation of *authorisation.* This distinction leads to the most important premises of modern constitutionalism: the distinction between constitutive authority and ordinary power, i.e. between constitutional rules and ordinary laws. And the major aim of constitutionalism, the protection of individual rights from the abuse of public power, is unequivocally implemented by Locke along the line between his two supreme powers. It is said that for Locke 'behind the sovereign authority stands the majesty of Natural law which limits its competence'.[16] A principle that embodies the natural law foundation would be 'Salus Populi Suprema Lex'.[17] The safety of the people is the supreme law, which justifies a constitutional order above the sovereign will. This is the gist of classical constitutionalism.

This might also be characterised as the principle of the 'golden mean' between governmental power and community authority, which symbolises a theoretical achievement of the Glorious Revolution. Of course, this does not mean that parliamentarians after the Revolution literally followed the Lockean theory. But it is clear that Locke completed a theoretical foundation of constitutionalism and continued to be influential in Anglo-American political thought. It should be added that this may not be 'glorious' from other ideological viewpoints. It seems historically true that the 'golden mean' is a conservative ideology of the middle class. In any event, it is now theoretically possible to defend individual liberty without violating a governmental system. From now on constitutional*ism* means a belief that there is, and must be, a

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[16] Raghuveer Singh, 'John Locke and the Idea of Sovereignty' (1959), p. 328. Singh emphasises that Locke 'belongs to the second tradition of Western political thought' distinct from the 'Hobbesian-Austinian' tradition.

[17] See Locke, *op. cit.*, p. 391. The maxim, 'Salus Populi Suprema Lex', was widely cited by seventeenth century pamphleteers. The maxim was the title of a book published in 1648, whose subtitle was 'The Peoples Safety is the Sole Soveraignty'. The author writes: 'Is not the State at large the absolute King, and the King (so-called) the kingdoms Steward? Is not the King and all Magistrates the Kingdoms ministers and servants? Is it not their duty and glory to serve the Kingdom? ... though he is above every one, yet not all; and common safety is the sole Sovereign.' The author's notion of 'the State at large' shows that the maxim, 'the safety of the people is the supreme law', is the principle that expresses a historical connection between constitutionalism and the doctrine of two sovereignty. *Salus Populi Solus Rex: The Peoples Safety is the Sole Soveraignty, or the Royalist out-reasoned* (1648), p. 2. Samuel Hunton has almost the same idea of '*Salus* soveraignty'. See Hunton, *The King of Kings: Or The Soveraignty of Salus Populi, over all Kings, Princes, and Powers whatsoever* (1655).

'golden mean' to sustain the two political goals.

The Development of Constitutional Sovereignty in Britain

The tradition of classical constitutionalism was to a great extent based upon the premises of common law and natural law, which gradually declined in the modern age. Although the vestiges of classical constitutionalism remained throughout the modern age, they continuously experience historical changes. In this section we shall view notions of sovereignty at the end of the Classical age and identify the modification of the constitutional concept of sovereignty.

The Post 1688 English Constitution

Despite a popular view that the Glorious Revolution transferred sovereignty from the king to parliament, the notion of parliamentary sovereignty did not gain ground immediately after the Revolution. As we have seen, the Revolution was justified mainly under the premises of classical constitutionalism. For instance, the most important achievement of the Revolution, the Bill of Rights of 1689, did not mention parliamentary sovereignty, even though parliament was given a major role to check royal power; instead, it listed 'illegal' acts of the king. Paradoxically, the king who pledged to observe constitutional rules was the highly respected sovereign who enjoyed the glory of the British Empire.

We can see post-1688 notions of sovereignty in the debate between pro- and anti-Revolution publicists. For instance, it is interesting to see the way James Parkinson, pro-Revolution fellow at Oxford, repudiated one of the advocates of the doctrine of 'passive obedience'. In distinguishing between power and authority, Parkinson argues that those who have sovereign power are not always given sovereign authority by God. In other words, the sovereign power holders are still under the restraint and government of God. That the sovereign power is capable of doing a good deal of evil and mischief does not mean that God allows them to do so with sovereign authority. But is it not the

case that the king may have sovereign authority as well as sovereign power? Parkinson answers that 'the Sovereign Authority is always in the People'.[18]

Parkinson's argument is polemic and may not be philosophical enough compared with the theories of Hobbes and Locke. But he surely expresses the crux of the liberal connotation of Hobbes's theory of authorisation and the constitutional structure of Locke's two supreme powers. Parkinson does not simply repudiate royal sovereignty in the name of popular sovereignty. He admits the sovereign *power* of the king; he defends king William and queen Mary, 'Lawful and Rightful King'. What he insists is that the people always retain sovereign *authority*. This position is founded upon a strong belief in the existence of the higher law which determines the proper relationship between sovereign power and authority. His first proposition is 'Allegiance, is Obedience according to Law.' His conclusion is that 'there is nothing can secure to a Prince his Sovereign Power, but that which sets bounds to it, the Law.'[19]

Another post-1688 liberal, the anonymous author of *The Judgement of Whole Kingdoms and Nations*, asserts that 'To extend the Governor's Right to command . . . is Treason against the Constitution'. 'By cancelling the Charter from which he deriveth and holden his governing Power, he not only makes his Title to Sovereignty precarious, but renders every Claim of that kind . . . to be an Invasion and Usurpation.' The author resorts to higher laws to justify his argument. Because there is no natural or divine law regarding any particular form of government or person which should have 'the sovereign Administration of Affairs', 'Mankind is at Liberty to chuse what Form of Government they like best.' He cites the maxim, 'the Safety of the People is the supreme law', and observes that the English government is 'a mixed limited monarchy, where the Supreme Power is divided between the King and People'.[20]

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[18] James Parkinson, *An Examination of Dr. Sherlock's Book, entituled, the Case of the Allegiance due to Sovereign Powers, stated and resolved, etc.* (1691), pp. 27-30.

[19] *Ibid.*, pp. 7, 32.

[20] *Judgement of Whole Kingdoms and Nations* (1710), pp. 3, 4, 8, 10. Andrew Michael Ramsay emphasises the necessity of sovereign authority, with which the monarch ought to be invested. But he also argues that absolute power is not arbitrary power, because 'Sovereigns have no Judges upon Earth above them, so as to punish them, but they have always a Law above them, in order to regulate them.' The end the sovereign has is 'the Rule and Supreme Law . . . and this Law is no other than the *publick good*.' For instance, therefore, the sovereign is prohibited from violating the liberty of the subject. 'There are the Rights of Sovereignty necessary to hinder the Abuses of Society. Thus are the Boundaries of Sovereignty necessary to hinder the Abuses of Authority.' *An Essay upon Civil Government* (1722), pp. 38, 101-107.

It is striking to see that almost the same features in understanding sovereignty were prevalent among the advocates of 'passive obedience'. Although it was said to have been written sometime after the Civil War, *Rules of Government: Or a True Balance between Sovereignty and Liberty* published in 1710 represented the atmosphere in the first half of the eighteenth century. While the author mentions 'Salus Populi Suprema Lex', he believes that 'Monarchical Government is best suiting with God's Ordinance and the Benefit of Society.' He strongly opposes 'co-ordination' of supreme powers. 'However, Limitation of Sovereignty is', he baldly asserts, 'agreed on by all politicians, and civilians, to be consistent with sovereignty itself.' Sovereignty is not taken from the governing person or persons, although 'the Absoluteness of the Execution, for some time, or in some part of the Sovereign Power' may be suspended. In those cases, 'he or they remain absolute, though limited.'[21]

In the same manner, another writer of passive obedience develops almost the same idea of sovereignty in *The English Realm* (1717). The author argues that the notion of sovereignty cannot be abstracted from the sovereign king. And if there is any power to which princes or states are accountable, 'let their Names found never so bid, they are not *Sovereign*, but subject *Sovereignty*'. However, interestingly, sovereign power may be limited as to the exercise of power. What makes princes 'complete Sovereigns' is the authority to give life and soul to the dead letter. The essentials of sovereignty are established not by 'political laws', but by 'IMPERIAL Laws, or the common Laws of Sovereignty'. At the level of the latter, subjects must not resist the sovereign, while the sovereign himself is subject to limitations. The author argues that there are two sorts of '*Imperial Sovereign*'. Although both '*Imperial Sovereigns*' are 'full, perfect, absolute and entire', one is limited only by the Laws of God and nature and the other by 'civil Laws and pactions' as well as divine and natural laws. The sovereign under political limitations of '*Humane Constitutions*' as to the exercise of his power still has absolute, full and entire power. Rather, arbitrary and despotic exercise of power has no relevance to 'the Being and Essence of *Imperial*, or *Sovereign* Power'. Therefore, although the King of England is limited in the use and exercise of his power, 'the *English* Realm is a perfect Sovereignty or Empire, and that the King of England, by the Imperial Laws of

[21] *Rules of Government: Or a True Balance between Sovereignty and Liberty* (1710), pp. 7-8, 13-14.

it, is a compleat, imperial, and independent Sovereign, to whom the foresaid Rights of Sovereignty do inseparably belong.'[22]

The popularity of the doctrine of passive obedience and the advancement of liberalism in post-1688 England were the two sides of the same coin. In order to avoid another civil war, it was imperative to unite all the people under the banner of royal sovereignty. In order to preserve constitutional rights, it was vital to maintain constitutional rules. The theory of absolute *and* limited sovereignty was one solution. Under the premises of classical constitutionalism, both sovereignty and liberty were embedded in the British Constitution. The British Constitution was conceived to be the glorious expression of power and freedom that no other nation than the British could enjoy.[23]

While absolute *and* limited sovereignty was a necessary product of the time, there was another possibility of explaining the British Constitution; sovereignty is not limited, but limiting forces are part of sovereignty. In *Commentaries on the Laws of England* published between 1765 and 1769, William Blackstone, authority on English constitutional law in the eighteenth century, set out constitutional principles along the latter line. He declares that 'there is and must be in all of them [several forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, resides.'[24] Then he goes on to explain 'three regular forms of government'. According to the location of the sovereign power, forms of government are classified into either democracy or aristocracy or monarchy. All three forms have different advantages and disadvantages.

But Blackstone does not stop at that point, leaving constitutional issues untouched. Blackstone remarks that 'happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this

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[22] *The English Realm: A Perfect Sovereignty and Empire, and the King, a Compleat and Imperial Sovereign* (1717), pp. 16-22.

[23] For instance, a liberal 'gentleman of the middle temple' admires the Constitution by writing that 'thank GOD, undeniable, that *Our Government was founded on the* Principles of liberty, by a WISE, a FREE, and a BRAVE PEOPLE. . . *who are the confessed* Origin, or Spring *of the* SOVEREIGN POWER, which . . . THEY *have committed into the* joint Hands *of* three Estates, *so framed and attempered, as to be Checks, the one upon the other* . . . This will appear the most wise, the most equal, the most just, the most perfect Form of Government, that now subsists upon this Globe. A glorious Constitution!' *A Critical Review of the Liberties of British Subjects* (1750), pp. 11-12.

[24] Blackstone, *The Sovereignty of Law* (1765-1769), p. 36.

observation.' In Britain while the executive power is lodged in a single person with all the advantages of absolute monarchy, the legislature is entrusted to three distinct powers, entirely independent of each other. Each branch of the three powers, the king, an aristocratic assembly of the lords, and the democratic house of commons, is armed with a negative power, sufficient to repel any innovation which it thinks inexpedient or dangerous. Blackstone then proclaims that in the British parliament

> is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. . . . [A change in the legislature from that, which is] presumed to have been originally set up by the general consent and fundamental act of the society . . . is according to Mr Locke . . . at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.[25]

While praising the anomaly of British sovereignty, Blackstone also asserts that 'the law ascribes to the king the attribute of *sovereignty*'.[26] Does this 'sovereignty' really have 'a supreme, irresistible, absolute and uncontrolled authority'? Each branch of parliament certainly wields 'sovereignty', when understood to be united with other branches. But at the same time it lacks 'sovereignty', when viewed as a body which retains negative powers against the others. The sovereign unity of the British parliament exists only within the British constitution. Outside the constitutional sphere, there are merely three limited powers. Or it may be interpreted that while the sovereign 'powers' are divided, there must be one 'authority' that claims 'the rights of sovereignty'. The very expression, 'the rights of sovereignty', indicates the constitutional character of Blackstone's theory of sovereignty.

Another significant feature of Blackstone's *Commentaries* is his strong belief in individual rights. He writes that 'the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by immutable laws of nature'. To be sure, when entering into society, the individual gives up 'a part of his natural liberty'. But it does not prejudice the fact that 'the first and primary end of

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[25] *Ibid.*, pp. 36-38.

[26] *Ibid.*, p. 94.

human law is to maintain and regulate these absolute rights of individuals'. Laws and liberty are so inseparable that constitution is alone calculated to maintain civil liberty. This leads Blackstone to declare that the idea and practice of this political or civil liberty flourish in their highest vigour in England.[27]

Is it contradictory to have the absolute authority of parliament together with the absolute rights of individuals? For Blackstone, one is possible only with the other. The absolute authority of parliament is founded upon the natural rights of individuals; if parliament violates the rights, the people restore the power to constitute another government. However, the implementation of individual rights depends on the supreme authority of parliament. Without the latter, liberty loses its protector. Or we may say that the authority of parliament and individual rights are absolute only within a constitutional framework. The political system that was established in Locke's time had continued for almost eight decades and *seemed* set to continue in the foreseeable future. It was not so ridiculous for Blackstone, therefore, to describe it in absolute terms. What was really absolute was the British constitution that sustained the authorities of parliament and individual rights. There was neither supreme authority nor absolute rights outside the framework of constitution.

Sovereignty in the Industrial Revolution

Adam Smith wrote in 1776 that the sovereign, 'servants of the public and maintained by the industry of the people', was restricted by the system of natural liberty of every man and in duty bound to protect the society and every member of it and to erect certain public work.[28] It is flawed to ask whether this restricted and obliged body should be called 'the sovereign' or not. There must be a strong public authority to protect public order; but it must not interfere with individual liberty and economic activities. This is a typical understanding of sovereignty within the Constitution at the end of the eighteenth century which was strongly associated with the rise of the Industrial Revolution in British society.

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[27] *Ibid.*, pp. 57-61.

[28] Smith, *The Wealth of Nations* (1776), pp. 124, 251.

In 1776 Jeremy Bentham, who represented utilitarianism in the period of the Industrial Revolution, said: 'In Great Britain, for example, the sovereignty is in the king, Lords, and Commons in Parliament assembled'.[29] The sovereign was defined as 'any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience; and that in preference to the will of any other person'.[30] Bentham rejects contract theory as a fiction and expands a theory of will. A law is the sovereign's will. It is the will of subjects to pay obedience, as long as it is beneficial to them. According to Bentham, the sovereign's will 'cannot be illegal', although 'it may be unconstitutional'.[31] In other words, unconstitutional acts are not necessarily illegal. Bentham is not a constitutionalist who mentions 'Salus Populi Suprema Lex'; his supreme law is the utilitarian calculation of 'the greatest happiness of the greatest number'. He perceives that sovereignty is a force to reform old systems. It is not only expected to protect rights, but also to promote social developments.

In a later work for a planned constitutional code, Bentham pronounces: 'The sovereignty is in *the people*. It is reserved by and to them.[32] The people are now explicitly given 'the Constitutive authority', which is 'in the whole body of Electors belonging to the state'. All other authorities are subordinate to 'the Constitutive authority', which can locate and dislocate the members of 'the Legislative authority'.[33] He states that 'The Legislative authority' in relation to the Administrative and the Judicial has no limits but only some checks.[34] Yet he also writes 'the people - the only legitimate source of power: the people, by whose authority, for whose sake, and at whose expense, all power, conferred by this our Constitution, has been created.'[35]

Bentham's theory of the sovereign will points in the direction of modern knowledge characterised by Foucault. 'Of the Constitutive authority, the constant will is that the

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[29] Bentham, *Of Laws in General* (1782), p. 5.

[30] *Ibid.*, p. 18.

[31] *Ibid.*, p. 16.

[32] Bentham, *Constitutional Code* (1830), p. 25.

[33] *Ibid.*, pp. 29-41.

[34] *Ibid.*, P. 42.

[35] *Ibid.*, p. 145.

national felicity - the happiness of the greatest number - be maximized.'[36] Bentham's concept of man goes beyond the classical assumption of individuals who merely retain natural rights. Bentham's man is a living creature who constantly 'wills' to maximise their happiness. It can be noted that in the historical context of the Industrial Revolution, he 'wills' to maximise economic gains. The Legislative authority, if necessary, exercises the power to abolish any principles of common law that do not conduce to utilitarian principles.

The constitutional structure of Bentham's state followed the premises of the Lockean model of constitutive and ordinary powers. Nevertheless, the emergence of modern man who pursued the maximisation of happiness marked the beginning of a new age. The constitutional principle of sovereignty within law was lost in Bentham's theory. Man was no longer satisfied with the protection of natural rights only. He pursued maximum happiness under constitutional premises. With the advent of the Industrial Revolution classical constitutionalism was being modified.

International Sovereignty in the Classical Age

We shall now examine the notions of sovereignty in the discourses on international relations. It should be emphasised, however, that the sense of the 'international' was very weak in the pre-modern age, because the notion of sovereignty was still intrinsically associated with sovereign kings.

Interesting evidence is shown by the discourses on 'the sovereignty of the British seas'. Fishery was one of the main concerns for the British and there appeared several books that defended the British sovereignty over seas. But they did not discuss the sovereignty of 'Great Britain'. Their presupposition was that 'Princes may have an exclusive property in the Soveraigntie of the severall parts of the Sea'.[37] This premise did not change after the Glorious Revolution. Sovereignty is 'the publick property of the King', which is exercised over the British seas by the Kings of England. 'In a Succession of Ages' they confirmed their sovereignty over British seas in their treaties with other

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[36] *Ibid.*, p. 45.

[37] John Boroughs, *The Soveraignty of the British Seas*, written in 1633, p. 1.

sovereigns.[38] In 1699 another writer repudiates the view that it is not a proper time to insist upon the sovereignty of the British seas, for the British king was born in Holland and succeeded to the crown by the intervention of Holland in 1688. But he strongly argues that this does not alter the fact that 'the Sovereignty of the Seas being the most Precious Jewel of his Imperial Crown' was given by God.[39]

Sovereignty was still the possession of the king in post-1688 England. It should be emphasised that the notion of the sovereignty of the nation-state had not fully come into existence. The 'law of nations' was synonymous with law of nature. When it was discussed, the sovereign king as a human being had to face his subjects and God prior to other sovereigns. Therefore, the law of nations could be referred to in order to judge whether an expelled sovereign retained a right to sovereignty or the people had a right to defend their liberties.[40] Far from ignoring domestic revolution, the law of nations functioned to justify the post-1688 political order. A familiar 'domestic analogy' before the modern age was not a comparison between a nation and a man, but that of a commonwealth and a family, i.e. the sovereign and the father. The law of nations determines what kind of right a man as a sovereign-father or as a subject-child has. Sovereignty was a concept to mark the relationship between the ruler and the ruled.

When William Penn wrote a plan of an European parliament in 1693-94 under the premises of the Classical age, adding numerous contemporary plans for peace, he solved the problem of sovereignty in an odd way from the modern viewpoint. He meets an imagined objection to his plan that sovereign princes and states will not be sovereign if a European parliament is established. Penn replies that:

> they remain as Soveraign at Home as ever they were. Neither their power over their people, nor the usual Revenue they pay them, is diminished: . . . So that the Soveraignties are as they were, for none of them have now any Soveraignty over one another.[41]

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[38] See Sir Philip Medows, *Observations concerning the Dominion and Sovereignty of the Seas* (1689), pp. 5, 34.

[39] Joseph Gander, *A Vindication of a National-Fishery*, (1699), pp. 49-55, 95. See also Gander, *The Glory of Her Sacred Majesty Queen Anne, in the Royal Navy, and Her Absolute Sovereignty as Empress of the Sea, asserted and vindicated* (1703).

[40] See Mathew Tindal, *An Essay concerning the Laws of Nations and the Rights of Sovereigns* (1694).

[41] Penn, *An Essay towards the Present and Future Peace of Europe* (1693-94), p. 12.

A modern writer would justify international institutions in the name of the will of the sovereign states to participate. But the issue for Penn and his assumed adversaries is not the existence of sovereign will. It is whether or not a European parliament will change the status of sovereigns as the superior rulers.

Furthermore, Penn writes that:

> by the same *Rules, of Justice and Prudence*, by which Parents and Masters Govern their Families, and Magistrates their Cities, and Estates their Republics, and Princes and Kings their Principalities and Kingdoms, *Europe* may obtain and Preserve *Peace among Her Soverainties*.[42]

What does it mean that parents and '*Europe*' are as sovereign as kings? Each has a similar superior status in its own sphere. Orders of families, kingdoms, and possibly '*Europe*' are almost the same, for they all have the relationship between superior and inferior. But what are the relationships between a family and a kingdom, and between kingdoms? At least in theory, this may not be a problem, for fathers, magistrates, princes, kings and any other human superiors obey the laws of God and nature. Even if God was becoming absent in the Classical age, the sense of his province had not disappeared and remained in the form of higher laws. The superiors do not obey any others in their own spheres, but are always subject to the laws of God and nature, possibly together with the laws of reason and constitutions.

Penn stresses the importance of the constitution of the Netherlands, 'the Wisest and Powerfullest States'. Referring to Sir William Temple's popular book, *Observations upon the United Provinces of the Netherlands* published in 1673, Penn shows that:

> there we shall find *Three Degrees of Soveraingties to make up every Soverainty in the General States*. I will reckon them backwards: First, *The States General themselves*; then the *Immediate Soveraingties* that Constitute them, which are those of the *Provinces*, answerable to the *Soveraingties of Europe*, that by their *Deputies* are to compose the *European Dyet, Parliament* or *Estates* in our Proposal: And then there are the several Cities of each *Province*, that are so many Independent or *Distinct Soveraingties*, which compose those of the *Provinces*, as those of the *Provinces* do

[42] *Ibid.*, p. 18.

compose the *States General* at the *Hague*.[43]

Temple and Penn's notion of sovereignty exists within constitutional orders of political societies. The principle of state sovereignty in the Classical age simply means that a state is a political community that has a political relationship between the sovereign and subjects. Paradoxically this could lead to the setting up of several constitutional orders that would not violate the relationship of the sovereign and subjects in existing political communities, but only broaden the range of autonomous political communities. A European parliament was not necessarily 'transnational' as modern men imagine, for all nations in the Classical age were supposed to belong to one community that should be regulated by the laws of God, nature and nations. The association of the idea of sovereignty with human relationships was not a serious obstacle to universalism, as it was open to higher laws, if not to any human superiors.

It is surprising that so common a word as 'international' was only coined by a thinker as late as the end of the eighteenth century. In 1780 Bentham explained that 'the word *international* . . . is a new one.' It is calculated to express 'the branch of law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence.'[44] In connection with the laws of God and nature, 'the law of nations' was surely meant to refer to some kind of 'internal jurisprudence'. It was not exclusively, as Bentham meant by 'international' law, concerned with 'the mutual transactions between sovereigns'.[45] His coinage spread throughout the world and in the end completely expelled the 'uncharacteristic' appellation by *internationalising* the law of nations in the modern age. The *idea* of *state sovereignty* in international relations was born only after the modern age began.

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[43] *Ibid*, p. 19. See also Temple's original description of the 'three degrees of soverainties' in *Observations upon the United Provinces of the Netherlands* (1673), pp. 52-74.

[44] Bentham, *An Introduction to the Principles of Morals and Legislation* (1780), p. 296.

[45] *Ibid.* It can be added that Bentham still only deals with sovereigns and subjects under the title of international law, and did not mention 'the sovereign state'. See Bentham, 'Principles of International Law' (1843), pp. 537-560.

Discourses of Constitutional Sovereignty in America

We shall now turn to notions of sovereignty in the United States in its founding periods. In a period characterised as the interim between the Classical and the Modern ages, we can find constitutional notions of sovereignty under premature modern conditions. Although little attention has been paid to traditional American theories of sovereignty, probably due to their anomalous character for modern knowledge, they certainly constitute the most important examples of the constitutional theory of sovereignty.[46] The mainstream of American political thought was without doubt under the influence of traditional English constitutionalism. The issue of sovereignty before 1776 was whether the sovereignty of the British crown should be 'limited' under the 'constitutional' premises or not.[47] But American constitutionalism produced a new notion of constitutional sovereignty. While the British counterpart had no *inter-state* constitutionalism but only an *inter-national* constitution within the Empire, American constitutionalism brought *inter-state* relationships into the sphere of constitutionalism.

The American Revolution

'A Declaration of Independence by the Representatives of the United States of America in Congress assembled' of 1776 is quite often described as an expression of the principles of popular sovereignty and national self-determination. But political thoughts in the text are not so simple as such labels. The wording of the Declaration clearly indicates that it was drafted under the influence of the Lockean ideas of classical constitutionalism. The Declaration was founded upon the premises of individual rights endowed by God and ordained by natural law, the consent of the governed and the right to resistance of the people. All these are the main principles in the tradition of English constitutionalism. Furthermore, there was little element of modern national sovereignty.

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[46] Daniel H. Deudney illuminates the originality of 'the Philadelphian System' in contrast to 'the Westphalian system' as well as a simple federal state. See Deudney, 'The Philadelphian System' (1995).

[47] For instance, a Pennsylvanian wrote: 'That states without freedom should *by principle* grow out of a free state, is as impossible, as that sparrows should be produced from the eggs of an eagle. The sovereignty over the colonies must be *limited*.' The Pennsylvanian Farmer, *A New Essay on the Constitutional Power of Great-Britain over the Colonies in America* (1774), p. 96.

In the first place, instead of the American nation, there were only the representatives of 'FREE and INDEPENDENT STATES' assembled in Congress. They did not protest the state of Great Britain, but George III, and complained of the ignorance of 'our British brethren'.[48] In addition, the Declaration lacks man in the modern age. 'Men' in the Declaration were created equal, but are still called 'the governed'. The Declaration stipulates what 'men' are entitled to do, but never mentions what they do.

This does not deny the fact that the American Revolution was a revolution for emancipatory expressionism. It is true that the War of Independence was waged for the ideals that can be described as popular sovereignty and national self-determination. Some of the constitutions of the thirteen states of North America expressed the ideal of popular government. For instance, the 'Constitution or Frame of Government' of Massachusetts of 1780 clearly stipulates in Article IV that 'The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state'.[49] From our genealogical perspective, therefore, it is possible to identify the coexistence of classical constitutionalism and more populist ideologies in the American Revolution. We shall thus trace the conflict between two forces, mainstream constitutionalism and particularistic populism, in revolutionary America.[50]

The Articles of Confederation, agreed on by the thirteen States in 1777, declares that 'Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right which is not by this confederation expresly [*sic*] delegated to the united states in congress assembled.'[51] This principle of State-sovereignty shows that the Confederacy was not a federal state, but merely 'a firm league of friendship'. People

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[48] *The Constitution of the Several Independent States of America; The Declaration of Independence; The Articles of Confederation between the said States; The Treaties between his most Christian Majesty and the United States of America* (1781), p. 187, 190-191.

[49] *Ibid.*, p. 9.

[50] Although I have pointed out 'Classical' premises in the Declaration of Independence, it is still true that Thomas Jefferson, the drafter of the Declaration, was more populistic than 'federalists' like James Madison. For instance, Jefferson had the view that the federal constitution belonged only to the living generation, to which Madison was opposed. See Merrill D. Peterson, 'Mr. Jefferson's "Sovereignty of the Living Generation"' (1976). See also Christian G. Fritz, 'Popular Sovereignty, Vigilantism, and the Constitutional Right of Revolution' (1994), in which Fritz focuses on the issue of 'vigilantism' in nineteenth century America and illustrates the conflict between the views of 'the rule of law' and 'the rule of men'.

[51] *Ibid.*, p. 193. Separate sovereignty of each State was never questioned before the establishment of the US Constitution. See C. Perry Patterson, 'State Sovereignty v. National Sovereignty prior to 1789' (1949).

are sovereign in each state. The Articles symbolises American history between 1777 and 1787, which was dominated by revolutionary populism.

The Confederacy had only one central congress which had neither executive nor judiciary branches. The Continental Congress was virtually impotent. In each State dominant legislatures expressed egalitarianism that prevailed with the ideal of the realisation of true Christian communities. As many people were in debt after the War of Independence, the members of State legislatures many a time passed legal measures to relieve the poor, which threatened economic interest.[52] It was these events that made James Madison and other 'Federalists' feel that 'the objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign states.'[53] The Constitutional Convention of 1787 was a counterattack upon such populism. The drafted Constitution was a challenge to State sovereignty. Sovereign power was divided between the Union and the States, between several branches, and the source and the exercisers. The American Constitution was a historical achievement of the constitutional theory of sovereignty.

American Constitutional Sovereignty

It is worth looking into 'the great national discussion' between the 'Federalists' and the 'Anti-Federalists' in order to grasp the logic of their ideological confrontations. James Madison and Alexander Hamilton in *The Federalist Paper* published under the pseudonym of 'Publius' contrived a revolutionary notion of sovereignty for the purpose of the ratification of the proposed Constitution regardless of the real authors's personal views.[54]

Madison writes that each State 'is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act.' However, this does not mean that

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[52] See Issac Kramnick 'Editor's Introduction' in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (1987), pp. 16-28.

[53] Quoted in Schwartz, *A Commentary on the Constitution of the United States* (1963), p. 33.

[54] While Madison has a vision of the Lockean limited liberal state to protect individual rights, Hamilton's personal view envisages a heroic state which can exert its power in international fields. He reveals it when he deplores the weakness of the Confederacy and says that 'Our ambassadors abroad are the mere pageants of mimic sovereignty'. Madison, Hamilton and Jay, *op. cit.*, p. 146.

the Constitution entails 'impossibilities' which the Articles of Confederation endeavored to accomplish, namely, 'to reconcile a partial sovereignty in the Union, with complete sovereignty in the States'. The Constitution is neither national nor federal, but a composition of both, so it produces 'a compound republic'. While it pursues a strong central government, it leaves to the several States 'the enjoyment of their sovereign and independent jurisdiction', or more accurately, 'a residuary and inviolable sovereignty'. For instance, the equality of representation of each State in the Senate 'is a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty'.[55] Hamilton also writes that 'as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they previously had, and which were not, by that act, *exclusively* delegated to the United States.' The limited delegation of sovereignty means 'the division of the sovereign power'.[56]

Madison explicates that 'as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.'[57] When 'the happiness of the people' demands 'the general sovereign' as well as 'the local sovereigns', the division of the sovereign power is the best solution. This is a result of the middle ground or golden mean principle of constitutionalism. Madison explains in 1787: 'Conceiving that an individual independence of the States is utterly irreconcileable [*sic*] with their aggregate sovereignty, and that a consolidation of the whole into a single republic would be as inexpedient as it is unattainable, I have sought for middlegroud, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.' He also writes in a letter: 'It is . . . difficult to argue intelligibly concerning the compound system of government in the United States . . . without admitting the divisibility of sovereignty.'[58]

He does not mean that multiple sovereignty is theoretically inconsistent. As 'the ultimate authority, wherever the derivative may be found, resides in the people alone,'

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[55] *Ibid.*, pp. 257-9, 262, 277, 365.

[56] *Ibid.*, pp. 220, 222.

[57] *Ibid.*, pp. 293-4.

[58] Quoted in Martin B Hickman, 'Double Majesty: Madison's Middle Ground' (1983), pp. 361, 375.

it is by no means strange that there are 'different agents and trustees of the people.[59] The people are sovereign; the people in each State and their agents are sovereign; the people in the United States and their agents are also sovereign. In addition to the source and the exerciser of sovereignty in the Lockean model, the Federalists put intermediary sovereignty between them. Sovereignty in the fundamental sense lies in the hands of the people. The United States government obtains the highest (but not always strongest) representation of sovereignty, while each State keeps intermediary sovereignty.

This logic of multiple sovereignty is justified along the line of classical constitutionalism. In the Constitutional Convention of 1787 James Wilson from Pennsylvania argued:

> We have been told that each State being sovereign, all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of Civil Government? He can not. As little can Sovereign State, when it becomes a member of a federal Govern[ment]. If N. J. will not part with her Sovereignty it is vain to talk of Govern[ment].[60]

George Washington as the president of the Constitutional Convention also writes:

> It is obviously impracticable in the foederal [*sic*] government of these States; to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all - Individuals entering into society, must give up a share of liberty to preserve the rest.[61]

But do all these mean that when becoming a member of civil government, each man forfeits his liberty? The Declaration of Independence denies this. What each man does is to accept constitutional rules of civil government. Similarly, they imply that each state must give up 'a share' of sovereignty by accepting constitutional rules to 'preserve the rest'.

Of course, such an attitude is certainly ambiguous. It always remains open to

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[59] Madison, Hamilton and Jay, *op. cit.*, p. 297.

[60] James Madison, *Notes of Debates in the Federal Convention of 1787* (1987), pp. 97-98. See Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 1, (1901) pp. 402-4.

[61] 'Letter from the Constitutional Convention to the President of Congress' in Bernard Bailyn (ed.), *The Debate on the Constitution*, Part One (1993), p. 965.

opposite interpretations.[62] No matter how ambiguous it might be, however, the point is that the order of sovereignty is determined by the US Constitution. It reigns over sovereignty.

The Anti-Federalists

The anti-federalists could not accept the Federalists' innovative notion of sovereignty. In the debate on the Constitution, an anti-federalist says that 'the idea of two sovereignties existing within the same community is a perfect solecism.... if the word means any thing at all it must mean that *supreme power*, which must reside somewhere instate; or in other terms, it is the united powers of each individual member of the state collected and consolidated into *one body*. The collection, this union, this supremacy of power can, therefore, exist only in one body.' He concludes: 'If this constitution should be adopted, here the sovereignty of America is ascertained and fixed in the federal body at the same time that it abolishes the present independent sovereignty of each state.'[63] 'An Officer' in Philadelphia complains that the '*sovereignty* of the states is not expressly reserved; the *form* only, and not the SUBSTANCE of their government, is guaranteed to them by express words.'[64]

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[62] For instance, Luther Martin from Maryland argued in the Constitutional Convention that 'the States may give up this right of sovereignty, yet they had not, and ought not: that the States like individuals were in a State of nature equally sovereign & free.... the States being equal cannot treat or confederate so as to give up an equality of votes without giving up their liberty'. On the contrary, Hugh Williamson insisted that 'if any political truth could be grounded on mathematical demonstration, it was that if the States were equally sovereign now, and parted with equal proportions of sovereignty, that they would remain equally sovereign. Madison, *op. cit.*, pp. 202, 204. Rufus King from Massachusetts pointed out that the States were not sovereign lacking its peculiar feature, by saying that 'the import of the terms "States" "Sovereignty" "national" "federal," had been often used & applied in the discussions inaccurately & delusively.' He also spoke of 'the phantom of *State* sovereignty' in contrast to 'substantial good' of individual rights. King conceived that 'None of the states are now sovereign or independent.... The magistracy in Congress possesses the sovereignty.' *Ibid.*, p. 152, 228; Elliot, *op. cit.*, p. 426. Elbridge Gerry from Massachusetts charged that the 'States & the advocates for them were intoxicated with the idea of their *sovereignty.*' *Ibid.*, p.217. The Supreme Court in the case of *Cohens v. The State of Virginia* in 1821 confirmed that 'the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people'. Quoted in Allen Johnson (ed.), *Readings in American Constitutional History 1776-1876* (1912), p. 288.

[63] The Impartial Examiner, 'To the Free People in Virginia' published in *Virginia Independent Chronicle*, 20 February, 1788', quoted in Harbert J. Strong (ed.) *The Complete Anti-Federalist* (1981), 5-14-4, p. 178. The same apprehension, 'a solecism of politics', was expressed by other Anti-Federalists. See 'letters of Centinel' and 'The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents' in *ibid.*, 2-7-99, p. 169, 3-11-23, p. 155, and 'Samuel Adams to Richard Henry Lee, Boston, December 3, 1787' in Bailyn, *op. cit.*, p. 446. Agrippa warned 'all the horrors of divided sovereignty, not knowing whether to obey the Congress or the state'. Strong, *op. cit.*, 'Letters of Agrippa', 4-6-21, p. 79.

[64] An Officer of the late Continental Army, 'To the Citizens of Philadelphia' in *ibid.*, 3-8-3, p.93.

The anti-federalists fear that the Constitution lacks the essential attributes of sovereignty of the States; eventually, the general government will dominate the States governments under the pretence of two sovereignties. 'A Farmer' in Pennsylvania insists: 'All the prerogatives, all the essential characteristics of sovereignty, both of the internal and external kind, are vested in the general government, and consequently the several states would not be possessed of any essential power, or effective guard of sovereignty. . . . the state sovereignties would be eventually annihilated, though the forms may long remain as expensive and burdensome remembrances'. An 'Anti-Federalist' thus criticises that the new system constitutes not 'a federal but a consolidated government.'[65]

Patrick Henry asks, 'what right had they to say, *We, the People*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorised them to speak the language of *We, the People*, instead of *We, the States*?'[66] Being suspicious of the disguising complexity of the Constitution, an Anti-Federalist asks, 'all these attributes of sovereignty, being vested exclusively in your new government, is it not a mockery of common sense to tell us, the state sovereignties are not annihilated?'[67]

In fact, the understanding of sovereignty in America at this time was not unequivocal. Ambiguity was enlarged in the process of the ratification. Although it was only South Carolina which mentioned sovereignty of the State among the first eleven ratifying States, the demand from some of the other states led to the first Congress adding several clauses to the Constitution.[68] Rhode Island, which did not send delegates to the Constitutional Convention, eventually ratified the Constitution in 1790. Then it ordained that it would pursue several more amendments, the first of which should pronounce that 'The United States shall guaranty to each state its sovereignty, freedom,

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[65] A Farmer, 'The Fallacies of the Freeman' published in (Philadelphia) *Freeman's Journal*, 16 April and 23 April 1788, in *ibid.*, vol.3. 14. 19. and 20., p. 190.

[66] Patrick Henry, 'Speech in the Virginia Ratifying Convention', 4 June 1788, in *ibid.*, vol. 5. 16. 1., p. 211. See the similar objection in Elliot (ed), *op. cit.*, vol. IV, pp. 15-16, 23-24.

[67] 'Essays by Cincinnatus' in Strong, *op. cit.*, 6-1-40, p. 26.

[68] The tenth amendment stipulates: 'The powers not delegated to the United State by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.' See Elliot, *op. cit.*, p. 319-39.

and independence'.[69]

The notion of divided sovereignty was a product of compromise. The fact is that in the Convention, Madison asserted that the 'states never possessed the essential rights of sovereignty. These were always vested in Congress.'[70] Hamilton was among the persons who were most disappointed with the result of the Convention. He argued in the Convention: 'no amendment of the Confederation can answer the purpose of a good government, so long as the state sovereignties do, in any shape, exist; . . . To avoid the evils deducible from these observations, we must establish a general and national government, completely sovereign, and annihilate the state distinctions and state operations'. He also asserted: 'Two Sovereignties can not co-exist within the same limits.'[71] Nevertheless, having parted with Hamilton, Madison drew the Virginia Resolution of 1798 to accuse the federal government of consolidating the States 'into one sovereignty' and transforming 'the present republican system of the United States into an absolute, or, at best, a mixed monarchy.'[72]

It is true that the Federalists won the 'great national discussion' and the Constitution became 'the supreme Law of the Land'. But this does not mean that Madison's mainstream position completely suppressed challenges from the populist side. Instead, the issue of sovereignty in the United States continued to remain in a state of turmoil between the offsprings of the two positions.

The Advancement of Constitutional Sovereignty

As John Quincy Adams declared in an 1831 oration, it is not true America 'that there must reside in all governments an absolute, uncontrolable, irresistable, and despotic power; nor is such power in any manner essential to sovereignty.'[73] The orthodox understanding of sovereignty in America after the ratification of the US Constitution

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[69] *Ibid.*, p. 336.

[70] 'Yates's Minutes' in Elliot, *op. cit.*, vol. 1, p. 461. Madison also says: 'There is a gradation of power in all societies, from the lowest corporation to the highest sovereign.' See also Madison, *op. cit.*, p. 213.

[71] 'Yates's Minutes' in Elliot, *op. cit.*, pp. 417, 419. See also Madison, *op. cit.*, pp. 129, 132, 133.

[72] Elliot, *op. cit.*, vol. IV, p. 528.

[73] Quoted in Joseph Story, *Commentaries on the Constitution of the United States* (1833), p. 152.

was manifested by the Supreme Court in the case of *Chisholm v. Georgia* (1792). It pronounced: 'The United States are sovereign as to all the powers of government actually surrendered. Each state in the Union is sovereign as to all the powers reserved.'[74] In other words, 'the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State.'[75] This is an innovative theory. But what else can explain the US Constitution? This theory of divided or coexisting sovereignty remained the orthodox position in the United States until the time of the Civil War.[76]

Joseph Story, judge of the US Supreme Court, explains how sovereignty in the United States is different from traditional sovereignty. He defines that by the word, sovereignty, 'in its largest sense is meant supreme, absolute, uncontrollable power, the *jus summi imperii*, the absolute right to govern'.[77] However, such a power does not exist in the United States; or it exists in a limited or refined sense. He says:

> the state, by which we mean the people composing the state, may divide its sovereign powers among various functionaries, and each in the limited sense would be sovereign in respect to the powers confided to each, and dependent in all other cases. Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each State, not granted to any of its public functionaries, is in the people of the State.[78]

This divided popular sovereignty is the model of constitutional sovereignty of the United States. Sovereignty and the sovereign people should be divided, as the Constitution orders it. And the theory of divided sovereignty is an acknowledgement

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[74] Quoted in J. Mark Jacobson, *The Development of American Political Thought* (1932), p. 410.

[75] The Supreme Court in the case of *Chisholm, Executor, v. Georgia*, 1793., quoted in Johnson. *op. cit.*, p. 140. It also enumerated in the case of *Ware v. Hylton* (1796) that 'The Several States retained all *internal* sovereignty and . . . Congress properly possessed the great rights of *external* sovereignty.' Quoted in C. E. Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), p. 163. 'To the constitution of the United States,' said Justice Wilson in a 1793 case, 'the term *sovereign* is totally unknown.' Quoted in Schwartz, *A Commentary on the Constitution of the United States* (1963), p. 31. The US Supreme Court once called the States 'quasi sovereign'. Quoted in *ibid.*, p. 32.

[76] In a differently constitutional way, Senator Taylor of Virginia distinguishes between the sovereignty of the people and of the states. He addresses that 'two principles sustain our Constitution: one a majority of the people, the other a majority of the States; the first was necessary to preserve the liberty or sovereignty of the people; the last, to preserve the liberty or sovereignty of the States.' 'Mr. Taylor of Virginia' in debate in the Senate, December 2, 1803, quoted in Johnson, *op. cit.*, p. 221.

[77] Story, *op. cit.*, p.149.

[78] *Ibid.*, pp. 151-152.

of the supremacy of the Constitution.

The relationship between the supremacy of the Constitution and popular sovereignty is well clarified by Nathaniel Chipman in his book published in the same year as Story's masterpiece. He begins by admitting that 'By sovereignty is commonly understood supremacy, supreme power, unlimited and uncontrolled.' However, he continues:

> When applied to states and nations, in relation to each other, it means nothing more than independence. A sovereign state, in a political sense, is a state or nation in the free and uncontrolled possession of self government. . . . In this application of the term there is no idea of supremacy, but simply that of national independence.[79]

He clearly distinguishes between external and internal sovereignty and has no problem in finding external sovereignty in the United States. Sovereignty is present, no matter how ambiguous it is. The sovereign people of the United States retains 'the free and uncontrolled possession of self government'. It is this constitutional structure of the body-politic which is the crucial mark of external sovereignty.[80]

Then Chipman focuses on the facet of internal sovereignty of the United States. He reveals that:

> Neither have the people, the original source of all power, retained to themselves the sovereignty, absolute and unlimited. It is retained under certain modifications and restrictions, agreeable to the constitution which they have submitted to observe. In this constitution there is no where lodged uncontrollable, arbitrary, and despotic, which it is declared, must, in all governments, reside somewhere, and is alike in all countries. If such be the necessary definition, our constitution has no provision of internal sovereignty'.[81]

Chipman also explicates the division of sovereignty delegated to the general government by the Constitution and retained by the several States.[82] It implies all the exercisers of sovereignty are limited, or there is no internal sovereignty in the strict

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[79] Nathaniel Chipman, *Principles of Government* (1833), p. 137.

[80] Edward D. Mansfield finds the remark of sovereignty in self government. He says that 'for a *state*, or nation, to be sovereign, it must *govern itself, without any dependence upon another power.*' Then he supports the doctrine of divided sovereignty. Mansfield, *The Political Grammar of the United States* (1834), p. 13.

[81] Chipman, *op. cit.*, p. 144.

[82] See *ibid.*, p. 273.

sense. Moreover, Chipman was clear to say that the source of all power, sovereign people, are also under the restriction of the Constitution.

In 1848 Frederick Grimke stresses that 'there is no power on earth, the people no more than the prince, which can be conceived to be absolved from the eternal principles of justice.'[83] In so saying, he proves the qualitative peculiarity of American sovereignty; it is different from any other kind of sovereignty, not because the people are sovereign, but because the sovereign people are under the restriction of justice. As the people of the United States rejected the idea that the sovereign can do no wrong, they could prevent the will of a mere fraction from substituting in the place of the will of the people, and gain the strongest national power. He insists 'that where the greatest amount of power resides in the nation, it will necessarily be attended with a self-limiting tendency; that the incapacity, or rather the want of inclination, to exert itself will continue no longer than is proper.'[84]

Grimke thus proclaims:

> The formation of written constitution by the people themselves is an incontestible proof that they believe there is such a rule; that it is superior to the mere commands of men; and that it has authority to govern in all public affairs as well as in the private relations of society. Constitutions which are originally designed to be a restraint upon the government operate necessarily in a popular commonwealth as a restraint upon the people also.[85]

Grimke summarises his argument by saying that:

> the American people have been scrupulously jealous of their own power, that they have endeavored to guard against the idea that might gives right, and have thus given to the term 'sovereignty of the people' an interpretation which it has received in no other commonwealth, either of ancient or modern times.[86]

However, the formal aspect of American sovereignty, which developed into the theory of divided sovereignty, did not dissipate the populist aspect. An observer from

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[83] Frederick Grimke, *The Nature and Tendency of Free Institutions* (1848), p. 241.

[84] *Ibid.*, p. 246.

[85] *Ibid.*, pp. 247-248.

[86] *Ibid.*, p. 251.

'the old world', Alexis de Tocqueville, argued that the American people had never lost its populist orientation. It is true that he admits the division of sovereignty between the Union and the States. He explains that sovereignty 'defined as the right to make laws' in the United States is 'divided between the union and the states',[87] although the fundamental sovereign is the people. The American system 'brings two sovereignties face to face.'[88] But Tocqueville also says that the great political principles in America were born and grew up in the States. The Union, which rests on legal fictions, is an ideal nation and exists only in men's minds. The sovereignty of the Union is 'an innovation' and 'a work of art'. By contrast, that of the States 'was born with the people themselves' and 'is natural'.[89]

It is no wonder that Tocqueville, observer of the achievements and dangers of democracy in America, finds popular sovereignty in the States, but not in the Union. He adds in the final note in the chapter entitled 'What Tempers the Tyranny of the Majority in the United States' that 'there is no need to remind the reader that here, and throughout this chapter, I am speaking not of the federal government but of the governments of each state, where a despotic majority is in control.'[90] Tocqueville goes as far as to say that 'the sovereignty of the people in the township is not ancient only, but primordial.'[91] Tocqueville finds the modern national theory of sovereignty only in the States. Sovereignty of the Union is a product of the Constitution. It is an innovative art, but not natural.

Here is a clear example of the conflict between the national and constitutional theories of sovereignty. When Americans mentioned 'the sovereignty of the State', what they meant by 'the State' was an abstract concept of political community composed of the whole people within an area. And this national principle was pertinent to the States rather than to the Union as a whole even in the first half of the nineteenth century. But in America a written constitution presided over all the political powers including the sovereign people. It was also intended to defend 'the Law of Nations' and declared

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[87] Alexis de Tocqueville, *Democracy in America* (1835), p. 123.

[88] *Ibid.*, p. 164.

[89] See *ibid.*, pp. 61, 143, 164, 166, 167.

[90] *Ibid.*, p. 260.

[91] *Ibid.*, p. 70.

treaties to be 'the supreme law of the Land'.[92] These two pillars of the United States - popular sovereignty and the Constitution - represent the national and constitutional principles. In the United States the constitutional tradition obtained its new theory of sovereignty, while the national theory of sovereignty appeared in the modern popular state.

We have identified the constitutional tradition that constituted the very foundations of British and American political thoughts in the Classical age. The recognition of this tradition is important for three reasons. First, the existence of the tradition suggests that the national theory of sovereignty fully developed in the modern age in conflict with constitutional notions of sovereignty. In order to examine this, we shall next trace Continental theories of national sovereignty and the growth of nationalistic understandings of sovereignty in the Anglo-American world. Second, the identification of the constitutional tradition as the theoretical backbone of Anglo-American political thoughts helps us to grasp the theoretical characteristics of Anglo-American discourses on not only domestic but also international society. Third, writing a history of the constitutional tradition shows us the historical trajectories of power relationships in international relations. We shall see that the rise and fall of the constitutional tradition reflect the degree of the power of Anglo-American values in international relations.

[92] See the US Constitution, Article I Section 8, Article VI.

Chapter 2 National Theories of Sovereignty on the Continent

In contrast to the Anglo-American constitutional tradition which was founded upon individualistic political values, theories of sovereignty which developed on the European continent after the French Revolution were based upon nationalistic premises. Although this thesis is primarily concerned with Anglo-American notions of sovereignty, it is helpful or rather indispensable to look at Continental theories of sovereignty in comparison with the former. It is no exaggeration to say that the impact of the French Revolution and the development of state theories in Germany overwhelmed Anglo-American theorists in the period from 1789 to 1914. However, the limited space of this chapter does not allow a comprehensive investigation into Continental theories. Instead it will focus on some major political theorists, exploring their ideas and their political backgrounds. The first section deals with the impact of the French Revolution upon the theory of sovereignty. I shall discuss Maistre's reactionary theory of sovereignty in order to illustrate the nature of theoretical problems in the post-Revolution era. The second section highlights the epoch-making theory of Hegel around the time of the Vienna Congress. It also examines Bluntschli as the most prominent German theorist in the middle of the nineteenth century. It next covers the period after the establishment of the German Empire. The theory of Treitschke is focussed on as an exemplar of the age of imperialism. These theorists are selected because they are among the most influential and widely known publicists in each time frame.

The Emergence of National Sovereignty

In order to understand the development of the theory of sovereignty in the modern age, it is imperative to grasp the significance of the French Revolution. It is noteworthy that Rousseau's general will theory became the principle which legitimised the will of

the National Assembly.[1] In the process of the French Revolution the 'nation' became sovereign. It is the purpose of this section to examine the impact of this historic incident.

National Sovereignty and the French Revolution

The historical importance of the French Revolution to the theory of sovereignty is located in Article III of the 'Declaration of the Rights of Man and the Citizen' of 1789, which declares that 'the principle of all sovereignty resides essentially in the nation'. This is the historic appearance of the sovereign 'nation' that never literally came into existence in the English and American Revolutions. In addition to a provision of the same principle, the Constitution of 1791 also stipulated: 'the sovereignty is one, indivisible, inalienable and imprescriptible' (Tit. III. Art. 1). This is a denial of the understanding of sovereignty in classical constitutionalism embodied by Grotius, Locke, Montesquieu and the American Federalists. The more radical Constitution of 1793 furthermore asserted: 'every individual who usurps the sovereignty may be at once put to death by freemen' (Act 27, B. of R.). The principle of sovereignty had not been so sanctified before the French Revolution without the help of God. It was the moment when sovereignty became a sacred symbol of modern man.

We shall not attempt to analyse the diverse and complex political creeds of the French revolutionaries.[2] It is generally said that the Constitution of 1791 was a bourgeois product, while that of 1793 was created by the Jacobins. This leads to the distinction between national sovereignty in 1791 and popular sovereignty in 1793. However, for the theory of the Rousseauean general will, the nation is a synonym of the people. For the purposes of our study, it can be argued that both the Constitutions of

[1] See John McDonald, *Rousseau and the French Revolution 1762-1791* (1965), p. 94.

[2] A succinct classification of French thoughts around the time of the Revolution is found in Maurice Cranston, 'The Sovereignty of the Nation' (1988). J. K. Wright identifies two opposed camps regarding the French Revolution: the liberal Lockean outlook of the Anglo-American political tradition and illiberal Gallic sources including absolute sovereignty, Cartesian subjectivism and Rousseau's cult of ancient liberty. Wright's own view is that the Declaration of Rights marked a pivotal moment in the evolution of a specifically modern French republicanism. He concludes that 'the politics of "national sovereignty," the "general will," and the "separation of powers" might better be seen in terms of this transitional republicanism, than as either an abortive French Lockeanism or a democratic mutant of absolutism.' Wright, 'National Sovereignty and the General Will' (1994), pp. 199, 233.

1791 and of 1793 were different from classical constitutionalism. Constitutional rules that had been expected to bind even the sovereign(s) obtained a different meaning in the French Revolution. Constitutions were now expressions of the will of the sovereign nation.

The French Revolution made a great contribution to the history of constitutionalism. It established many constitutional provisions that spread throughout the world. But the constitutional theory of the French Revolution was different from the Anglo-American counterparts. The French Revolution was a revolution against the *ancien régime*, while English revolutionaries resorted to 'the ancient constitution'. The French Constitutions declared a principle of sacred national sovereignty, while the US Constitution lacked a provision of sovereignty. These differences are decisive in the sense that the French Revolution was more inclined in the direction of positive liberty, while the Anglo-American in the direction of negative liberty. Of course, this is a relative difference that becomes evident only when the two types are compared with each other. Still, it is not difficult to discern the different characters of the Anglo-American revolutions and the French Revolution from our genealogical perspectives. It is the development of the latter which we shall view in this chapter.

Maistre and the Reaction to the Revolution

In the midst of its chaotic aftermath, the majority of intellectuals were not sympathetic to the Revolution. It is thus helpful to look at anti-revolutionary theories in order to illustrate the theoretical problems in the era. Among those who examined the issue of sovereignty immediately after 1789, Joseph de Maistre stands as the champion of reactionary thought. His critical discourses on popular sovereignty illustrate the theoretical problems brought about by the Revolution.

Post-1789 divine theories of sovereignty originated from the Catholic wing of the school that aimed to restore order by establishing the traditional authorities of king and the Church.[3] According to Maistre, 'sovereignty comes from God', although particular forms of government are decided by human consent. Sovereignty, which is 'always one,

[3] See Merriam, *op. cit.*, pp. 52-62; Harold J. Laski, *Authority in the Modern State* (1919). pp. 123-188.

unviolable and absolute', is an indispensable principle without which there would be no society. Society and sovereignty are 'born together', and 'the word *people* (peuple) is a relative term that has no meaning divorced from the idea of sovereignty.' There is no people without a sovereign centre around which they aggregate. The idea of the sovereignty of the people is not only absurd, but also impossible. Maistre thus asserts: 'I believe I can define democracy as *an association of men without sovereignty.*'[4] Maistre argues that the French people cannot be sovereign. The phrase 'large republic', like 'square circle', is self-contradictory. He observes that a republic is the government that gives the most rights to the very small number of men who are called the *sovereign* and that takes away the most from all the others who are called *subjects.*[5]

While taking these reactionary views, Maistre's political theory is not simply anachronistic. For instance, divinity which decides the relationship between the ruler and the ruled is nothing but a device to implement a national unity. He says that 'nations are born and die like individuals' and 'Nations have a general soul'. Thus religion and politics are merged into one to form 'a *general* or *national mind* (une *raison universelle* ou *nationale*)' and repress the aberrations of individual reason. Government is a true religion. Faith and patriotism are the two great miracles of the world.[6]

In 1820 Maistre identifies spiritual supremacy with temporal sovereignty. 'Infallibility in the spiritual order of things and sovereignty in the temporal order, are two words perfectly synonymous.' The Sovereign Pontiff and the temporal sovereigns are infallible. This is not because they are omnipotent, but because men must be governed. Maistre emphasises that the sovereign Pontiff's divine right is able to release the people from any oath of allegiance to temporal sovereigns. He asserts that in order to avoid tyranny as well as anarchy, dispensation from this oath is the only means of restraining temporal authority. Spiritual sovereignty is justified as the least dangerous mode of restraining temporal sovereignty. The temporal sovereigns are actually limited outside their sphere; but they are not limited in the legitimate sphere. This is the divine constitution of Maistre's body-politic. Pontifical power 'is from its essential constitution,

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[4] Maistre, 'Study on Sovereignty', pp. 94, 114, 98-99, 112, 120; *Étude sur la souveraineté* (1794-1795), pp. 314, 425, 313, 323-324, 418, 465-466.

[5] Maistre, *Considerations on France*, pp. 72, 147; *Considérations sur la France* (1797), pp. 68-69, 179-180.

[6] 'Study', p. 99, 107-109; *Étude*, p. 325, 369-377.

the least subject to the caprice of politics.'[7]

It is striking that while Maistre emphasises the divine aspect of sovereignty, he is less interested in the realisation of an ideal Christian community. His political theory is concerned with very modern problems: national unity and constitutional restraint. It is on the *method* to achieve these goals that Maistre broke away from revolutionary popular sovereignty.[8] But if so, what is the significance of his theory in the historical context of the post-1789 period?

Sovereignty above the Sovereign

It is easy to write off the rise of divine theories as a short-lived reaction to the Revolution. In the study of international relations, the Holy Alliance has been similarly regarded as a minor incident in the post-1789 era. But were they really just anachronistic reactions to the modern Revolution? Is there no historical implication in the fact that the two constitutional countries we have examined, Britain in Europe and the United States in the Western Hemisphere, stood in the way of the Holy Alliance by adhering to the principle of non-interference?

It is quite interesting to see that in early nineteenth century France there was also a rise of discourses on the sovereignty of abstract values like reason, justice and right. Sharing the same theoretical tendency with Benjamin Constant, who is regarded as an advocate of negative liberty,[9] Victor Cousin argued in lectures delivered in 1819-1820 that sovereignty came from right (*droit*). And reason was 'the true and the only principle

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[7] Maistre, *The Pope*, pp. 1, 4, 122, 192, 127; *Du pape* (1820), pp. 1, 6, 167, 260, 172-173.

[8] Catholic theories do not inevitably end up with reactionary conservatism in the modern age. Another prominent Catholic thinker, Félicité R. de Lamennais, started with a position to emphasise the role of 'the divine law' in the period before the July Revolution. But in a book published in 1838 he came to proclaim: 'from the sovereignty of each individual arises, in society, the collective sovereignty of all, or the SOVEREIGNTY OF THE PEOPLE, which is equally inalienable. . . . you, the People, essentially free, are the sovereign'. Lamennais, *The Book of the People*, pp. 32-34; *Le livre du peuple* (1838), pp. 82, 85. See also John J. Oldfield, *The Problem of Tolerance and Social Existence in the Writings of Félicité Lamennais 1809-1831* (1973) pp. 127-130.

[9] Constant says that 'it is easy for the authority to oppress the people as subject, in order to force it to express, as sovereign, the will which the authority prescribes for it.' If sovereign really exists, it is the universality of the citizens. But even then, 'Sovereignty has only a limited and relative existence.' Constant, 'Principles of Politics Applicable to All Representative Governments', p. 179, 177; 'Principes de politique applicables a tous les gouvernements représentatifs' (1815), pp. 12-13, 9.

of right and sovereignty'.[10] François Guizot, conservative historian and home minister at the time of the February Revolution of 1848, rejected both popular and divine sovereignty; he resorted to the sovereignty of reason, of justice and of right.[11] Neither will nor arbitrary human reason, but 'eternal reason, the only true source of legitimate power', is sovereign.[12] Even after the February Revolution, Guizot insisted that representative government was justifiable because it saw sovereignty in reason.[13] Elsewhere he wrote that in 'theocratical system' kings were 'the personification of sovereign justice, truth, and goodness.'[14]

How is it that these abstract discourses on sovereignty chronologically coincided with reactionary theories of sovereignty? Considerations of their political backgrounds may provide an answer. The revolution killed the sovereign king. The prosecution of the king meant that he was no longer absolute. The sovereign was dead in the Revolution. But the Revolution also revealed that the new sovereign, the nation or people, was incapable of reigning as the sovereign. Nevertheless, paradoxically, the value of sovereignty was loftily reaffirmed as a very revolutionary doctrine. The sovereign king was dead and the sovereign people were incapable, but the notion of sovereignty still remained supreme. Sovereignty stood above the sovereigns.

The theorists of divine sovereignty protested against the Revolution by saying that there had to be a relationship between the sovereign and subjects, and that some kind of transcendental authority was needed to justify the structure of political society. Maistre said, 'Archimedes knew well that, to raise the world, you need a fulcrum outside the world.'[15] The 'fulcrum' could be reason, truth, justice, the right, whatever seemed supreme and adequate to the notion of absolute sovereignty. What was theoretically crucial was to fill the vacant seat of the sovereign. If neither the king nor the people was supposed to be absolute, God or abstract values had to take the place of sovereignty. It

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[10] Cousin, *Cours d'histoire de la philosophie morale au dix-huitième siècle* (1839), pp. 297-300. See also Merriam, *op. cit.*, pp. 75-77.

[11] Guizot, *Du gouvernement de la France depuis la Restauration et du ministere actuel*, quatrième édition (1821), p. 201.

[12] Guizot, *Of Democracy in Modern Societies* (1838), p. 18.

[13] Guizot, *History of the Origin of Representative Government in Europe*, p. 74; *Histoire des origines du gouvernement représentatif en Europe* (1851) I, p. 112.

[14] Guizot, 'The History of Civilization in Europe' (1972), p. 234.

[15] Maistre,'Study', p. 128; *Étude*, p. 525.

is no wonder, therefore, that the treaty of the Holy Alliance of 1815 declared that 'One family, namely, Austria, Prussia, and Russia, thus confessing that the Christian world, of which they and their people form a part, has in reality no other Sovereign than Him . . . , that is to say, God.'[16] It can also be noted that in Britain and the United States there was no need for the holy 'fulcrum', because the 'fulcrum' had already been set up in the Constitutions of these countries.

Before the nineteenth century, sovereignty did not acquire such a great level of abstractness. Sovereignty was never disconnected from the actual sovereign persons. In the era after the Revolution, however, the supremacy embodied in specific persons could not be maintained. As a result, sovereignty as supremacy became highly abstract. By contrast, in the latter half of the twentieth century, sovereignty is an international principle, rather than a manifestation of substantial supremacy, as shown by the fact that most of the sovereign states are tiny and weak. But sovereignty in the nineteenth century still meant absolute supremacy. But if neither the king nor the people were supposed to be supreme, where could the 'fulcrum' be found? The possible answer other than God, reason and the demigod Constitutions in Britain and the US would be 'the state itself', which obtained philosophical and scientific articulations in post-1789 Germany.[17]

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[16] 'Treaty between Austria, Prussia, and Russia. Signed at Paris, 18th (26th) September, 1815.' in René Albrecht-Carrié, *The Concert of Europe* (1968), p. 34.

[17] This does not deny that the problem I shall identify in German theories was somehow shared in the Anglo-American world too. The crucial issue in the post-Christendom West was the occupation by the state of the vacant seat of the dead sovereign, i.e. the supreme seat of sovereignty above the sovereign, which was previously reserved for God alone. In this context it is interesting to see changes in the discourses on the 'sovereignty of God' in English-speaking countries. Elisha Coles, Calvinist and the most famous exponent of 'the sovereignty of God', declares in his masterpiece first published in 1673 and reprinted many time until 1948: 'Sovereign Power belongs to God. . . . Supreme power may reside in many (as in mixed monarchies and commonwealths); but as law-makers and supreme, they are but one.' Coles, *A Practical Discourse of God's Sovereignty* (1673), pp. 1, 2. Until the nineteenth century 'God's sovereignty' was genuinely a topic of religious controversy. But in the modern age it began to be politicised. For instance, a pastor in Ohio in 1820 explained that the special privilege of some nations, especially 'the island of Great Britain, and the United States of America' was 'an act of Divine sovereignty'. Ephraim Woodruff, *The sovereignty of God* (1820), p. 4. British sovereignty in India was also justified or at least examined in the name of the sovereignty of God. See W. K. Fletcher, *The Queen in India: The Change of Times and Rules, exemplifying the Sovereignty of Almighty God* (1858); John Wilson, *The British Sovereignty in India*, third edition (1837). In 1885 the warning was that democracy might be 'the hugest idolatry . . . the idolatry of the will of man.' Reuen Thomas, *Divine Sovereignty and other Sermons* (1885), p. 17. A Catholic Englishman protested irreligious governments in England and France and insisted that 'the kingdom of Christ, which is the Catholic Church, . . . is itself a Nation . . . with inalienable rights as a Sovereign political body, superior to all those political corporations, that have the title of "states".' A Catholic Englishman, *Some First Lines of Catholic Politics, traced from the Human Sovereignty of Christ on Earth* (1881), p. 2. In 1918 a minister-writer deplored that although the 'Sovereignty of God' is an expression that once was generally understood, 'But, today, to make mention of God's sovereignty is, in many quarters, to speak in an unknown tongue. . . . The God of the twentieth century is a helpless, effeminate being who commands the respect of no really thoughtful man.' Authur W. Pink, *The Sovereignty of God* (1918), p. 20.

Sovereignty of the Nation-State

We shall now turn to German philosophers and jurists, for it was in Germany that the leading and influential theories of sovereignty developed in the nineteenth century. The difference of theoretical tendencies between France and Germany may be summarised in two statements by two kings. Louis XIV's famous words, 'L'État c'est moi', symbolised the struggle for absolute sovereignty in France. By contrast, Frederick II proclaimed that 'the king is the first servant of the state'.[18] Mainstream German theorists had no difficulty in accepting the premise of the sovereignty of the state. They were agreed that the state itself was the absolute sovereign, while they regarded monarchy as the highest expression of the absolute sovereignty of the state. Then they developed the theory of the sovereignty of the nation-state.

Hegel and the Philosophy of National Sovereignty

The 'Prussian' tendency in state theory was already evident in Kant. Kant was a proponent of the general will theory, but he had no intention of overthrowing the existing monarchy in Prussia. Kant distinguished between three persons who composed the general united Will, among whom the legislator was called the sovereign authority. But Kant admitted no right of the people to resistance. For him it was impossible to make subjects sovereign over the sovereign. Instead, Kant explained that the sovereign had two characters: physical person(s) and 'the pure idea' derived from the general will. The sovereign is an abstract object of thought representing the whole people. These two characters ~~was~~ were reinforced by his recognition of the 'forms' and the 'spirit (*Geist*)' of the state and sovereignty.[19] In consequence, Kant presented three themes of the modern state: will, time, and the duality of form and spirit. The state wills and evolves in time,

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[18] In *Anti-Machiavel* (1740), Frederick II writes: 'A Sovereign, he [Machiavelli] should have said, was originally designed for the Good of the people; . . . it appears that the Sovereign, far from being the absolute Master of his people, is nothing more than their chief Servant?' (p. 3). However, of course, this does not deny the fact that he was despotic.

[19] Immanuel Kant, *The Metaphysical Elements of Justice*, pp. 78, 86, 109, 112-113; *Metaphysische Anfangsgruende der Rechtslehre* (1797), SS. 165, 176-177, 208, 211-213.

for it has a spiritual essence behind its forms. The knowledge of the Classical age now appeared to be a superficial metaphysics of formalistic order.[20] The 'discovery' of this 'spiritual' sovereignty behind 'formal' sovereignty distinguishes the German tradition from the Anglo-American.

Individualistic rationalism that was still present in the French Revolution dramatically declined during the Napoleonic War. Occupied and humiliated Germany put an end to the era of Enlightenment and launched a counter-attack of romanticism. G. W. F. Hegel, champion of the philosophy of the nation-state in the romantic period, developed Kant's 'spiritual' sovereignty. Hegel attempts to construct a philosophy of the identification of the sovereign king and the sovereign general will. Hegel acknowledges that Rousseau's achievement is to put forward the will as the principle of the state, a principle which has thought not only as its form, but also as its content.[21] Although he rejects Rousseau's social contract theory, Hegel adopts Rousseau's achievement of national sovereignty. Hegel then criticises the formal understanding of the state and emphasises the rational content of the state. This follows from his description of a negative aspect of the principle of atomism in civil society. He is also convinced that the individual's actual freedom can be found only in the state. He defines the state as 'the actuality [*wirklichkeit*] of the ethical Idea' or 'the actuality of the substantial *will*, an actuality which it possesses in the particular *self-consciousness* when this has been raised to its universality [*Allgemeinheit*]; it is the *rational* in and for itself.' He adds that this substantial unity [*Einheit*] is 'an absolute and unmoved end itself', in which 'freedom enters into its highest right'. This ultimate end possesses 'the highest right in relation to individuals, whose *highest duty* is to be members of the state.'[22]

This is a statement of a perfect self-autonomous state. It is actual, rational, substantial, and absolute. The state, or the nation, as the highest subject possesses the absolute and the highest right of sovereignty. According to Hegel, 'the particular function and powers of the state are not self-sufficient and fixed, either on their own account or in the particular will of individuals, but are ultimately rooted in the unity of

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[20] See Foucault, *op. cit.*, p. 242.

[21] Hegel, *Elements of the Philosophy of Right*, p. 277; *Grundlinien der Philosophie des Rechts* (1821), S. 243.

[22] *Ibid.*, p. 275; SS. 241-242.

the state as their simple self - constitute the sovereignty of the state.'[23] This is internal sovereignty as opposed to external. He explains that although feudal monarchy had external sovereignty, internally neither the monarch himself nor the state was sovereign. Internal sovereignty is realised only in the state which obtains its subjectivity. Hegel says that it 'can *exist* only as *subjectivity* which is certain of itself, and as the will's abstract - and to that extent ungrounded - self-determination in which the ultimate decision is vested. This is the individual aspect of the state as such, and it is in this respect alone that the state itself is *one* [*Einer*].'[24]

If subjectivity, self-determination, and oneness of the state are not realised, there can be no internal sovereignty. This is the reason why Hegel is neither a proponent nor an opponent of popular sovereignty. What Rousseau aimed for, the oneness of the people, is accomplished in the sovereignty represented by a person, namely a monarch. Hegel admits that internal sovereignty lies with the *people* [*Volk*], but only as the whole [*Ganzen*] in general.[25] Popular sovereignty in this sense is not contradictory to monarchy. Rather, without a monarch and the *articulation* of the whole associated with monarchy, *the* people is a formless mass.[26] On the other hand, a monarch is also not the sovereign without the people. The ultimate subject of sovereignty is always the whole state.

External sovereignty of the nation-state [*das Volk als Staat*] derives from the notion that the state has a primary and absolute entitlement to be a sovereign and independent power in relation to others. At the same time, however, Hegel emphasises that this entitlement is purely formal. Whether the state does in fact have being in and for itself depends on its content - on its constitution and present condition. According to Hegel, recognition, which implies that the form and content are identical, also depends on the perception and will of other states.[27]

The identification of form and content is an entitlement of a state as an acting individual subject among other individual states. While the legitimacy of a state is a

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[23] *Ibid.*, p. 315; S. 284.

[24] *Ibid.*, pp. 316-317; S. 285.

[25] *Ibid.*, p. 318; S. 287.

[26] *Ibid.*, p. 319; S. 288.

[27] *Ibid.*, p. 367; S. 337.

purely internal matter, it is equally essential that the legitimacy should be supplemented by recognition on the part of other states. Hegel explicates: 'Without relations [*Verhältniss* (*sic*)] with other states, the state can no more be an actual individual [*Individuum*] than an individual [*der Einzelne*] can be an actual person without a relationship [*Relation*] with other persons.'[28] Now the theory of the sovereign holistic will has produced a complete picture of the society of personified states.

Hegel's theory of the state seems to be an abstract and 'upside down' justification (ideas justify reality) of the existing monarchy.[29] But no matter how abstract it looks, his philosophical orientation had a tremendous influence on the theory of the modern sovereign state. Although he justifies monarchy, he does not articulate a traditional notion of ruler sovereignty. The monarch is the head of the state. And sovereignty lies in the subjectivity of the state. Sovereignty realises itself when the distinction between the ruler and the ruled becomes meaningless. Sovereignty as the expression of the subjectivity of the state is the kernel of the modern theory of sovereignty.

It helps our study to summarise the main features of Hegel's epoch-making theory of state sovereignty. First, the identification of the ruler and the ruled implies the identification of form and content. The will of the state absorbs the constitutional framework as the part of its own expression. Classical constitutionalism appeared to be a formalistic doctrine that lacks the content of the state. It is with Hegel that the relationship between civil society and the state was perceived as an opposition and as a result the identification of them became a central issue in social sciences.

Second, the complete personification of the state necessarily personifies international society. *International* politics is not an aristocratic game, nor even diplomacy, between sovereigns. It is the society of states like human society. The tradition of the law of nations is now destined to be outmoded, as there is no universal community of individuals. Hegel established a philosophical foundation of the modern tradition of domestic analogy, i.e. the *international.*

Third, the notion of sovereignty is highly abstract, as the state becomes highly abstract. But the abstractness is understood as a proof of the identification of the

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[28] *Ibid.*

[29] See Karl Marx, *Critique of Hegel's 'Philosophy of Right'* (1970), pp. 20-40.

empirical with the transcendental world. Sovereignty is a core concept of the mystical but organic entity of the state. The notion of sovereignty as well as the state has obtained a privileged position.

The general will of the nation appears beyond the limits of the representation of the Classical age. The nation in Hegel's theory is the 'actuality' of the sovereign state. The highest truth of actuality appears when the distinction between the empirical and the transcendental spheres is abolished. Universal truth reveals itself in and for itself, and completes the theory of national sovereignty.

Bluntschli and the State as the Sovereign Person

Central Europe was the main stage for the eruption of national movements in the middle of the nineteenth century. The constitutional *and* national arguments by German liberals culminated in Frankfurt in 1848, although they failed to establish a constitution.[30] With a rise of nationalism and the sense of *divided* Germany, constitutionalism was destined to be a positive ideology for national unity rather than a negative ideology of checks and balances. In Germany, constitutions were often understood as the expressions of the will of the state.

This tendency was evident even before 1871. In the middle of the nineteenth century, so-called the jurists of the *Rechtsstaat* school dominated academia. They corresponded with the rise of constitutionalism and democratic movements throughout the German states. However, the jurists of the *Rechtsstaat* school were not identical with classical Anglo-American constitutionalists. *Rechtsstaat*, 'legal state' or 'constitutional state', is not always tantamount to the state under the premises of classical constitutionalism. In Germany the concept of the state is not merely a framework of juristic personality. The Hegelian state is conceived to live and will. Under such a premise, even constitutional law is an expression of the will of the state. Anglo-American constitutionalism is mainly intended to secure the negative liberty of individuals. However, *Rechtsstaat*

[30] Heinrich von Gagern, first provisional president of the Frankfurt Parliament, addressed it in the following terms: 'we are to fashion a constitution for Germany, for the whole realm. The justification and the authority for this task lie in the sovereignty of the nation. . . . Germany wants to be one, one realm, governed by the will of the people'. Quoted in Rupert Emerson, *State and Sovereignty in Modern Germany* (1928), pp. 8-9.

could indicate that constitutional law is part of the realisation of the organic state's existence.[31]

The most prominent jurist in this period is Johann C. Bluntschli, a professor in Heidelberg, who was said 'to do for the European State what Aristotle accomplished for the Hellenic'.[32] In his work published in 1852 Bluntschli explains 'national sovereignty (*Nationalsouveränität*) in the true sense'. Sovereignty belongs to the state itself as a person, namely, the state-ordered nation. 'Nation' does not mean an atomistic mass of individuals, but the organised and ordered totality.[33] According to this theory, Bluntschli expands upon the organic theory of German states. The sovereignty of the people could be thought of as the sum of individuals or the citizens in their assemblies, which leads to the danger of anarchy or direct democracy. What is really sovereign is the nation in a political sense as the organised totality with head and members. He asserts that there is no contradiction between national sovereignty and prince sovereignty and that the whole including the head is superior to the head alone. The whole state makes law, under the restraint of which the prince moves. Sovereignty of the State is that of the law, while sovereignty of the prince is that of government.[34] Bluntschli's conception of the state possesses not only a number of men, a fixed territory and distinction between governors and governed, but also unity, an organic nature, and moral and spiritual personality.[35]

In the revised editions of his masterpiece, Bluntschli further emphasises the organic nature of the nation-state. For instance, he argues that:

> So far as the state appears as a person, so far it has independence, honour, power, supreme authority, unity ; in one word, sovereignty. The State as a person is sovereign, and therefore we speak of sovereignty of the State.[36]

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[31] For instance, Friedrich Julius Stahl, leading scholar of the *Rechtsstaat* school, attacked Locke and Montesquieu for the doctrine of the separation of powers. Stahl's theory of real constitutionalism could be attained only through an organic structure developing within and from the original and continuous unity of sovereign power. See Emerson, *op. cit.*, p. 27.

[32] 'Translator's preface' in Bluntschli, *The Theory of the State* (1885), p. v.

[33] Bluntschli, *Allgemeines Staatsrecht* (1852), S. 340.

[34] *Ibid.*, S. 341.

[35] *Ibid.*, SS. 20-24.

[36] Bluntschli, *The Theory of the State* p. 500; *Allgemeine Staatslehre*, sechste Auflage, I (1886), S. 572.

According to Bluntschli, the modern era is the process in which the state becomes 'the politically organised national person of a definite country';[37] the state is not only a means for the advantage of the individuals who compose it as English and American writers maintain, but also an end itself.[38] And the end of the state is 'the development of the national capacities, the perfecting of the national life, and its completion'.[39]

According to Bluntschli, a constitution is the body of the state, while one national spirit and one national will are the spirit and the will of the state. What makes a state really the state is not the constitution, but the nation. He articulates: 'If the State is to fulfil its part as the embodiment of the nation, it is plain that its laws and institutions must have regard to the capacities and needs of the nation . . . A constitution which disregards the peculiar character of the nation, and which does not correspond with its spirit and thought, is an unnatural and incapable body.'[40] The spirit of the state comes first and decides its body. The national constitution is 'the natural right of a nation' to give to the state its own character.[41]

For Bluntschli, the state is no longer an artificial body-politic. Bluntschli even thinks that the organic state personality is an object of psychological study.[42] If no human being is conceived to be sovereign in reality, the nation-state, the higher embodiment of men, assumes sovereignty. The sovereignty of the nation-state is a product of the age of 'the sovereignty above the sovereign'. But the sovereignty of the nation-state is not a denial of the dignity of modern man. Rather, it is the highest realisation of the ideal of man.

Treitschke and the Sovereignty of the German Empire

Despite the fact that Germany as a nation-state was established in 1871, it is commonly understood in the discipline of International Relations that the modern states

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[37] *The Theory*, p. 23; *Allgemeine Staatslehre*, S. 24.

[38] See *The Theory*, p. 287; *Allgemeine Staatslehre*, S. 347.

[39] *The Theory*, p. 300; *Allgemeine Staatslehre*, S. 362.

[40] *The Theory*, p. 101; *Allgemeine Staatslehre*, S. 115.

[41] *The Theory*, p. 101; *Allgemeine Staatslehre*, S. 116.

[42] See W. A. Dunning, *A History of Political Theories: From Rousseau to Spencer* (1920), pp. 334-9.

system originates from the Peace of the Westphalia in 1648. This simple but strong proposition defines a basic structure of a centuries-long European order, although it was Napoleon who thoroughly extinguished the Holy Roman Empire. The German Confederation was originally maintained as 'an international union (*völkerrechtlicher Verein*) of sovereign princes and free states'.[43] But modern nationalism combined with *Realpolitik* destroyed the political system of the small German sovereigns that had been established in 1648. The sovereignty of the 'German nation' was a vivid example of the sovereignty above the sovereigns.[44] History shows that the 'German nation' emerged and realised itself in a rise of nationalism and the advancement of *Realpolitik.* In consequence, the Westphalian system as a Classical device for international balance of power collapsed in Germany.

In the post-1871 period, the study of sovereignty was no longer an object of philosophy. The new reality of the German Empire seemed to need a new science of the state. Otto von Gierke initiated the *Genossenschaft* theory which explained legal personality of organic associations; it was a science of 'fellowship'. Although Gierke's doctrine was introduced in Britain as a justification of non-sovereign corporate personality - the legal personality of private organisations was described as anti-sovereign thought in Britain - Gierke himself believed in the organic sovereignty of the German Empire. In Germany multiple organic units were bases of a larger sovereign entity.

In the same period, there occurred a wave of positivistic political jurisprudence. Interestingly, nineteenth century German 'positivists' were still 'upside down' in the sense that concepts had superiority over facts. German positivists relied on highly abstract presuppositions and insisted that laws were creations of the state. But no positivist asked whether the foundation of positivism, the state, was really positivistic or not. According to the positivists, the state is a real being. It wills and creates laws. Sovereignty is a reality. It organises and determines facts. These abstract presuppositions formed a science of the state.

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[43] It was ordained by the Act of Confederation of 1815 and the Final Act of Vienna of 1820. See Emerson, *op. cit.*, pp. 20-21.

[44] The constitutions of German states enacted between 1815 and 1871 were all declared in the name of the sovereign kings and other 'nobles'. They did not mention state- or national sovereignty. See Zeydel (ed.), *Constitutions of the German Empire and German States* (1919).

The most important achievement of positivists including Paul Laband and Georg Jellinek was the famous theory of *Kompetentz-Kompetentz* or 'auto-limitation'. It was intended to explain the sovereignty of *Rechtsstaat*, and that of the German Empire in particular. Sovereignty, defined as supreme, absolute, unlimited and indivisible power, resides in the state. It might look limited by the constitution, the laws, and the treaties of the state. But all these are self-limitation of the state, since *by definition* there can be no power above the state. Sovereignty is the capacity of the state that determines its own capacity.

But this paramount attribute was not granted to any states. The search for sovereignty was a common phenomenon in the late nineteenth century. This means that sovereignty was perceived to be a real entity which can be 'discovered' somewhere. I call this phenomenon the *reification* of sovereignty, which characterises the notion of sovereignty in the age of imperialism. In the process of the *reification* of sovereignty, the title of sovereignty was given only to Prussia and the German Empire as a whole. And in speaking of other small and weak states, jurists invented the conceptions like non-sovereign state or half-, imperfect, semi-sovereign state.[45] This shows that only a limited number of states were conceived to deserve the privileged title of the sovereignty above the sovereign. German positivists were 'realistic' jurists, although their world of reality was constructed upon the reality of abstract concepts. The constitution of the Empire did not determine the nature of sovereignty; the reality of sovereignty determined the constitution. Sovereignty was not a topic of constitutional rule-making. It was a matter of the science of the state.

At the turn of the century Heinrich von Treitschke, whom many Anglo-American scholars recognised as the representative or even most extreme example of German militaristic state theory, articulated a political theory of the post-1871 generation. His main theme is that the state is power. He maintains that the study of the state is indispensable in social sciences, because politics always has primacy in history. The state is defined by Treitschke as 'the people (*Volk*), legally united as an independent entity'. The state aims to establish a permanent tradition throughout the ages. Treitschke claims that from historical insight he recognises the nature and necessity of war. The

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[45] See Merriam, *op. cit.*, pp. 185-216.

state is not merely intended to secure life and property to the individual. It is what the individual will sacrifice life and property for. The state, 'the great collective person', is 'the people's collective will'. According to Treitschke, the state is something even more than an organism, as its essence is will and power. The State is power, precisely in order to assert itself as against other equally independent powers. War and the administration of justice are the chief tasks of the state. That is to say, 'power is the vital principle of the State'. The 'genuine creators of the German Empire were Bismarck and the Emperor William; not Fichte or Paul Pfizer, or other pioneers.' In political life will power is the first essential of creative work.[46]

The state is so absolute a moral supremacy that it cannot legitimately tolerate any power above its own. And it freely exploits a variety of material resources to protect itself against hostile influence. Sovereignty is, therefore, the very standard and criterion of the state. The state is born only when a group or an individual in a community has achieved sovereignty by imposing its will upon the whole body. It is true that every state, in treaty making, will limit its power in certain directions for its own sake. But as treaties originate from the free will of the state, they do not abrogate sovereignty. In addition, all treaties lose their force at the very moment when war is declared between the contracting parties. Moreover, every sovereign state has the undoubted right to declare war at its pleasure, and is consequently entitled to repudiate its treaties. The real test of sovereignty is, in short, power, or more specifically, military capability of the state. A defenceless state may be termed a Kingdom for conventional or courtly reasons, but 'science', whose first duty is accuracy, must boldly declare that such a country no longer takes rank as a state.[47] Treitschke then asserts:

> The right of arms distinguishes the State from all other forms of corporate life . . . The difference between the Prussian Monarchy and the other German States is here apparent, namely, that the King of Prussia himself wields the supreme command, and therefore Prussia, unlike the others, has not lost its sovereignty. The other test of sovereignty is the right to determine independently the limits of its power, and herein lies the difference between a federation of States and a Federal State. . . . Since Prussia alone has enough votes on the Federal Council to be in a position to prevent

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[46] Treitschke, *Politics* vol. I, p. 3, 13-25; *Politik*, erster Band (1897), SS. 13, 23-35.

[47] *Politics*, pp. 26-30; *Politik*, SS. 35-39.

an alteration of the Constitution by its veto, it becomes evident that she cannot be outvoted on such decisive questions. She is therefore, in this second respect also, the only truly sovereign State which remains.[48]

It is this vigorously power-oriented notion of sovereignty that justifies the glorious establishment of the German Empire. It was a product of *Realpolitik*, so that the king of Prussia is the sovereign of the sovereign Empire. For Treitschke, contract and constitutional theories are merely fictitious. Even 'society', unlike the state, is intangible. For him, 'there is in fact no actual entity corresponding to the abstract conception of civil society which exists in the brain of the student.' Were the social view of the state that liberalism tends towards the only one, 'the framework of our nationality would simply collapse, and Germany be disintegrated by the warring of innumerable social groups.' But a war against outside forces has the desired effect, for 'it is war which turns a people into a nation' for the ideal of the fatherland. Treitschke adds that the state is not the whole of a nation's life. But it constructs the framework of all national life by its sovereign power.[49]

It is no wonder that Treitschke emphasises that international law must not run counter to the nature of the state. 'No State can reasonably be asked to adopt a course which would lead it to destroy itself. Likewise every State in the comity of nations must retain the attributes of sovereignty whose defence is its highest duty even in its international relations. We find the principles of international law most secure in that department of it which does not trench upon questions of sovereignty; that is in the domain of etiquette and of international civil law.'[50] This is a logical consequence of the replacement of the law of nations with *international* law.

In the age of imperialism, nationalism was not a moral claim; it was a test of national power. Even if it was admitted that every nation had a life, it did not follow that every nation was equal. Darwin had taught that the process of natural selection was inevitable. Why not among nations? Sovereignty was not automatically granted to any nations. It had to be won only by selected superior nations. The national theory of sovereignty

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[48] *Politics*, pp. 30-31; *Politik*, SS. 39-40.

[49] *Politics*, pp. 45-54; *Politik*, SS. 54-63.

[50] *Politics*, vol. II, p. 595; *Politik*, zweiter Band (1898), S. 549.

became critically harsh in this period. The natural existence of nations was a given fact. When national independence was not realised, therefore, the issue was not whether there was a nation as a natural person, but whether a nation possessed enough power to achieve its own sovereign status. That was what the society of nations meant in the age of imperialism.

The system of imperialism was based on domestic analogy in a peculiar way. International society was conceived to be a society of sovereign nations and non-sovereign nations like domestic society composed of sovereign power holder(s) and others. The perception of the laws of nature and nations as the universal laws had almost disappeared. Just as a national constitution was an expression of the will of the sovereign state, international treaties were merely expressions of the will of sovereign states and subject to changes of the will. This is the presupposition of imperial international society from the point of view of the national theory of sovereignty.

The national theory of sovereignty in nineteenth century Germany stemmed from the ideal of the organic nation-state. This point relates to our further investigation into Anglo-American notions of sovereignty. On the one hand, British and American scholars could not fully accommodate the German organic theory of the nation-state. This will lead to a popular contrast between the Anglo-American and German traditions in the interwar period. On the other hand, Anglo-American theorists could not ignore the historical necessity in the theory of national sovereignty: the nation-state building and power politics in the age of nationalism and imperialism. They gradually adopted the premises of national sovereignty enunciated by German philosophers and jurists. We shall next see this development of the national theory of sovereignty in Britain and America.

Chapter 3 The Spread of National Sovereignty in Britain

Classical constitutionalism in Britain where there was no written constitution was based on the assumption of the 'ancient constitution' or the premises of natural law. God was absent, but his existence was the very foundation of the constitutional order. However, such premises of classical constitutionalism appeared to be 'metaphysics' in the modern *episteme* and destined to be outmoded. We shall see in this chapter the retreat of the classical type of constitutional notions of sovereignty in the period from the middle of the nineteenth century to the eve of the First World War. The first section deals with the Austinian and other theories of sovereignty in the time of laissez faire liberalism. The next focuses on the development of theories of sovereignty in the age of imperialism in both the domestic and international contexts.

Sovereignty in the Laissez Faire Age

After the Napoleonic War Great Britain obtained hegemonic power. The superiority of the British economy was indisputable in the nineteenth century. Combined with the confidence in the British political system, early Victorian intellectuals pursued domestic as well as international order based upon laissez faire doctrines. But classical constitutionalism became outmoded, as it needed to be modernised in some ways. While the theory of national sovereignty was still alien to most of the British people, they recognised Austinian theory as an orthodox doctrine in this age.

Austin and the Growth of the Constitution

A collection of John Austin's lectures, *The Province of Jurisprudence Determined*, was published in 1832, the year the first electoral reform was enacted. Austin is a theorist in the period of a transition from classical constitutional to democratic and

imperial Britain. Although it is common to label Austin as a positivist of absolute sovereignty, we shall see in his theory lingering yet declining elements of classical constitutionalism.

According to Austin, there are two marks of sovereignty and the independent political society which sovereignty implies. First, 'The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior'. Second, 'That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior.' This definition depends on Austin's positivist dogma. He says that 'Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.'[1] A brief look at this concise definition gives the impression that Austin lacks constitutional rules. However, it is mistaken to conclude that Austin ignores any constitutional elements.

It is noteworthy that Austin admits that 'one component part of the sovereign or supreme body is the numerous body of *the commons*'. They 'share the sovereignty' with the king and the peers, and elect the members of the commons' house. This is a problematic proposition, as even before 1832 it is surprising that 'the numerous body of the commons' is not in a habit of obedience to a determinate human superior. Furthermore, Austin unequivocally uses the word, constitution: 'The representative body, for instance, might be bound to use those powers consistently with specific ends pointed out by the electoral: or it might be bound, more generally and vaguely, not to annihilate, or alter essentially, the actual constitution of the supreme government.'[2]

Sovereignty in 'the actual constitution of the supreme government' is explained in 'the division of those powers into *supreme* and *subordinate*'.[3] The former are the political powers which belong to a sovereign *or* state. The latter are those portions of the supreme powers which are delegated to political subordinates. Following Bentham, Austin then proclaims that there are unconstitutional acts and constitutional laws. If the

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[1] Austin, *The Austinian Theory of Law* (1832), pp. 96-97.

[2] *Ibid.*, p. 126.

[3] *Ibid.*, p. 136.

sovereign violates the principles and maxims which are habitually observed, it is not illegal, but unconstitutional. He also says that there is constitutional law meaning 'the positive morality or the compound of positive morality and positive law, which fixes the constitution or structure of the given supreme government.'[4] To begin with, while denying original social contracts like other modern philosophers, Austin asserts that 'the permanence and origin of every government are owing to the people's *consent*', based on 'the principle of utility'. This means that 'the power of the sovereign flows from the people, or the people is the fountain of sovereign power'.[5]

It is also notable that Austin distinguishes 'a composite state' or 'a supreme federal government' as in the case of the United States, from 'a system of confederated states' or 'a permanent confederacy of supreme governments' in the cases of the German Confederation and the Swiss Confederation. Austin's description of the former is not so simple as his definition. He writes:

> In the case of a *composite state*, or a *supreme federal government*, the several united governments of the several united societies, together with a government common to those several societies, are jointly sovereign in each of those several societies, and also in the larger society arising from the federal union. . . . As compacted by the common government which they have concurred in creating, and to which they have severally delegated portions of their several sovereignties, the several governments of the several united societies are jointly sovereign in each and all. . . . I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states, governments *as forming one aggregate body*: meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein.[6]

We are then inclined to ask: how many people are 'sovereign' in the United States? Are they really 'superior' and do they receive 'a habit of obedience'? What is the purpose of the search for the sovereign individual(s) in every society? The answer lies in Austin's conviction of the condition of 'independent political society'. Austin makes clear that sovereignty is the correlative expression of subjection.[7] The relationship

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[4] *Ibid.*, pp. 160-169.

[5] *Ibid.*, pp. 198-199.

[6] *Ibid.*, pp. 144-147.

[7] *Ibid.*, p. 96.

between sovereign and subjects constitutes an autonomous structure of 'independent political society', while 'in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal.'[8] Austin does not say that there is always a supreme power holder. He only says that 'independent political society' needs a human relationship between sovereign and subjects, whatever it is. And he is highly conscious of the existence of the constitution that determines the structure and the rules of the relationship.

Nevertheless, it is certain that Austin's constitutionalism is clearly different from the Lockean model in its unitary nature of sovereignty. He no longer commits himself to social contract theory, as Benthamite utilitarianism forms his theoretical backbone. In addition, Austin's scepticism regarding the constitution significantly contrasts with Blackstone's conviction of the stability of the British constitution. In strongly renouncing the idea of the original covenant, Austin remarks that even in Anglo-American states, the parties who determined the constitution 'were merely a slender portion of the whole of the independent community, and were virtually sovereign therein before the constitution was determined.' He stresses that 'the constitution of the supreme government has *grown*. . . . it has not been determined at once, or agreeably or a scheme or plan; that positive moral rules of successive generations of the community (and, perhaps, positive laws made by its successive sovereigns) have determined the constitution, with more or less of exactness, slowly and unsystematically.'[9]

Indeed, we can see a gradual growth of the British Constitution in Austin's theory. Despite the vigorous definition of sovereignty, he includes 'the commons' who 'share' sovereignty and elect the members of their house. Austin neither avoids the problem of sovereignty nor arranges the coexistence of absolute sovereignty and absolute individual rights. Instead of implementing classical constitutional rules to protect individual rights, Austin inserts utilitarian mechanism into the middle of the sovereign body. In Austin's theory, the static nature of the classical constitution was being eroded.[10]

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[8] *Ibid*,. p. 21.

[9] *Ibid.*, p. 223.

[10] Foreseeing the changes in the British constitution, George Cornwell Lewis wrote that the term, constitution, was 'used to signify something ideal, an imaginary model of excellence which the government has never, in fact, attained'. According to him, 'the power of the person or persons in whom the sovereignty resides, over the whole community, is absolute and unlimited. The sovereign has the complete disposal of the life, and duties of every

Austin's concise definition of sovereignty was an attempt to re-identify the sovereign in rapidly changing modern states. To a certain extent Austin succeeded in re-locating sovereignty somewhere in modern states. He defended the role of the constitution in the face of the coming cries of democratic national movements. But as we shall see later, the further growth of the constitution was destined to make his definition outmoded.

Sovereignty of Middle Class Individuals

It is striking that one of Austin's contemporaries, the great nineteenth century liberal, John Stuart Mill, took the view that as the English people were extremely practical, the 'doctrines of sovereignty of the people, and the rights of man, never had any root in this county'.[11] Mill was never committed to conservatism or to populism. In 1859 he rather inquired: 'What, then, is the rightful limit to the sovereignty of the individual over himself. Where does the authority of society begins?'[12] Mill's answer was to describe the individual in terms of sovereignty that is to be limited by the authority of society. Nineteenth century liberals were not classical constitutionalists who resorted to theories of social contract, common law, and natural law. They were devoted to the observation of modern man. Their main interest was political economy in which modern man was conceived to pursue his economic gains according to his interest. An artificial construction of political society, which Hobbes was once proud of, was now nothing but an empty fiction. In such an intellectual atmosphere, Bentham and Austin's utilitarian theories of sovereignty coexisted with laissez faire liberalism. The British people still enjoyed political and economic superiority and were proud of their combination of liberty and sovereignty.

In 1865 Walter Bagehot commenced an attack upon the formalism of past constitutional theories. He rejects the theory of the English polity according to which legislative, executive, and judicial powers are divided. He also strongly criticises the

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member of the community.' Lewis represented a decline of the binding legality of constitutional rules and the articulation of 'absolute and unlimited' sovereignty. Lewis, *Remarks on the Use and Abuse of Some Political Terms* (1832), pp. 20, 41.

[11] Mill, *Collected Works of John Stuart Mill XXIII, Newspaper Writings, August 1831 - October 1834* (1986), p. 445.

[12] Mill, *On Liberty* (1859), p. 141.

view that the monarchical, the aristocratic, and the democratic elements have each 'a share in the supreme sovereignty, and that the assent of all three is necessary to the action of that sovereignty.' This mistaken view alleges the three components 'to be not only the outward form, but the inner moving essence, the vitality of the Constitution.'[13] Bagehot believes that the English Constitution has a division of 'the outward form' and 'the inner moving essence'. Accordingly, he asserts that no one can approach an understanding of English institutions or of others, unless he divides them into two classes: the dignified parts and the efficient parts.[14] Bagehot implies that the theory of sovereignty constitutes a 'dignified part'. The 'efficient parts' are constituted by institutions like the cabinet.

The monarchy is a product of the weakness of men's imaginations, which set up the question, 'Will you be governed by a king, or will you be governed a constitution?' or 'Will you be governed in a way you understand, or will you be governed in a way you do not understand?' Bagehot, not as enthusiastic about events like the marriage of the Prince of Wales as other English people, thinks that a '*family* on the throne is an interesting idea also. It brings down the pride of sovereignty to the level of petty life.'[15] What he means by 'the dignified parts' are nothing but 'the outward form', which have no 'inner moving essence'.

The year of the third electoral reform, 1884, is recorded by the publication of Herbert Spencer's *The Man versus the State*. Spencer radically opposes the growing state interference with individuals in the last quarter of the century. He asserts that the divine right of kings was merely replaced by that of parliament or the majorities. He even criticises 'the most defensible interpretation of Bentham's view' that 'the totality of all powers and rights, originally existed as an undivided whole in the sovereign people; and that this undivided whole is given in trust (as Austin would say) to a ruling power, appointed by the sovereign people, for the purpose of distribution.' This interpretation of Bentham's view demand that each man exist in two capacities. In his private capacity he is subject to the government. In his public capacity he is one of the sovereign people

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[13] Bagehot, 'The English Constitution' (1865), p. 204.

[14] *Ibid.*, p. 206.

[15] *Ibid.*, p. 229.

who appoint the government. According to Spencer, 'Bentham's proposition leaves us with a unit in the plexus of absurdities', because it is impossible to identify each individual with a unit in the sovereign body.[16]

Spencer bases his theoretical foundation not upon any artificial constitutional devices, but upon (what he believes to be) real social progress. His theory maintains 'the vital principle of social progress; inasmuch as, under such conditions, the individuals of most worth will prosper and multiply more than those of less worth. So the utility, not as empirically estimated but as rationally determined, enjoins this maintenance of individual rights; and, by implication, negatives any course which traverses them.'[17] The course of social progress determined by Spencer seemed to be an expression of his own interpretation of historical evolution of society.[18] But it is certain that his theory represented the spirit of progressivism in the late nineteenth century.

Nineteenth century intellectuals explored social evolutions in which the theory of sovereignty was the 'dignified' 'outward form'. Respect for royal sovereignty was accepted by intellectuals as a formal principle of the British Constitution. But how did they deal with the growing cries for popular sovereignty that seemed to constitute part of 'inner moving essence', namely, the motor of social evolutions? The accommodation of a rising 'inner moving essence' was a task that intellectuals in the late Victorian time had to face.

Domestic Sovereignty in the Imperial Age

In face of the challenge posed by other rising industrial powers in Europe, America, and eventually Asia, the management of the gigantic British Empire became a crucial issue in the last quarter of the nineteenth century. The 1875 conservative government of Disraeli announced a new stage of British imperialism. In the age of imperialism, a highly centralised political system of the Empire as a whole had to be reconciled with democratisation or nationalisation in the mother country. In the domestic scene Great

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[16] Spencer, 'The Man versus the State' (1884), pp. 151-152.

[17] *Ibid.*, p. 167.

[18] See Tim Gray, 'Herbert Spencer's Liberalism - from Social Statics to Social Dynamics' (1990), p. 124.

Britain had undergone the waves of mass political movements influenced by revolutions in Continental countries. Modern mass protests were different from political turmoil in the seventeenth century in that they reflected class struggles in the process of the Industrial Revolution. The British government was forced to implement three electoral reforms in 1832, 1867, and 1884, which brought about gradual political revolutions in the form of constitutional reforms. Now the problem for British scholars was how to explain imperial sovereignty in harmony with democratic and national sovereignty. Under such circumstances, A. V. Dicey, the greatest jurist of British constitutional law, re-established the new fundamental principles of the British constitution.

Dicey and British Imperialism

In his masterpiece first published in 1885 Dicey writes that he performs the part 'simply of an expounder.'[19] He is not concerned with English constitutional*ism*, but just explains the *existing* British Constitution. After many a country has adopted written constitutions, the task for lawyers was to prove the existence of an unwritten constitution in Britain. British constitutional law is identified, when the term is defined so as to 'include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'.[20]

Dicey refuses Blackstone's statement that the King of England is the sole magistrate of the nation as 'formalism of lawyers' 'under the fictitious ascription to the sovereign of political omnipotence'.[21] According to Dicey, sovereignty belongs to Parliament, composed of the King, the House of Lords, and the House of Commons. Parliament has the right to make or unmake any law whatever; and no person or body is recognised as having a right to override or set aside the legislation of Parliament.[22]

Dicey excludes any possibility of legal limitation of parliamentary sovereignty. He explains that 'limited sovereignty' is 'a contradiction in terms'. Its frequent and convenient use simply signifies the fact that 'some person, *e.g.* a king, who was at one

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[19] Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885), p. 4.

[20] *Ibid.*, pp. 24, 25.

[21] *Ibid.*, pp. 9-12.

[22] *Ibid.*, p. 36.

time a real sovereign or despot, and who is in name treated as an actual sovereign, has become only a part of the power which is legally supreme or sovereign in a particular state.'[23] According to Dicey, in no circumstances can sovereignty be limited. If it looks limited, the fact is that real sovereignty has been transferred or extended to somewhere else.

Dicey's famous distinction between legal and political sovereignty is used to maintain the absolute notion of parliamentary sovereignty. Dicey emphasises that his description of the British Constitution is different from Austin's theory. While Austin holds that sovereign power is vested in the king, the House of Lords, and the Commons or the electors, Dicey excludes the electors from the list. The difference has derived from Austin's confusion of legal and political sovereignty. That Austin vests sovereign power in the electors contradicts the fact that he mainly uses the word, sovereignty, as 'a merely legal conception', that is, 'the power of law-making unrestricted by any legal limit'. By imposing his own description of sovereignty on Austin, Dicey asserts that if the term be thus used, the sovereign power under the English Constitution no doubt belongs to parliament. The electors may be the political sovereign in a state the will of which is ultimately obeyed by the citizens of the state.[24]

The constitutional unity which was present even in Austin's theory has collapsed. The structure of Dicey's theory may look similar to the Lockean model marked by the distinction between the exerciser and the source of sovereignty. Nevertheless, Dicey believes that legal and political sovereignty should not coexist in the same world. Each claims to be omnipotent in its own sphere without any intercourse with each other. As a result, the concept of limited sovereignty has been thoroughly removed from the theory of sovereignty. We cannot limit and divide sovereignty. Therefore, let us have *two* unlimited and indivisible sovereignties.

This theory has grave implications in the historical context. On the one hand, the legal sovereignty of the Westminster parliament reigns not only over Great Britain but also over all the colonies of the worldwide British Empire. It is the strongest sovereign

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[23] Dicey, *The Law of the Constitution*, the third edition (1889), pp. 65-66.

[24] *Ibid.*, pp. 64-70. It should be noted that as a result of the three electoral reforms undertaken in the nineteenth century, the number of electors increased from four thousands in Austin's time to five millions in 1885.

in the world. On the other hand, the British people are given another title of sovereignty. Although parliament is also called the *legal* sovereign, the British people are the *politically* absolute sovereign. In short, Dicey's theory of sovereignty at once explains the imperial principle of sovereignty in the international field and the democratic and national principle of sovereignty in the domestic field.

Under this formal principle, it is asserted that not only the Victoria (New Zealand) parliament but also the Belgian parliament together with railway companies and English school boards are included in the same category of 'non sovereign law-making body'. The New Zealand parliament as well as other much less independent colonial legislatures are subject to the 'Imperial Parliament', which is the author of the Constitution of the Commonwealth. It follows that there is no significant difference between the New Zealand parliament and the South-Eastern Railway company for both are subordinate to the sovereign Imperial Parliament. Neither the Belgian nor the French parliaments can rival the British Imperial Parliament, as the former parliaments are subordinate to their Constitutions.[25] The legal sovereignty of the United States is admitted to 'the majority of a body constituted by the joint action of three-fourths of the several States'. But it is a miserable sovereign, for Dicey conceives it to be like 'a monarch who slumbers and sleeps.'[26] Mystifying the sovereignty of the British Parliament, Dicey is also proud of the tradition of the rule of law in the Anglo-American states in contrast with the tradition of the French 'administrative law' (*droit administratif*).[27] It is almost impossible, therefore, to imagine any legal sovereign that is stronger and less arbitrary than the British Imperial Parliament.

Dicey is ready to admit that sovereignty is in practice limited externally and internally. The external limit to the real sovereign consists in the possibility or certainty of the resistance of his subjects.[28] Internal limit arises from the nature of sovereign power itself, as legislators must go mad when they pass absurd laws. These two limitations do not always coincide. But the difference between the will of the sovereign and the nation may be terminated by the foundation of 'a system of real representative

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[25] *Ibid.*, pp. 85-124.

[26] *Ibid.*, p. 136.

[27] *Ibid.*, pp. 179-216.

[28] *Ibid.*, p. 70.

government'. Where a Parliament truly represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises, must soon disappear.[29] Dicey first divides legal and political sovereignty. Only then does he express his hope for the unity of the two. This approach is quite cautious and clever, but fatally academic. What happens if the two sovereigns conflict with each other? Practically this is a crucial question, which Dicey, expounder of constitutional law, does not attempt to solve. He instead hides it behind highly formal devices of the theory of sovereignty.

Decline of Constitutionalism

When the eighth edition of *The Law of the Constitution* was published in 1915, Dicey added quite a long introduction. It was intended to trace the changes of the working of the Constitution in the three decades after the publication of the first edition. For instance, the Parliament Act, 1911, cast serious doubt upon the subject of sovereignty. Did it deprive the House of Lords of sovereignty? Dicey's conclusion is that sovereignty still resides in the same place. He argues that the House of Lords constitutes a part of sovereignty with its power to delay the passing of any Act. Then he concedes that 'the Parliament Act has greatly increased the share of sovereignty possessed by the House of Commons and has greatly diminished the share thereof belonging to the House of Lords.'[30] But what is the 'share' of sovereignty belonging to the House of Lords which is exerted only in a negative way? How can we imagine the 'share' of sovereignty which is supposed to be intrinsically indivisible? Democratic movements of 'political sovereignty' were overwhelming 'legal sovereignty' in nineteenth century Britain. But Dicey did not have an image of an integral constitution which would encompass the two sovereigns.

Dicey also remarks that while the Imperial Parliament still possesses absolute sovereignty, it has become impossible to exert equal power throughout the whole of an immense Empire. Dicey concedes that the omnipotence of Parliament has been applied

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[29] *Ibid.*, p. 77.

[30] Dicey, *Introduction to the Study of the Law of the Constitution*, eighth edition (1915), p. xxiv.

in its full effect only to the United Kingdom.[31] The Imperial Parliament retains absolute sovereignty, although it is a more or less fictitious omnipotence. He observes that the Imperial Parliament has sovereignty over the Dominions, although the colonial policy of England is to grant every Dominion absolute, unfettered, complete local autonomy.[32]

Moreover, Dicey deplores the decline of the rule of law. Dicey asserts that 'In England democratic government has already given votes . . . to citizens who . . . hardly perceive the risk and ruin involved in a departure from the rule of law.'[33] Now Dicey stands up to say in defence of governmental power that 'the authority or the sovereignty of the nation, or even the conception of the national will, is a sort of political or metaphysical fiction which wise men will do well to discard.'[34] Dicey, aged almost eighty, remains a conservative scholar, who still fears the national sovereignty of the French Revolution. It is his own distinction of the two sovereigns that is now the most critical problem in Britain.

It might be safe to say that whatever Dicey's own intention was, legal and political sovereignty corresponded with the form and the content of sovereignty that had been 'discovered' by the German philosophers. In this sense Dicey truly struggled with the problem of sovereignty that suffered from nationalism and democratisation in the modern era. He certainly realised that a traditional constitutional order could not hide the gap between the form and the content that became evident in his time. Unfortunately, however, he did not have dialectic to unify the form and the content. In Britain the two sovereigns reign in their own distinct spheres without theoretical connections between them.

Quite interestingly, James Bryce, influential political scientist, develops the theory of the distinction between the two sovereigns along the line of form and content. According to him, there are 'Legal Sovereignty (*de iure*)' and 'Practical Sovereignty (*de facto*)'. 'Legal Sovereignty exists in the sphere of Law'. 'Practical Sovereignty exists in the sphere of Fact'. The former is 'Formal', and the latter 'Material'.[35] 'Legal Sovereignty

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[31] *Ibid.*, pp. xxvi-xxvii.

[32] *Ibid.*, pp. xxix-xxxii.

[33] *Ibid.*, p. lix.

[34] *Ibid.*, p. xliii.

[35] Bryce, 'The Nature of Sovereignty' (1901), pp. 69-70.

is Divisible', as different branches of it may be concurrently vested in different persons or bodies. By contrast, 'Practical Sovereignty seems indivisible', for it belongs to the strongest person or body only (though perhaps not known to be the strongest). Similarly, 'Legal Sovereignty may be Limited' under certain rules. 'Practical Sovereignty is, by definition, incapable of being limited.'[36] In short, what is divisible and limited is 'Legal Sovereignty'. What is not is 'Practical Sovereignty'. Bryce expects that 'Had the qualifying terms *de iure* or *de facto* been added every time the word "Sovereignty" was used, most of these difficulties would have disappeared.'[37] For instance, the belief that sovereignty cannot be divided is extremely artificial.[38] The recognition of the two sovereigns will eradicate such a misunderstanding. It also explains why sovereignty is limited domestically, namely in the legal sphere, while it is unlimited internationally, that is, the exclusively *de facto* sphere.[39]

Where the Legal is not at the same time the Practical, it is difficult to discover the latter. In no two countries are the phenomena of 'Practical Sovereignty' quite the same. Bryce asserts that, nevertheless, there are two kinds of Sovereign in every political community . At stake is to find and analyse the relationship between the two sovereigns. Bryce formulates four patterns of their relationship. When sovereignty *de iure* attains its maximum of quiescence, Sovereignty *de facto* is usually also steady, and hidden behind it. When Sovereignty *de iure* is uncertain, Sovereignty *de facto* tends to be disturbed. When Sovereignty *de facto* is stable, Sovereignty *de iure*, though it may have been lost for a time, reappears, and ultimately becomes stable. When Sovereignty *de facto* is disturbed, Sovereignty *de iure* is threatened.[40]

H. Sidgwick, an authority in the field of political science, is more willing to accommodate the new political trends than Dicey and Bryce. He asserts that if, in a country under simple parliamentary government, any constituency could dismiss its representatives at any time by the vote of a simple majority, 'it could hardly be doubted

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[36] *Ibid.*, pp. 70-71.

[37] *Ibid.*, 96.

[38] *Ibid.*, p. 93.

[39] *Ibid.*, p. 110.

[40] *Ibid.*, p. 69.

that the electorate was sovereign'.[41] If supreme power is attributed to a body that has a constitutional right to change the structure and regulate the action of government, it ought to be attributed to the mass of the people in any state. In any state, if a sufficiently large majority of the people altogether refused obedience, the power of government would come to an end. Sidgwick thus confesses that the mass of the people in any country may be said to be the ultimate depository of supreme political power.[42] According to him, 'political power that is not merely exercised at the discretion of a political superior, - and that must therefore be regarded as supreme or ultimate - is usually distributed in a rather complex way among different bodies and individuals'.[43]

Political philosopher, David G. Ritchie, recognises the distinction of two sovereignties as a constitutional problem. He finds three types of the sovereign: the nominal, the legal and the political. He insists that while Hobbes, Bentham and Austin identified all the three as one, Locke described all of them. Locke does not 'shirk the verbal paradox of saying that there are three supremes, and yet there is not one supreme'.[44] This characterises Locke's constitutionalism, while 'The historically true and very convenient phrase "limited monarchy" makes' Austin and his predecessors and followers angry.[45] Ritchie interprets the coexistence of the multiple sovereigns as an element of constitutionalism. Yet his emphasis upon constitutionalism derives from a conception of an organic society. For instance, he even asserts that natural selection determines which nation shall survive in the field of international law.[46] Constitutional sovereignty distinct from abstract legal sovereignty is for him in the law of organism.

W. S. M'Kechnie, a constitutional lawyer in Glasgow, also distinguishes between the legal sovereignty of parliament and the political sovereignty of the people, in addition to the nominal sovereignty of the crown. Political sovereignty, which implies negatively 'the independence of a State' and positively 'its efficient organization', represents 'the power of the whole over every part - of the State over the individual with all his

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[41] Sidgwick, *The Elements of Politics*, second edition (1897), p. 628.

[42] *Ibid.*, p. 630.

[43] *Ibid.*, p. 638.

[44] Ritchie, 'On the Conception of Sovereignty', (1891), p. 393.

[45] *Ibid.*, p. 395.

[46] *Ibid.*, p. 410.

associations, institutions, and relations.' It is difficult to distinguish sovereignty from the state itself. It 'cannot be lost unless the State itself is annihilated.'[47] Legal sovereignty derives from the necessity for 'the common will or supreme political power in the State' to 'find some recognized constitutional method of expressing itself. . . . The legal sovereign is, then, the authorized embodiment of the political one. The whole constitutional history of a nation is a record of the efforts made by the general will, which is the source of law, to realize itself in an external form.'[48] Thus M'Kechnie emphasises the unity of the two sovereigns. Legal sovereignty is '*a true manifestation* of the will of the people, the true political sovereign.'[49]

W. Jethro Brown in his excursus of Austin's *Jurisprudence* written in 1906 reveals what has happened since the early nineteenth century when Austin was writing. He finds at least four distinct types of the conception of sovereignty in the British Constitution; first, the dominating power of the government, second, the electoral body, third, the popular majority, and finally, the state as a moral organism. Brown remarkably holds that the theory of sovereignty must keep pace with the progress of society. It follows that society proceeds from the large political aggregate, through the democratic community, to the realization of a national life.[50]

Referring to Dicey, Brown turns to legal sovereignty. The difficulty is the location of sovereignty in a constitution. He asks, 'To what power ought formal supremacy to be attributed in the case of a State with a written and rigid constitution containing no provision for its amendment?' One solution is the agreement of the people. But Brown believes that the 'more logical solution would be to attribute the sovereignty to the State itself.'[51] The theory of the sovereignty of the state maintains the perfect meaning of sovereignty. Browns articulates: 'The sovereign is the source of all law, and so cannot be limited by law; where a legal limitation is held to exist upon a power claiming to be sovereign, we are compelled to infer that legal theory looks beyond the pretended

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[47] M'Kechnie, *The State and the Individual* (1896), pp. 127- 130.

[48] *Ibid.*, p. 131.

[49] *Ibid.*, p. 137.

[50] Austin, *op. cit.*, p. 277.

[51] *Ibid.*, pp. 282-283.

sovereign to the State itself as true sovereign and ultimate source of law.'[52]

Starting from Dicey's doctrine, Brown goes beyond it for 'very practical considerations'. 'In a multitude of ways the State, as owner of its territory, as invested with property and the dubious blessing of a National Debt, demands legal recognition. But if once the law recognises the state as an entity capable of rights and duties, it is almost compelled to attribute sovereignty to that entity, and to regard the supreme law-making institution as merely an actualization of a formal supremacy which in the last analysis can only be found in the State itself.'[53] Brown puts it thus:

> Although the location of the sovereign varies in the different legal theories of different nationalities, it seems probable that the Jurisprudence of a near future will recognize that the State itself is the true sovereign, and that such a body as the Parliament of Great Britain should be described, not as the sovereign, but as the sovereign-organ. . . . We shall not fear to think of the State as a unity, a personality, a sovereign - a sovereign in whose presence the visible ruler can aspire to no higher title than that of sovereign-organ.[54]

Although Brown's notion of legal personality of the State was very formalistic, his doctrine of legal sovereignty amounted to the sovereignty of the state. And in his proposal, the search for new locations of sovereignty reached the point of what Continental scholars of national sovereignty had expressed for a long time. British scholars were very slow to dissolve constitutional premises into an organic entity of the state.

But why did British scholars not discard the problem of sovereignty as 'the outward form', as their predecessors did some decades ago? It seems that for scholars in the age of imperialism, 'sovereignty' was a reality which had to be identified somewhere and somehow. Under the conditions of laissez faire doctrines, the issue of sovereignty never arose as an object of serious investigations. But if 'sovereignty' is not a reality, how can imperial policies be maintained? How can international competitions among leading nations be understood? How can an ideal state be pursued in the face of democratic movements? It is not the purpose of this thesis to explore the details of historical

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[52] *Ibid.*

[53] *Ibid.*, p. 284.

[54] *Ibid.*, pp. 296-297.

backgrounds of this sudden *reification* of sovereignty. But it seems safe to say that the phenomenon of the *reification* of sovereignty exactly satisfied the needs of an imperialist age.

Philosophical Idealists

We shall now look into the philosophical attack on the tradition of constitutional sovereignty. In the field of Political Theory, there arose a siginificant theoretical movement towards the end of the nineteenth century. So-called British idealists,[55] who emphasised the organic understanding of the state, began to attack traditional British political theories. The theory of an organic state demanded a modification of the concept of liberty. The British tradition of negative liberty was based on the presupposition of the distinction of the state and individuals, which was not suitable for an organic state.

In his lectures delivered in 1879-80, T. H. Green examines the problem of political obligation to the state in connection with the problem of sovereignty. Green finds in Rousseau's theory the value of the conception of the state as representing the sovereign general will. According to Green, Rousseau's sovereign is the only sovereign *de jure*, which is distinguishable from the sovereign *de facto* in the actual ordinary States.[56] It is the sovereign *de jure*, which is the source of justification of political obligation. The sovereign *de facto* or the 'ostensible sovereign' is only able to exercise coercive power in virtue of an assent on the part of the people. Green intends to reconcile Rousseau with Austin in order to gain 'the truest view of sovereignty'.[57] Austin's coercive sovereign is justified only when there is a sense of possessing common interests which Rousseau's general will expresses.[58] Green states that:

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[55] 'Idealism' in this sense has nothing to do with what is called 'idealism' in the discipline of International Relations.

[56] Green, 'Lectures on the Principles of Political Obligation' (1879-80), pp. 395-398. It is interesting that Green's conceptions of two sovereignty are the reverse of Dicey's. Both of them place sovereignty of the people beyond their own academic field.

[57] *Ibid.*, p. 402.

[58] *Ibid.*, p. 403.

the institutions of political society - those by which equal rights are guaranteed to members of such a society - are an expression of, and are maintained by, a general will. The sovereign should be regarded, not in abstraction as the wielder of coercive force, but in connection with the whole complex of institutions of political society.[59]

Green justifies the political obligations of individuals by delineating the structure of the two sovereigns. If the general will is the source of sovereignty and of the justification of the government, individuals participating in sovereignty cannot therefore criticise the sovereign. Green asserts: 'A right is a power claimed and recognised as contributory to a common good. A right against society, in distinction from a right to be treated as a member of society, is a contradiction in terms.'[60] Green's 'obligation' does not derive from the British tradition of the rule of law. Political obligation is justified, because those who are subordinate are the sovereign. The Rousseauean identification of the ruler and the ruled dispels the Lockean distinction of government and society.

Green points out that previous political theorists make no inquiry into the development of society and of men through society. They treat sovereign and subject apart, which are in fact correlative.[61] He implies that society and men are able to merge into one and become inseparable. According to Green, morality and political subjection have a common source, which is the rational recognition by certain human beings of a common well-being.[62] Therefore, a basis of political or free society 'should represent an idea of common good'.[63] This means that it is realised only in the state. Green's notion of the state is above the sovereign. The state is above monarchical, parliamentary, and popular sovereignty. Every mode of sovereignty should be merged into the only supreme mode of sovereignty, namely, state sovereignty.

The attack on the constitutional understanding of the state in its strongest form appeared with Bernard Bosanquet. He insists that the originality of his work lies in that it is an 'attempt to apply the conceptions of recent psychology to the theory of State coercion and of the Real or General Will, and to explain the relation of Social

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[59] *Ibid.*, p. 409.

[60] *Ibid.*, p. 416.

[61] *Ibid.*, p. 427.

[62] *Ibid.*, pp. 430-431.

[63] *Ibid.*, p. 432.

Philosophy to Sociological Psychology'.[64] What is really remarkable in Bosanquet, even compared with other British idealists, is his very organic notion of the nation-state.

He identifies the peculiarity of the nation-state as the phenomenon of the self-governing individual community.[65] Bosanquet remarks that the self-governing community is not merely a unit of legal personality. There must be moral content in the modern nation-state. Legal ideas and natural growth merge in 'a self-conscious purposive organism'.[66] This understanding of the modern nation-state inevitably leads him to re-examine the concept of 'self'. The critical issue is the conception of 'self-government', because it is a conceptual device to justify political obligation, an imperative task for political theorists in the time of revolutionary movements. Bosanquet finds a paradox in 'self-government'. In what way can the term 'self', derived from the 'individual' mind, be applicable to social coercion exercised by some persons over others?[67]

First of all, Bosanquet asserts that the conception of 'self-government' is incompatible with '*prima facie* theories' or 'theories of the first look', by which he means the theories guided by the 'impression of the natural separateness of the human unit'.[68] In those theories the factors of self and government are alien and opposed.[69] As long as the antithesis of self and government continues, the conception of 'self-government' also continues to be paradoxical as well. In *prima facie* theories, government always reveals itself as coercion exercised by 'the others' over 'the one'. In this context Bosanquet praises the transformation of the notion of 'person' from the physical individual through the legal 'person' (Hobbes) towards the 'moral person' of a higher or greater self (Rousseau).[70]

There must take place 'a transition from the private self into the great communion of

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[64] Bosanquet, *The Philosophical Theory of the State* (1899), p. ix.

[65] *Ibid.*, pp. 3-16.

[66] *Ibid.*, p. 36.

[67] *Ibid.*, p. 55.

[68] *Ibid.*, pp. 80-82.

[69] *Ibid.*, p. 64.

[70] *Ibid.*, pp. 93-96.

reality'. What the self ought to be, governs causal private selves.[71] As freedom from constraint includes freedom from a part of self to be governed, negative freedom is 'only an elementary type or symbol' without the fuller freedom of positive freedom.[72] It is positive freedom which provides 'a system of self-government', namely, the government of what ought to govern over what ought to be governed. This 'system of self-government' is thus 'the ultimate root of political obligation'.[73] Accordingly, he asserts that 'the State' is not a number of persons, but 'a working conception of life'.

Now the notion of sovereignty is defined in accordance with the unity of the nation-state. Bosanquet stipulates: 'Sovereignty, therefore, resides in no one element. It is, essentially, the relation in which each factor of the constitution stands to the whole. That is to say, it resides only in the organised whole acting *qua* organised whole.'[74] Analysing Hegel's idea of the state, Bosanquet also says: 'Law and constitution are utterances of the spirit of a nation'.[75] The common good expressed by the nation is the reason why the constitution is important, and why the system of self-government needs the higher notion of 'The Nation-State', which 'is recognised as absolute in power over the individual, and as his representative and champion in the affairs of the world outside.'[76]

Bosanquet's argument characterises the challenge from the national to the constitutional theory of sovereignty in his era. This is not to say that Bosanquet's theory dominated British political theories. A counter-attack of constitutionalism occurred in the time of Anglo-German conflicts in the twentieth century. Nevertheless, Bosanquet's theory signifies the development of the theory of state sovereignty in the nineteenth century. At the end of the century of nationalism, national sovereignty achieved its theoretical completion even in the country of the champion of Classical constitutionalism.

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[71] *Ibid.*, pp. 126-127.

[72] *Ibid.*, pp. 136-146.

[73] *Ibid.*, p. 149.

[74] *Ibid.*, p. 282.

[75] *Ibid.*, p. 283.

[76] *Ibid.*, p. 320.

Discourses on Sovereignty in International Law in Britain

To conclude our investigation into nineteenth century notions of sovereignty in Britain, we shall now examine the discourses on sovereignty in the field of international law. The appearance of the nation-state in the modern age changed the conceptual map in people's minds dominated by the laws of nations and nature. When nations were conceived to be like-men in a society of nations, it was supposed that the society of nations was a higher equivalent of human societies. In other words, under 'the anthropomorphism of nations'[77], international society began to be looked upon in analogy with domestic society, whether it would lead to a super-state or anarchy.

But the individualistic tendency in Britain had difficulty in accepting the anthropomorphism. At first, British international lawyers were perplexed with the difference between international law and constitutional law. In the age of laissez faire liberalism, the constitutional mind might reject the anthropomorphic analogy between men and nations. But in the age of imperialism, the analogy became no longer doubtful. As a result, there appeared several main features of British constitutionalism in British international law. For instance, as we shall highlight in comparison with American international law in the next chapter, one of the features of British traditional constitutionalism was (in spite of the tradition of the protection of individual rights) the vindication of the *inequality* of individuals. Constitutionalism rather meant a balance of power between multiple social classes. Inequality was not a predicament, but a source of constitutionalism in Britain. This feature in traditional constitutional law applied in international law demanded the rejection of the principle of the equality of nations. It rather functioned to justify the balance of power among great powers that was supposed to maintain international order.

Traditional International Law

For British lawyers in the nineteenth century, 'international law' was better than the

[77] I mean by 'the anthropomorphism of nations' the identification of nations as living organic entities.

'law of nations', but not a satisfactory expression, as 'nation' should be replaced with 'states'. They found it difficult to identify nations with states.[78] Nations could mean English, Welsh, Scottish and Irish; the state is the commonwealth composed of the United Kingdom and its dominions.[79] The nation and the state must be distinguished as rigidly as possible. In the first place it should be emphasised that states differ from individuals subject to the natural law, for a 'State is a metaphysical entity, a mere abstraction'.[80] The actual subjects of international law are thus said to be the representatives of states: the sovereigns and their ambassadors.[81]

It is also said that 'The State is a Community of persons, living within certain defined boundaries, subject to a constituted government, and freely united together for their common good.' With such a constitutional structure of the ruler and the ruled, as late as 1887 it is said that 'In the United Kingdom all sovereignty vests in the Queen, acting through her Ministers in Council, responsible to Parliament'. In addition, a state may 'consent to have its own sovereignty limited or qualified.'[82]

In nineteenth century Great Britain, at least towards the end of the century, modernisation has more to do with constitutionalism than nationalism. Therefore, William O. Manning observes: 'The resemblance, indeed, between a private citizen in a State and the State itself, as a member of a society of States, becomes less and less noticeable, as a simple monarchical system of government becomes exchanged, in one State after another, for more complex systems, - as a constitutional monarchy, a republic, or a federal government.' The state is now 'seen to be an aggregate of human beings'. Accordingly, the conception of sovereignty is modified in a constitutional manner. 'The sovereignty of a State is the inherent capacity it enjoys to select, to maintain, or to change its own form of government'.[83]

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[78] '[I]n so far as States are distinct from nations, the former, not the latter, are subjects of International Law. T. J. Lawrence, *A Handbook of Public International Law*, (1885), p. 3. By contrast, in America the word, state, is 'not satisfactory, because it is employed to define parts of territory'. Herbert W. Bowen, *International Law* (1896), p. 3.

[79] 'A State may consist of one or more people or nations.' 'A State includes all its colonies and dependencies.' Leone Levi, *International Law with Materials for a Code of International Law* (1887), p. 80.

[80] Archer Polson, *Principles of the Law of Nations, with practical notes* (1848), pp. 2-3.

[81] Robert Phillimore, *Commentaries upon International Law*, vol. 1 (1854), p. 10.

[82] Levi, *op. cit.*, p. 82, 94.

[83] Manning, *Commentaries on the Law of Nations*, a revised edition (1839), pp. 91-94.

The simple presupposition of the existence of separate equal nations is too artificial for British lawyers like Manning. This realistic attitude leads him to assert that the 'doctrine of the equality of States is, in some measures, an artificial one, and very imperfectly corresponds with actual political facts.' At least, there must be 'a distinction between legal and political equality'.[84] This candid acceptance of dualism of politics and law, to which Dicey gives an authoritative expression, is also one of the characteristics of British international law.[85] British jurists tend to emphasise that political reality exists regardless of legal principles. And international law must recognise the reality.[86]

Sovereignty in the Age of Imperialism

The recognition of the reality of international politics leads lawyers to regard political aspects in the age of imperialism as an indispensable part of international studies. For instance, John Westlake urges 'the student of international law' to 'appreciate the actual position of the great powers of Europe'. He asserts: 'At no time and in no quarter of the globe can small states ever have been admitted by large ones to political equality with themselves'. The legal field cannot exist aloof from this actuality.[87] He rather prefers to say that there are two 'facts'. In spite of the equality of states as the first fact, 'the second fact' is that the 'general rules of international law apply in their fulness [*sic*] only to sovereign states like France or the United Kingdom, and to natural persons brought into relation with sovereign states . . . Between sovereign states and natural persons international law recognises groups of the latter not on an equality with the former, of

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[84] *Ibid.*, pp. 100-101.

[85] In international relations where no legislative authority exists, it is not the political but the legal sphere that has a revolutionary force. Admission of international political order by mainstream British international lawyers derives from this twisted relationship of the two spheres.

[86] The 'Great Powers of Europe have obtained such a position of authority that they are able to exercise predominance over other States. This position is now well recognised.' Sherston Baker, *First Steps in International Law* (1899), p. 46. Thomas A. Walker stipulates that political sovereignty is one sovereign whole which 'unites Independence with Constituent Power'. Legal sovereignty is 'the authority of Functionary' limited by constitutional law, or 'Representative of National Independence, and the Exerciser of National Government or Supremacy.' While Walker unequivocally expresses the principle that 'All States are formally equal', he takes for granted the gap between this 'formal' principle and the reality of the supremacy of the Great Powers. Walker, *The Science of International Law* (1893), pp. 37, 41; *A Manual of Public International Law* (1895), pp. 11-13. Lawrence distinguishes between 'the Great Powers' and 'Ordinary Independent States' among 'sovereign states' distinct from 'part-sovereign states'. Lawrence, *op. cit.*, pp. 18-21. See also Lawrence, *The Principle of International Law* (1895), pp. 55-77.

[87] Westlake, *The Collected Papers of John Westlake on Public International Law* (1914), pp. 92-93.

which Bulgaria may be taken as an example, and which may be classed together as semi-sovereign though they may and do differ in their particular condition and rights.' In order to explicate the two 'facts', he strictly distinguishes between sovereignty and independence. 'Sovereignty is partible', while independence is not. Independence corresponds with 'full sovereignty'; but there is no such thing as 'partial independence' corresponding with 'semi-sovereignty'.[88]

By the beginning of the twentieth century, one of the features of the British constitutional way of thinking, a formal notion of the state composed of individuals, has declined. The most authoritative British international lawyer who immigrated from Germany, L. Oppenheim, clearly explicates: 'Sovereign States exclusively are International Persons - i.e. subjects of International Law.' This means that monarchs, diplomatic envoys, and private individuals are not international persons.[89] Now Oppenheim numerates four conditions for the existence of a state as an exclusive subject of international law: a people, a country, a government and a sovereign government.[90] If a state lacks 'full sovereignty', it is named 'not-full Sovereign State', which is understood as an 'imperfect International Person'. He explains that such 'imperfect International Personality is, of course, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself.'[91]

Oppenheim notes that the conception of sovereignty 'has never had a meaning which was universally agreed upon', for there have been two schools on sovereignty; one admits the divisibility of it, and the other does not. Especially after the Westphalian Peace the existence of several hundred reigning princes 'enforced the necessity upon publicists to recognise a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half-sovereignty.'

Oppenheim succinctly demonstrates what happened to the conception in the

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[88] Westlake, *Chapters on the Principles of International Law* (1894), pp. 86-87. See also Westlake, *International Law, Part I Peace* (1904), pp. 20-22. T. Baty argues that there exists a kind of superiority which was neither equivalent to sovereignty nor merely nominal, i.e. semi-sovereignty or *mi-souveraintés*. The South African Republic is a contemporary example of a semi-sovereign state. See Baty, *International Law in South Africa* (1900) pp. 45-68.

[89] Oppenheim, *International Law: A Treatise, vol I, Peace* (1905), pp. 99-100.

[90] *Ibid.*, pp. 100-101.

[91] *Ibid.*, pp. 99-102. Horace S. Seal also has the idea of 'perfect' and 'imperfect' sovereignty. The former is irresponsible, indivisible, unlimited, instant and unavoidable. The latter is also irresponsible and indivisible, but limited and not immediate. Seal, *Sovereignty and the State* (1907), pp. 7, 10.

nineteenth century. The generally recognised fact is 'that a sovereign monarch may well be restricted in the exercise of his powers by a Constitution and positive law.' In addition, several federal states show 'the divisibility of sovereignty between the member-States and the Federal State.' Furthermore, 'the science of politics has learned to distinguish between sovereignty of the State and sovereignty of the organ which exercises the power of the State. The majority of publicists teach nowadays that neither the monarch, nor Parliament, nor the people is originally Sovereign in a State, but the State itself.' Nevertheless, 'the old controversy regarding divisibility of sovereignty has by no means died out.'[92] Oppenheim's statement is noteworthy for he is in the country where Dicey has strongly denied the divisibility of sovereignty. In order to maintain legal order in international as well as domestic society, sovereignty in international law must be divided, while sovereignty in constitutional law must not.

Oppenheim's admission of the divisibility of sovereignty reinforces the reality of the age of imperialism. The states are not in fact equal. In addition to colonial-states, there are non-full sovereign states in international society. That is the reality which international lawyers must recognise. He concludes that 'those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs. As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.'[93]

In the beginning of the twentieth century the inequality between states was such a clear reality that the title of sovereignty had to be restricted to the limited number of states. This was a basis of the British class system of constitutionalism. The different classes of states composed an international constitution in accordance with their positions. Great powers acted as great powers; minor states as minor states.

Two points can be emphasised here. First, despite the difference as regards the divisibility of sovereignty, Dicey's imperial theory of sovereignty and Oppenheim's international law are based on the same perception of reality. Among numerous unequal states in the world, the perfect sovereign is the British Imperial Parliament or Great

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[92] *Ibid.*, pp. 103-107.

[93] *Ibid.*, p. 108.

Britain as an international person. Most of the other states except some other great powers are not entitled to sovereignty. Second, dualism runs through both Dicey and Oppenheim. Dicey refines legal sovereignty by excluding political sovereignty from the study of constitutional law. On the other hand, Oppenheim degrades legal sovereignty by including political sovereignty in the study of international law. But this academic difference again points in the same practical direction; a hierarchical governmental system. Dicey's political sovereign was a bulk of subjects who were sovereign outside the scope of constitutional law. His legal sovereign ruled over the subjects in Britain as well as the British colonies. Oppenheim's legal sovereigns were nominally sovereign states. Great powers governed international society. Dicey and Oppenheim in two different fields constructed different theories, but in order to accommodate the same reality. Sovereignty was no longer a principle of Classical constitutionalism; but it was an expression of the reality in the age of imperialism.

In the nineteenth century Great Britain experienced hidden but great changes in its constitutional system due to the waves of democratisation, nationalism and imperialism. Accordingly, the traditional nature of constitutional sovereignty gradually became old-fashioned. This is the process of a reluctant acceptance of the national theory of sovereignty in Britain, which scholars in International Relations tend to ignore under the presupposition of the 'Westphalian' nation-state system. However, this does not mean that the tradition of British constitutionalism completely disappeared. We shall see later an international application of the tradition of constitutionalism, which is constructed upon the basis of the achievement of nationalism: the anthropomorphism of nations. Before that, we shall turn to the process of the development of national sovereignty in the United States.

Chapter 4 The Spread of National Sovereignty in America

The United States was an embodiment of constitutionalism in the early nineteenth century. Although its national power was undeveloped in comparison to Great Britain, its embodiment of many liberal and democratic ideals made it the source of interest amongst political theorists. Domestically, it maintained the principles of popular sovereignty and supremacy of the Constitution; it continued to implement democratic reforms but still avoid the spellbinding obsession with absolute sovereignty of the people which frightened European intellectuals after the French Revolution. Internationally, the pillar of US foreign policies was the Monroe Doctrine of 1823, which established the principle of non-interference with the Western Hemisphere. It can be said that the Monroe Doctrine was a principle of negative liberty in the international field. It sought to establish the principle of non-interference, rather than the realisation of democratic ideals, in the society of nations. However, as the United States finished its westward expansion, developed economic and military strength, and consolidated national identity after the American Civil War, it gradually emerged as a new great power. In the late nineteenth century, the Monroe Doctrine was modified by the so-called 'Roosevelt corollary'. It ceased to be a principle of non-interference and became a principle of US imperialism in the Western Hemisphere.

In this chapter we shall examine the development of notions of sovereignty in the periods leading up to the development of US nationalism and imperialism. The first section deals with the debates on the issue of sovereignty up to the outbreak of the Civil War. The second section focuses on the post-Civil War era. The third section covers American discourses on sovereignty with respect of international law.

Debates about Sovereignty around the Time of the Civil War

While the theory of divided sovereignty became an orthodox doctrine after the ratification of the Constitution, the ambiguity of the location of sovereignty remained a hotbed of political conflict. In the last decade of the eighteenth century the legislatures of Virginia and Kentucky passed resolutions to declare that each State was sovereign and independent. Even some of the Northern States considered secession after Jefferson's agrarians won the presidential election in 1800.[1] It is no wonder that Tocqueville had a pessimistic opinion about the Union's future, for he was in America just when the 'nullification' claimed by the Southern States was in dispute.[2] The question whether the states have the right of secession or not cannot be settled, for the US Constitution has no provision of it.[3] In the following decades constitutionalism as the golden mean principle declined, and national sovereignty of the States and that of the Union confronted each other.

Sovereignty as Allegiance

President Andrew Jackson proclaimed in 1832:

> The States severally have not retained their entire sovereignty. It has been shown that, in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty. . . . The States, then, for all these purposes, were no longer sovereign. The allegiance of their citizens was transformed, in the first

[1] See Jacobson, *op. cit.*, p. 411.

[2] As regards the relevance of sovereignty with the doctrine of nullification, see Johnson, *op. cit.*, pp. 308-34.

[3] In a chapter added in 1856, Grimke insists that although sovereignty can be alienable and divisible, the States wield the right to secede. See Grimke, *op. cit.*, pp. 503-17. On the contrary, Edward Everett argues that even if the States are sovereign, 'State sovereignty does not authorize secession'. According to him, '"sovereignty" is a word of very various signification'. Everett, 'Introductory Address' in Frank Moore (ed.), *The Rebellion Record*, (1861). J. S. Wright enthusiastically advocates the sovereignty of the State as 'a demigod person', and denies national as well as divided sovereignty. But he does not admit secession, and accuses the seceding southern States of breaking the contract. Wright, *Citizenship Sovereignty* (1862), p. 72.

instance, to the Government of the United States'.[4]

This statement, of a president famous for democracy in the Union, indicates that at stake was the direction of the 'allegiance of their citizens'. The issue of the 'allegiance' is an old topic. But it can be noted that in America the people were not just subjects; they are the sovereign as well. This means that their allegiance was directed not towards their king, but ultimately towards themselves. The 'allegiance' was nothing but the problem of identity. Modern men in America had to decide what identity they found most significant. The political struggles that led to the Civil War revolved around that issue.

The confrontation between the 'nationalists' and the 'particularists'[5] was illustrated by a famous debate in the Senate in 1833. Daniel Webster defended the unity of the Union by saying that a Constitution was not a league, compact, or confederacy, but a fundamental law. And he argued that sovereignty was not a doctrine of the State but the people as a whole nation. He asserted that the 'sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. . . . In Europe, sovereignty is of feudal origin, and imports no more than the state of the sovereign. . . . But with us, all power is with the people. They alone are sovereign.' According to Webster, 'the people of the United States are one people.'[6] This populist argument of Webster became influential in the Northern States around the time of the Civil War.[7]

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[4] 'Proclamation of President Jackson to the people of South Carolina', December 10, 1832, in Johnson, *op. cit.*, p. 337.

[5] In nineteenth century American history, the 'nationalists' mean. pro-Union advocates and the 'particularists' are State rights defenders.

[6] Daniel Webster, *The Papers of Daniel Webster, volume 1, 1800-1833*, (1986), p. 589-92. See also 'Second Reply to Hayne', January 26-27, 1830, in which Webster argued that the government of the United States was not the agent of the state governments. He emphasised 'the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people.' He continued to say that the 'States are, unquestionably, sovereign, so far as their sovereignty is not affected by this supreme law. But the State legislatures, as political bodies, however sovereign, are yet not sovereign over the people. So far as the people have given power to the general government, so far the grant is unquestionably good, and the government holds of the people, and not of the State governments. We are all agents of the same supreme power, the people. The general government and the State governments derive their authority from the same source. . . . the people of the United States have chosen to impose control on State sovereignties.' *Ibid.*, p. 330.

[7] Webster's logic was adopted by John L. Motley during the Civil War: sovereignty only resides in the people; if the traditional understanding of sovereignty demands its association with the state, there is no such concept as sovereignty in America. See John L. Motley, 'Causes of the Civil War: A Letter to the London Times' in Moore, *op. cit.*, Documents and Narratives, p. 211.

Webster's adversary, John C. Calhoun, represented particularism. He contended that the terms like union, federal, united, implied the sovereignty in the several States, not in the American people in the aggregate. He asserted that:

> the sovereignty is in the several States, and that our system is a union of twenty-four sovereign powers, under a constitutional compact, and not of a divided sovereignty between the States severally and the United States. In spite of all that has been said, I maintain that sovereignty is in its nature indivisible. It is the supreme power in a State, and we might just as well speak of half a square, or half of a triangle, as of half a sovereignty.'[8]

Both Webster and Calhoun, despite their confrontation, adopted populist tones. In addition to Webster's stress upon the American people, Calhoun's insistence is that sovereignty resides in the people of the States respectively.[9] Both of them resort to popular sovereignty; the question is whether the sovereign people exist in the nation *or* in the States. There must be somewhere a natural entity called *the people*, who alone hold sovereignty; but are they in the nation *or* in the States? Either national sovereignty *or* State sovereignty must monopolise the allegiance of the citizens. The constitutional concept of sovereignty has evidently started to decline; the notion of sovereignty is now enthusiastically confirmed as 'absolute, unqualified, unconditional and unlimited'.[10]

The fact that the issue of sovereignty was at the core of the confrontation between the North and the South is shown by the ordinances of secession by the Southern States in 1861. They declared that the seceding state was 'in the full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent

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[8] Calhoun, 'Speech on the Revenue Collection [Force] Bill', in *op. cit.*, pp. 433-434.

[9] John C. Calhoun, 'Exposition and Protest', December 19, 1828, pp. 343-344. William D. Porter defends State sovereignty 'for sovereign power is inherent, original, and self-existent', which means that the people in the State are the only sovereign. He denies the exercise of sovereignty by the federal government as well as municipal governments in the name of the popular sovereignty of the State. Porter, *State Sovereignty and the Doctrine of Coercion* (1860). John Jay asserts on the side of the North that 'the rebel government is an usurpation of the grossest kind, not only against the people of the United States in their sovereign capacity, but against the people of the States in whose name it assumes to act, and by whose will it pretends to have been established.' 'An Address delivered at mount kisco, Westchester county, New York, on the 4th of July, 1861, by John Jay' in Moore, *op. cit.*, Documents and Narratives, p. 381. See also Jay, *New Plottings in aid of the rebel doctrine of state sovereignty* (1864).

[10] Abel P. Upshur, *A Brief Enquiry into the True Nature and Character of our Federal Government* (1863), p.78.

State'.[11] South Carolina, the first secessionist State and Calhoun's native place, did not mention sovereignty in its Ordinance. Instead, it explained that the State retained sovereignty under the Constitution of the United States. 'Declaration of Causes which induced the Secession of South Carolina' appended to the Ordinance implied that there was no need for mentioning the restoration of full sovereignty because the State retained it even before the secession.[12] According to it, history proves that the sovereign people in the State is inherent and natural, compared with the artificiality of the Union.

Jefferson Davis, President of the Confederated States during the War, emphasises in his post-Civil War lengthy work that 'the only political community - the only independent corporate unit - through which the people can exercise their sovereignty, is the State.'[13] Davis supposes that all governments are in subjection to the will of the people, and that the sovereign will is expressed only in the State. Thus State sovereignty is the only possible expression of undivided and indivisible sovereignty. According to Davis, historical documents prove that the founders of the American system and men of those days, far from considering sovereignty a term of feudal origin, seem to have regarded it as a very vital principle in that system.[14] As 'the allegiance of the citizen is due to the sovereign alone', 'the people of each State alone possessed sovereignty, and consequently were entitled to the allegiance of the citizen.'[15] Davis professes that 'we dared to draw our swords to vindicate the rights and the sovereignty of the people, that we dared to resist and deny all sovereignty as inherently existing in the Government of the United States'.[16]

Davis's argument illustrates the modern logic of the 'allegiance of the citizen'. Davis contends that the citizen of the State, not of the Union, must comply with the allegiance to the people of the State, not of the Union. This might mean that a person as a citizen

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[11] The same phrases were used in the Ordinances of Secession by Georgia, Louisiana, Virginia, North Carolina and Arkansas. Other seceding States also declared themselves to be sovereign. See Moore, *op. cit.*, Documents and Narratives, pp. 20, 22, 26, 27, 70, 203, 260, 264. 'Constitution for the Provisional Government of the Confederate States of America' and 'Constitution of the Confederate States of America' of 1861 expressed each state as 'sovereign and independent'. See *Provisional and Permanent Constitutions of the Confederate States* (1861).

[12] See *ibid.*, p. 3.

[13] Davis, *The Rise and Fall of the Confederate Government* (1881), p. 141.

[14] *Ibid.*, p. 145.

[15] *Ibid.*, p. 154.

[16] *Ibid.*, p. 582.

of a State should pledge the allegiance to himself as a part of the people in the State against himself as a part of the people in the Union. Is this really possible? Only if we can identify which is the *truer* people.

The same logic is adopted by Alexander H. Stephens, Vice President of the Confederated States and 'next to Calhoun, the leading political thinker produced by the South'.[17] In a post-Civil War book in which he delved into historical details in order to prove the sovereignty of States, Stephens asserts that he and Jefferson Davis were not pro-slavery. They just identified themselves with those who maintained the federative character of the general government.[18] He explains that the subject of slavery 'was, to the Seceding States, but a drop in the ocean compared with those other considerations. . . . Hence, during the whole war, . . . I was wedded to no ideas as a basis of peace, but that of the recognition of the ultimate absolute Sovereignty of all the States as the essential basis of any permanent Union between them'.[19] The reason why he fought is the allegiance 'to Georgia in her sovereign capacity'. This allegiance is not given to the government of the State, but to 'the people of the State in a regularly - constituted Convention, embodying the real Sovereignty of the State'.[20]

Stephens's understanding of sovereignty is tantamount to allegiance, as sovereignty is the paramount authority to which allegiance is due. Thus he makes clear that 'allegiance and Sovereignty, as we have seen, are reciprocal'.[21] Stephens distinguishes allegiance from legal matters. 'Paramount authority of Sovereignty' and allegiance are different from law including the Constitution, because the former can set aside the latter; allegiance and sovereignty have priority over the Constitution. Although he was not a secessionist before the War, he duly acknowledged that 'the Sovereign will of the State, when expressed through its properly constituted organ, was for secession, or a withdrawal of the State from the Union.' Thus he 'obeyed the high and Sovereign behest

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[17] Herbert McClosky, 'State Sovereignty: Alexander H. Stephens' Defense of Particularist Federalism' (1948), p. 170.

[18] See Stephens, *A Constitutional View of the Late War between the States* (1868), p. 10.

[19] *Ibid.*, p.542.

[20] *Ibid.*, pp. 19-20. The same sentiment was expressed by Sam Houston to Texas. Houston respected the secession of Texas, though he had been opposed to it. 'Sam Houston's Speech, Texas, May 10, 1861' in Moore, *op. cit.*, Documents and Narratives, p. 267.

[21] Stephens, *op. cit.*, p.492.

of my State'.[22]

Stephens does not necessarily intend to ignore the Constitution. But he finds in the Constitution the federative character of 'a Union of Sovereign States'; it is the essence of the Constitution. According to him, there was no fundamental change between the Articles of Confederation and the Constitution, as both instituted a Government by States and for States.[23] This is a historical fact, no matter how much it could be modified theoretically. This historical fact is evident in the debates around the time of the ratification of the Constitution, and is confirmed by the resolutions in the Senate proposed by Calhoun in 1838, and by Davis in 1860.[24] In short, Stephens recognises the Constitution only as an embodiment of a union of sovereign states. In other words, sovereignty associated with allegiance is superior to the Constitution. What is most important is not the Constitution, but the sovereignty of and allegiance to the State.

Majority Sovereignty

The most prominent and influential theorist among the particularists is Calhoun. His political view on the Constitution of the United States is expressed in *A Discourse on the Constitution and Government*. He asserts that the United States is composed of free, independent and sovereign States. The federal Union is not national.[25] For instance, he argues that historical investigation shows that the preamble of the Constitution refers to the people of the several States of the Union, not in the aggregate.[26] He also repudiates the idea of divided sovereignty, because 'Sovereignty is an entire thing - to divide, is - to destroy it.'[27]

The Constitution imposes restrictions on the exercise of sovereign power which the several States voluntarily established. Yet, this does not mean that the creator - the

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[22] *Ibid.*, pp. 19-25.

[23] *Ibid.*, pp. 50-59.

[24] For instance, the resolution passed on May 24, 1860 stipulates that 'in the adoption of the Federal Constitution, the States adopting the same, acted severally as free and independent Sovereignties'. Quoted in *ibid.*, p. 409.

[25] Calhoun, 'A Discourse on the Constitution and Government', written shortly before 1850, in Calhoun, *op. cit.*, p. 83.

[26] *Ibid.*, p. 92.

[27] *Ibid.*, p.105.

people of the several States - is subordinate to the created. The Constitution binds between the States as a compact, and not on, or over them as a constitution. '[I]t is but a *compact* and not a *constitution - regarded in reference to the people of the several States, in their sovereign capacity.*' According to Calhoun, it is a constitution *for* the United States - not *over* them; and established, not *over*, but *between* the States ratifying it. But 'The case is reverse, as to the action of its citizens, regarding them in their individual capacity. To them it is a law - the supreme law within its sphere.'[28] Although the people in the States are sovereign, the citizens must obey both State sovereignty and the US Constitution.

It is worth comparing this particularistic view of the United States with his general political theory. In *A Disquisition on Government*, also written just before his death, he explains his doctrine of 'the concurrent or constitutional majority' in opposition to 'the numerical or absolute majority'. He reasons that the community is always divided into two great parties - a major and minor - between which there will be incessant struggles to retain the control of the government. Therefore, the principle of universal suffrage is not sufficient, though it is indispensable and primary, to attain constitutional governments. The principle of dividing and distributing the powers of government perfects the constitution in its strict and limited sense.[29] From these principles, Calhoun describes 'two different modes in which the sense of the community may be taken'. He says that one sense of the majority, which constitutes the majority by the right of suffrage, regards numbers only, and considers the whole community as a unit. The other, which needs a proper organism, regards interests in addition to numbers, and considers the community as made up of different and conflicting interests. The former is 'the numerical, or absolute majority'; The latter, 'the concurrent, or constitutional majority'.[30] Calhoun asserts that 'it is, indeed, the negative power which makes the constitution - and the positive which makes the government. The one is the power of acting - and the other the power of preventing or arresting action. The two, combined, make constitutional governments.'[31] Thus for Calhoun, 'the great and broad distinction

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[28] *Ibid.*, p. 195.

[29] See Calhoun, 'A Disquisition on Government', written shortly before 1850, in *ibid.*, pp. 5-23.

[30] *Ibid.*, pp. 23-24.

[31] *Ibid.*, p. 29.

of governments is - not that of the one, the few, or the many - but of the constitutional and the absolute.'[32]

Calhoun's doctrine is usually regarded as a justification of State sovereignty. However, he did not literally connect his theory to the issue of sovereignty in America. We can easily ascertain the reason. If State sovereignty is really absolute as Calhoun emphasises, it has nothing to restrain itself. But to discuss the concurrent majority in the context of the United States implies the existence of a political community above the sovereign State. Calhoun's political theory and his advocacy of State sovereignty give rise to a subtle but critical tension. If Calhoun wants to commit State sovereignty to the theory of the constitutional majority, he has to suppose that the United States is 'a proper organism'. But it is contradictory to his definition of sovereignty.

Calhoun's theory of the concurrent majority does not justify secession, let alone absolute sovereignty of the State. The 'conservative principle' of constitutional governments is compromise, while that of absolute governments is force.[33] But absolute sovereignty of the State rejects any proper organism that circumscribes it. Although the particularists repeatedly warned about the tyranny of the majority, they never warned about the tyranny of the majority in the State.[34] The nationalists sanctified the majority of the Union, but not the majority in the State. Struggles for the national theory of sovereignty were tantamount to struggles for the *true* majority.

No other examples can more clearly show the conceptual struggle appertaining to the Civil War than the comments made by two presidents of the United States. When South Carolina declared secession in December, 1860, the then president of the Union, James Buchanan, explained in a reply to the South Carolina commissioners that the president had no power to admit independence of a State. He wrote: 'it would be to invest a mere executive officer with the power of recognizing the dissolution of the Confederacy

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[32] *Ibid.*, pp. 29-30.

[33] See *ibid.*, p. 30. Calhoun distinguishes secession from nullification. See 'The Fort Hill Letter on State Interposition', Calhoun to Governor Hamilton, August 28, 1832., quoted in Johnson, *op. cit.*, p. 324-325.

[34] A convention in South Carolina addressed: 'The government of the United States is no longer a government of a confederated republic, but of a consolidated democracy.... "The right divine to rule in kings" is only transferred to their *majority*. 'Sovereignty of South Carolina / The Address of the people of South Carolina, assembled in convention, december, 1860, to the people of the slaveholding States of the United States / Dec. 29, 1860' in Moore, *op. cit.*, Documents and Narratives, pp. 396-400.

among our thirty-three sovereign States'.[35] What is remarkable is that he had also confirmed in the same month that 'the federal government embraces the very highest attributes of national sovereignty.'[36] When he faced a seceding State, he looked for a constitutional measure to solve the problem in vain, and then tried to leave the problem to Congress. He was perplexed because he had overlapping sovereignty in mind.

However, only less than a month later, the new president of the United States, Abraham Lincoln, emphasised in his inaugural address the need for the minority to acquiesce in the majority. He proclaimed:

> A majority held in restraint by constitutional check and limitation, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a majority, as a permanent arrangement, is wholly inadmissible. So that, rejecting majority principle, anarchy or despotism in some form is all that is left.[37]

To be sure, Lincoln refers to 'restraint by constitutional check and limitation'. But it is still remarkable that he ordains a majority to be 'the only true sovereign'. He demands that the minorities obey not the Constitution, but the sovereign majority. Even if Lincoln says that he does not admit the permanent rule of the majority, it does not change the fact that the sovereign national will is represented by a majority.

This assertion of the sovereignty of a majority of the 'nation' marks a turning point in American history. The traditional constitutional theory of sovereignty began to give way to national sovereignty of the American nation, into which State sovereignty was eventually absorbed.

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[35] 'The President Reply / Washington City, Dec. 30. 1860' in *ibid.*, p. 12.

[36] 'President Buchanan's message of December 3, 1860' in Johnson, *op. cit.*, p. 456.

[37] 'Inaugural of Abraham Lincoln' in Moore, *op. cit.*, Documents and Narratives, p. 38. John L. Motley also insists that sovereignty is the will of the people expressed by majority. *Ibid.*, p. 211. What is noteworthy is that when Lincoln directly repudiated sovereignty of the States, he resorted to the logic of abstract political entity. He proclaimed that 'Much is said about the "sovereignty" of the States, but the word even is not in the National Constitution, nor, as is believed, in any of the State constitutions. What is a "sovereignty" in the political sense of the term? Would it be far wrong to define it "a political community without a political superior"? Tested by this, no one of our States, except Texas, ever was a sovereignty; and it even Texas gave up the character on coming into the Union'. 'President Lincoln's Message of July 4, 1861', in Johnson, *op. cit.*, p. 470. There is a significant gap between Lincoln's two ideas of sovereignty: the sovereignty of a majority of a free people and sovereignty defined as 'a political community without a political superior'. The majority in a State is not a sovereign majority; the majority as 'the only true sovereign of a free people' exists only in the Union.

The Emergence of American Conception of National Sovereignty

It was natural that national sentiment grew out of the aftermath of the Civil War. Congress implemented coercive measures to reform the Southern States. The Presidency, symbolised by the myth of Lincoln, increased its authority and prepared for the imperial policies of later periods. The US Supreme Court also gradually politicised itself as a national organ.[38] It should be noted that as American industries realised rapid nation-wide growth, the US became one of the most powerful nations in the world. In international fields, it entered into an imperial stage towards the end of the nineteenth century. In reinterpreting the Monroe Doctrine, the US Secretary of State, Richard Olney, asserted in 1895 that 'the United States is practically sovereign on this continent'.[39] In domestic fields, further democratisation of the federal government was a necessity, as the nation came to monopolise the allegiance of the citizens. The 1913 constitutional amendment of the direct election of Senate was a result of the process of nationalisation. Until then the constitutional nature of the United States had decisively changed.[40] This was the age of growth of national sentiment in the United States.

Sovereignty of the United States

There was a transitional period after the Civil War. As the orthodoxy of traditional constitutionalism did not completely disappear, we can find the advocates of non- or anti- national sovereignty in the period after the Civil War. Thomas M. Cooley, Supreme Court judge, maintained the legal understanding of divided sovereignty. As

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[38] Judge Oliver Wendell Holmes said in 1899: 'Where there is doubt the simple tool of logic does not suffice, and even it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice.' Holmes, 'Law in Science and Science in Law' in *Collected Legal Papers* (1920), p. 239.

[39] Quoted in Dexter Perkins, *A History of the Monroe Doctrine* (1941), p. 175.

[40] Walter Neale attacked the national government. According to him, after the two historical stages, 'the American kingdoms (1578-1783)' and 'the American Republics (1783-1865)', there appeared the age of 'the American Monarchy (1865-1910)'. Neale, *The Sovereignty of the States* (1910). Frank Buffington Vrooman observes: 'The Civil War settled the question of state sovereignty. The Civil War was the ultimate amendment to the Constitution.' Vrooman, *The New Politics* (1911), p. 255.

late as 1868 he defines the notion of sovereignty as 'the supreme, absolute, uncontrollable power by which any State is governed'. 'In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects'.[41] The 'subjects' according to which sovereignty is divided should be found in the Constitution. But Cooley's position did not appear to be persuasive or attractive, since the difficulty in defining the 'subjects' had eventually resulted in the tragedy of the Civil War.

It is fair to say that the States' rights theory was not abandoned immediately after the war. P. C. Centz defends the defeated theory of State sovereignty. In order to prove that the States are sovereign in the Union, Centz emphasises the absolute notion of sovereignty. Sovereignty is indivisible; it is not qualifiable or limitable. Thus there is only one sovereignty in a political community. American history proves that it is the people. Both the federal and State governments are the delegates of the sovereign people. But where are the people? History shows that the people are in each State.[42]

O. A. Brown pronounces a compromise position. First of all, he confirms the fundamental principle of popular sovereignty by saying that 'supposing a political people or nation, the sovereignty vests in the community, . . . by the natural law, or law by which God governs the whole moral creation.'[43] Then he proceeds to the 'simple fact' 'that the political or sovereign people of the United States exists as united States, and only as united States. The Union and the States are coeval, born together, and can exist only together.'[44] He continues saying that 'while the sovereignty is and must be in the States, it is in the States united, not in the States severally, ... so the sovereignty is in the Union, not in the States severally; but there could be no sovereign union without the States, for there is no union where there is nothing united.'[45]

But what does this mean in practice? In the atmosphere after the Civil War, it was

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[41] Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, (1868), p. 2. See also Cooley, *The General Principles of Constitutional Law in the United States of America*, (1880), pp. 14, 19.

[42] Centz, *The Republic of Republics*, (1865), pp. 305-324. John C. Hurd denies that the nation holds sovereignty. See Hurd, *The Theory of our National Existence, as shown by the Action of the Government of the United States since 1861* (1881), pp. 112-115.

[43] Brown, *The American Republic* (1866), p. 133.

[44] *Ibid.*, p. 219.

[45] *Ibid.*, p. 221.

quite natural that there appeared more 'nationalist' positions. John Alexander Jameson proclaims that sovereignty resides in 'the nation, considered as a political society or body corporate.' But this is not a theory of the sovereignty of the Union. He writes: 'Back of all the States and of all *forms of government* for either the States or the Union, we are to conceive of the NATION, a political body, one and indivisible, made up of the citizens of the United States'.[46] This 'vast body, as a corporate unit' distributes powers to the Union and the several States. This is the reason why 'although the nation is the only real sovereign, the States are often called sovereign'. On account of their permissive supremacy in local State affairs, the States are but '*quasi* sovereign'.[47] For Jameson unequivocally refuses to admit the sovereignty of the constitutional convention,[48] his theory of the sovereignty of the nation does not have any single sovereign representative. Instead, he proclaims a historical necessity of an organic theory of the nation to synthesise constitutional conflicts.

John Norton Pomeroy has no hesitation in adopting the sovereignty of the nation in the field of constitutional law. In 1868 he expresses that 'There can be no nation without political sovereignty, and no political sovereignty without a nation.'[49] He defines the term, sovereign, as 'the expression of an absolute idea; it does not admit any notion of grades, of inferiority, of dependence, or of division.' Then he concludes that 'the United States fulfils all the requirements which have been mentioned as necessary to the existence of a nation; that the people thereof is an independent, separate political society with its own organization and government, possessing in itself inherent and absolute powers of legislation.' By contrast, each State is 'in a position of permanent subordination.'[50] The sovereignty of the whole nation as an organic entity was the most necessary and promising doctrine in America in the last third of the nineteenth century.

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[46] Jameson, *The Constitutional Convention* (1867), p. 54.

[47] *Ibid.*, p. 55.

[48] *Ibid.*, pp. 290-303.

[49] Pomeroy, *An Introduction to the Constitutional Law of the United States* (1868), p. 27.

[50] *Ibid.*, 30-31.

In 1868 William B. Greene in Boston wondered why several States including Massachusetts stipulated their sovereignty in their constitutions. Sovereignty is possessed by the United States; but it is possessed by the Commonwealths too. Thus he observes that 'Sovereignty, as it exists in God, is simple and indivisible; but, as it exists among men, it is multiple and separable into parts.' This means that 'Neither the United States nor the Commonwealths possess *absolute* sovereignty: no body-politic either does, ever did, or ever can possess absolute sovereignty.'[51]

Greene argues that the several States granted certain powers to the United States. The latter then *assumed* sovereignty in the strength of these powers. Sovereignty, not power, cannot be granted, but can only be *assumed.* '*Sovereignty is* (under God, who is the sole fountain of might and dominion) *original, self-derived authority to decree, to judge, and to do.* . . . Sovereignty is prevailing force, and subsists by divine (perhaps diabolical) right: it is violent, heroic, extra-human, inexplicable.'[52] The manifestation that '*Sovereignty is self-derived authority*' implies that constitutional designs are not decisive. Sovereignty is self-sufficient and not a product of a constitutional allocation of powers. Sovereignty always exists by itself; it is a real entity. This is now a more persuasive argument than the theory of divided sovereignty. As in the case of Great Britain, in America there emerged a phenomenon of the *reification* of sovereignty in the age of imperialism.[53]

In the process of this reification, 'sovereignty' surpasses any constitutional settings. Francis Lieber, the leading national theorist who came from Germany, proclaims in 1865 that 'Sovereignty is inherently an attribute of a society, or of the representing agent of society . . . sovereignty is not a sum total of many or a few fractional sovereignty, it

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[51] Greene, *The Sovereignty of the People* (1868), pp. 5-6.

[52] *Ibid.*, p. 11.

[53] For instance, Lawrence Lowell stipulates that 'the existence of any law is a question of fact.' In other words, 'the extent of sovereign power being, like the very existence of sovereignty, a pure matter of fact, depends entirely upon the extent of the obedience actually rendered.' Lowell, 'The Limits of Sovereignty', (1888). Franklin Henry Giddings provides a sociological search for the emergence of 'sovereignty', not of the idea of sovereignty, in history. See Giddings, *The Principles of Sociology* (1896), pp. 285, 314. He also formulates four types of sovereignty: personal, class, mass and general sovereignty. Giddings, 'Sovereignty and Government' (1906), p. 12.

is the attribute of an organized or organizing people.'[54] In accordance with this organic view he also insists that a 'double allegiance' is impossible. He advises on the amendments proposed for the constitution of New York that the word, sovereign, which was attributed to the State of New York, be omitted in the revised constitution.[55]

Lieber's work in 1838 was a forerunner of the philosophical justification of the nation. He contended in it: 'Man cannot exist without the state.' 'And this absolute necessity, with the power necessarily flowing from it over all outward relations, we call sovereignty. The right, obligation and power, which human society or the state has, to do all that is necessary for the existence of man in society, is the true sovereign power.' According to Lieber, 'sovereignty is a power and energy naturally and necessarily inherent in society; it only exists with society, it cannot pass from it. It is the vital principle of the state'. This he calls a theory of 'the sovereignty of society', which is 'the self-sufficient plentitude of sovereignty'.[56] This is not particularly a manifestation of the sovereignty of the American nation. But it was understood so in American history after the Civil War.

The most expressive national doctrine of sovereignty is articulated by E. Mulford. His thesis is that 'the nation is a moral person. . . . The central attribute of personality is the will. The will in its freedom is defined in no formal or empty notion; it is the self-determination of a person, and that alone is free.'[57] Thus he criticises 'the fiction of social contract'.[58] The nation is not a formal organization. 'The nation is the realization of the freedom of the people. The freedom of the people subsists in the being of the nation as a moral person. The real freedom of the nation . . . can have no ground in a

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[54] Lieber, 'Amendments Proposed for the Constitution of the United States, 1865' in *Contributions to Political Science, including Lectures on the Constitution of the United States and Other Papers, being volume II of his miscellaneous Writings* (1881), pp. 155, 157.

[55] Lieber, 'Amendments Proposed for the Constitution of New York, 1867 in *ibid.*, p. 216. The third Constitution of New York adopted in 1846 stipulates that the 'people of this State' have 'their right of sovereignty'. *The Constitution of the Several States of the Union and United States* (1852), p. 144.

[56] Lieber, *Manual of Political Ethics*, Part 1 (1838), pp. 246-247, 250-251, 269-270. It may be noted that Lieber's theory of sovereignty is not as organic as Hegel's. He clearly takes sides with 'the government of Anglican liberty' in opposition to 'the Gallican type', which means 'the unity of power' or 'the undivided sovereignty of the people' or 'the absolute rule of the majority'. Lieber, *On Civil Liberty and Self-Government* (1853), pp. 122-123, 235.

[57] Mulford, *The Nation* (1872), pp. 72-73.

[58] *Ibid.*, p. 76.

merely formal conception.'[59] Thus he proclaims that 'Political sovereignty is the assertion of the self-determinate will of the organic people, and in this there is the manifestation of its freedom.'[60] He stresses that 'The people' is not the mob with a formal organisation. 'The sovereignty is of the organic people, constituted as a nation.'[61] This is the pivotal principle of politics, for 'The sovereignty of the nation is the original power through whose self-determinate action the political order is established, and in it all the other powers subsist and from it they proceed.'[62] The law which is understood in the light of this principle is no longer formal and abstract. It is 'the will of the people in the nation, as organic and moral.'[63] That is to say, 'The nation is the domain of law; the law is of the nation, for the nation.'

Naturally, Mulford identifies the nation with the government. 'The government is of the people and it is over the people. There is no contradiction, but it is predicated in the being of the nation as a moral person. . . . It is the will of the people in its self-determination, that is its sovereignty and its freedom.'[64] He goes on to assert that 'The government is the manifestation of the sovereignty of the people. It rests on no contract. . . . . The government as the representative of the will of the people as a moral person, has its strength in the will.'[65]

Mulford distinguishes between the nation and the commonwealth. Contrary to the nation, the commonwealth is a formal organisation; it is the civil order of society, which precedes the nation. His conception of the nation and the commonwealth correspond with the state and civil society in Hegel's philosophy, and the Union and the State in America.[66] He explains: 'The commonwealth is invested with a formal sovereignty. It is not the sovereignty of the people, . . . but a formal sovereignty, limited to a certain process and to the formal exercise of certain powers for the prosecution of the process.'[67]

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[59] *Ibid.*, p. 113-114.

[60] *Ibid.*, p. 129.

[61] *Ibid.*, p. 135.

[62] *Ibid.*, p. 136.

[63] *Ibid.*, p. 137.

[64] *Ibid.*, p. 141.

[65] *Ibid.*, p. 142-143.

[66] *Ibid.*, pp. 238-239.

[67] *Ibid.*, pp. 302-303.

He proclaims: 'The real sovereignty is in the organic people, whose will is the supreme law; but it is the people of the United States, and not of each or any particular State, whose will is the supreme law.'[68]

Sovereignty as the will of the organic people is almost a perfect manifestation of national sovereignty. Not least due to the experience of the Civil War,[69] Mulford develops a complete theory of national sovereignty for the American nation. Mulford's conception of nation is a real being and a synthesis of content and form. Mulford's argument represents the degree to which the philosophical foundation of national sovereignty has taken root in America.

Scientific Justification of Sovereignty

Another feature of discourses on sovereignty at the end of the nineteenth century is 'scientific' justification of the absolute notion of national sovereignty. With the emergence of a new science called political science, the concept of sovereignty obtained the sanction of some prominent 'political scientists' in the last decade of the nineteenth century.

What is characteristic is that the justification of American national sovereignty was conducted in the name of popular sovereignty. We can easily ascertain the reason for it. The nineteenth century was ending with the rise of popular and national movements. It was not the time for the Americans to simply hold to the principle of checks and balances, and non-interference. Why should the Americans not be proud of their leading role in world history as the most successful state of popular sovereignty?

For instance, John A Jameson found that the age of national sovereignty, the nineteenth century, was the American age. He claims that 'the sovereignty of the people, in the American sense, is a *fact*; that it is not a *law* or a *right*'.[70] And the fact is that 'the sovereignty of the people' means nothing other than 'national sovereignty'. The issue for

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[68] *Ibid.*, p. 312.

[69] Mulford accuses formal theorists of regarding 'the battle for the nation and its unity and authority, at least with indifference, and as void of moral content, until it should become an immediate war against slavery'. *Ibid.*, p. 134.

[70] Jameson, 'National Sovereignty' (1890), p. 198.

Jameson is not divided sovereignty or any other constitutional devices. According to him, the enemy of the Americans is not national or state sovereignty, but 'feudal' sovereignty in Europe. Jameson proves that only the 'nation, *i.e.* the people of the United States, acting either *in solido*, or in groups by states' is the sovereign in the United States.[71] While the individuals who compose the nation are amenable to their authorities, 'as an organized political community, free and independent' they are the sovereign.[72]

According to him, 'that the nation, the people, is superior in strength and in endurance to any part of itself, is, I take it, both a mathematical and a sociological truth.' He asks, if it is not the case, how it can be explained that the great amount of voluntary efforts of the people were offered in the Civil War.[73] He thus concludes that 'no theory of sovereignty but that of the people as a whole is in harmony with the facts of American political life.' The American theory has worked well. It promises to work equally well in the future. He asserts that 'if for any reason it be thought to be less scientific or less consistent with abstract political theory than that of Austin, so much the worse for abstract political theory. It is the American doctrine of sovereignty, and not the European.'[74]

Jameson follows Webster's doctrine expressed more than half a century later. But no one challenges the validity of this statement after the Civil War. It has become an established fact. The sovereignty of the American people, the national sovereignty of the United States, is a fact. This truth should be shown to Europe where people are still searching for the true sovereign.

John W. Burgess, an eminent political scientist who studied in Germany, explains the importance of the role of American scholars for the study of sovereignty. He begins by defining the state as 'a particular portion of mankind viewed as an organized unit'.[75] The

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[71] *Ibid.*, p. 202.

[72] *Ibid.*, p. 203.

[73] *Ibid.*, pp. 209-210.

[74] *Ibid.*, p. 213. According to Frank S. Hoffman, sovereignty as the essential attribute of a state is 'in the people in their organic capacity as a State, and not in the government.' See Hoffman, *The Sphere of the State or the People as a Body-Politic* (1909), p. 4.

[75] Burgess, *Political Science and Comparative Constitutional Law*, vol. I (1896), p. 51. It is worth noting this 'concept' of the state may be the stages in the realization of the 'idea' of the state defined as 'mankind viewed as an organized unit'. *Ibid.*, pp. 49-50.

state so defined is all-comprehensive, exclusive, permanent and sovereign. By sovereignty he means 'original, absolute, unlimited, universal power over the individual subject and over all associations of subjects'. This principle reveals the dual character of sovereignty; it is on the one hand inimical to individual liberty and individual rights, but on the other hand it is their only solid foundation and guarantee. These prove that the principle of sovereignty cannot be logically and practically avoided.[76]

If limited, Burgess contemplates, it is not sovereignty. It is conceivable 'that a state may outgrow its form of organization, so that the old organization no longer contains the real sovereignty'. So when a sovereign seems to be limited, we must look for the real sovereign. The 'real sovereignty' resists triumphantly the 'apparent sovereign', for 'the state must always hold its form to accord with its substance'.[77] The state is the sovereign; or Burgess seems to say that what is sovereign is the state. He ordains: 'The state must have the power to compel the subject against his will: otherwise it is no state; it is only an anarchic society. Now the power to compel obedience and to punish for disobedience is, or originates in, sovereignty.'[78]

Not paradoxically, the sovereign state is the source and support of individual liberty. The reason lies in the realisation of the 'modern national popular state'. It 'is the most perfectly and undisputedly sovereign organization of the state which the world has yet attained. It exempts no class or person from its law, and no matter from its jurisdiction. It sets exact limits to the sphere in which it permits the individual to act freely.'[79] Burgess systematises what European political theorists have found inconsistent; the people are the sovereign and at the same time subjects. At the end of the nineteenth century the American political scientist is proud of postulating that it is the highest development of the state. It is no wonder that Burgess is willing to assert that 'the more completely and really sovereign the state is, the truer and securer is the liberty of the individual.'[80]

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[76] *Ibid.*, p. 52-53.

[77] *Ibid.*, p. 53.

[78] *Ibid.*, pp. 55.

[79] *Ibid.*, pp. 55-56.

[80] *Ibid.*, p. 56. James Wilford Garner supports this view and says that with the introduction of constitutionalism 'it became an easy matter to reconcile the doctrine of an unlimited sovereignty with that of a limited government.' Garner also emphasises that there is a division by the sovereignty itself of governmental

Burgess goes so far as to say that 'the state can do no wrong'.[81] But his account is not the Continental philosophical affirmation of the organic state. Instead, he emphasises the importance of the distinction of the state and the government. As the sovereign is the state, not the government, there is no danger of an unlimited power of the state. Burgess asserts that while Europeans, especially Germans feel it difficult to distinguish between them, 'In America we have a great advantage in regard to this subject. With us the government is not the sovereign organization of the state. Back of the government lies the constitution; and back of the constitution the original sovereign state, which ordains the constitution both of government and of liberty'. Now the American political scientist is able to say that 'The national popular state alone furnishes the objective reality upon which political science can rest in the construction of a truly scientific political system'.[82]

It is no less true to say with Burgess that 'the national popular state' arose most clearly in America. However, this does not mean that German theorists did not recognise national sovereignty. Rather, it is German theorists who developed the organic theory of the state throughout the nineteenth century. The significant fact is that 'the national popular state' was not an ideal of the Federalists. The Constitution was proposed by those who feared the tyranny of the people. This suggests that the history of the United States was being modified in the direction of national sovereignty after the Civil War.

In the field of legal science absolute state sovereignty was strongly glorified by W. W. Willoughby, authoritative juristic and political philosopher. He reinforces the theory of state sovereignty, taking advantage of the distinction between the state and the government. The state includes three elements; 'a community of people socially united', 'a body of rules or maxims determining the scope of public authority and its exercise' and the government. The government is 'a political machinery'. For instance, the government is not allowed to enter the domain of individual liberty. From the power

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powers, but 'no division of the will itself'. Garner, *Introduction to Political Science* (1910), pp. 257, 262.

[81] Burgess, *op. cit.*, p. 57.

[82] *Ibid.*, p. 58. See also Burgess, *The Foundation of Political Science* (1933), pp. 56-61. John C. Gray distinguishes between the two forms of political organisation; one of them gives all political power to one man and the other to a body of men organized in a particular way. In the former which is the typical Austinian state, there is a sovereign and subjects. In the latter, a commonwealth and citizens. It is the latter which spread in the modern period, although the former remains in the countries of Europe. Gray, *The Nature and Sources of the Law*, (1909), pp. 74-75.

of the state, however, it cannot be shielded. Sovereignty is 'the vital principle in the life of the State'. The government is an organ of the state and possesses sovereignty together with other organs. It is merely given sovereignty for its exercise.[83]

Willoughby goes on to say that sovereignty 'belongs to the State as a person, and represents the supremacy of its will.' He also maintains that sovereignty 'is the very possession of this sovereign will that gives personality to a politically organized community. Sovereignty, as thus expressing a supreme will, is necessarily a unity and indivisible, - unity being a necessary predicate of a supreme will.'[84] Neither international nor constitutional law can limit state sovereignty. International law is not law in the strict sense, for it is a mere product of the will of the sovereign states. As regards domestic law, Willoughby notes that 'All law is a formal limitation of Sovereignty.'[85] It is merely formal, as any law can be changed at the mercy of the sovereign will. Constitutional law is, as it can also be amended, not different from any other laws. He explains: 'The state is not and cannot be itself controlled (except formally) by constitutional law. Somewhere within its power must lie the legal competence to express a will that is sovereign and therefore without limitation.'[86]

Willoughby propounds a categorical distinction between law and fact. But he does not formulate legal and political sovereignty like British theorists. Instead, he demands that sovereignty be an omnipotent substance in the sphere of fact. He says: 'Sovereignty, upon which all legality depends, is itself a question of fact, and not of law.'[87] Any legal issues do not affect sovereignty 'except formally', for sovereignty is a resident of a different world. Sovereignty, the 'very life and personality' of the state, is no more able to be transferred 'than a man has the power to transfer *his* life or personality.'[88]

Willoughby's theory of sovereignty changes the nature of the traditional question of the location of sovereignty. He does not see the necessity to ask whether sovereignty is located in a definite individual or body of individuals, or in the entire people, as the

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[83] Westel Woodbury Willoughby, *An Examination of the Nature of the State* (1896), pp. 4, 183, 185, 204-206.

[84] *Ibid.*, p. 195.

[85] *Ibid.*, p. 209.

[86] *Ibid.*, p. 219.

[87] *Ibid.*, p. 217.

[88] *Ibid.*, p. 221.

answer is, 'Sovereignty is a necessary ingredient of the State'.[89] Sovereignty does not reside in the ruler or in the ruled or even in the nation. It resides in the state. He thus concludes that 'all organs through which are expressed the volitions of the State, be they parliaments, courts, constitutional assemblies, or electorates, are to be considered as exercising sovereign power, and as constituting in the aggregate the depository in which the State's Sovereignty is located.'[90]

Willoughby's theory of sovereignty contains some of the main characteristics of the modern theory of national sovereignty. While it is not a philosophical argument of sovereignty, it presupposes the substantial existence of sovereignty. Like German jurists Willoughby also constructs a perfect world of reified abstract forms. This theory of the reification of abstract forms does not lead to constitutional sovereignty. The concept of sovereignty conceptualised as a perfect and self-sufficient substance is not deduced from the actual world; instead, the actual world is deduced from the concept of sovereignty.

It is no wonder that Willoughby and Burgess are not able to admit constitutional theories like divided sovereignty. It is natural for them to ordain that 'In a Federal State a true central State is created, the several units are legally and constitutionally united - the power of ultimately determining its own legal competence - resides in the federal body. . . . its foundation rests in itself. It is created by the people as a whole, and the so-called individual States, or, as we prefer to term them, "Commonwealths," are creations of its will.'

There is only one state called the United States. That the Commonwealths are conventionally called States is misleading. Otherwise, the United States becomes a confederacy of several states. This conclusion is not derived from the observation of actual political events, but from the definition of sovereignty. The scientifically justified and substantiated notion of sovereignty reigns in the world of 'fact' in absolute terms.

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[89] *Ibid.*, p. 285.

[90] *Ibid.*, p. 307.

Discourses on Sovereignty in International Law in America

Unlike British international lawyers who were sceptical of the principles of international law, American counterparts had historical reasons to take them at face value. Above all, one of the major principle of international law, the equality of states regardless of their size and power, was one of the major principles of the US Constitution too. Before the Civil War in particular, the boundaries between constitutional and international laws were blurred, for the issue of the 'composite state' composed of several states was a problem discussed in both disciplines. To explain that the United States was an international actor, while the German confederacy (until 1871) was not, was a critical point. Moreover, the Concert of Europe, quasi-government of great powers, was foreign to American international lawyers who were rather obliged to explain the legal nature of the Monroe Doctrine and adhere to the principle of the equality of states. As a result, when classical constitutional theories disappeared, international law remained an arena for classical constitutionalism. We shall observe in this section that the changes in constitutionalism in the domestic field after the Civil War did not obstruct, but rather prepared for the emergence of international constitutionalism in the period after the First World War.

Traditional International Law

According to Henry Wheaton, an authority among nineteenth century international lawyers, 'The law of nations, or international law, as understood among civilized, christian nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.'[91] In America there was no gap between nations and states in international law. This marks the constitutional feature of American international law

[91] Wheaton, *Elements of International Law*, vol. 1 (1836), p. 54.

based on the anthropomorphism of nations. On these conditions the subjects of international law, the sovereign states, are defined by Wheaton in Vattel's terms as 'separate political societies of men living independently of each other'. He admits that some states are 'completely sovereign, and independent', while 'the sovereignty of other states is limited and qualified in various degrees.' Nevertheless, he asserts: 'All independent states are equal in the eye of international law, whatever may be their relative power.'[92]

It was quite common in the nineteenth century to classify states into some categories like 'tributary and vassal states', 'personal and real unions under the same sovereign', 'incorporate union', 'confederate states' and 'composite states', etc.[93] The political communities called states had such great differences that it was natural for international lawyers to limit the number of genuine sovereign states. Sovereignty was the privilege of a few Christian and civilized states. But what was characteristic in America was that this inequality did not discourage American international lawyers from emphasising the principle of the equality of states.

Of course, the principle of the equality of states had to be modified in accordance with certain laws among states. Theodore D. Woolsey points out three attributes of the conception of states: sovereignty, independence and equality. Sovereignty, which may include them all, is defined as 'the uncontrolled exclusive exercise of the powers of the state'. Independence is 'the negative side of sovereignty'. 'States which are truly sovereign are necessarily equal in rights'.[94] A sovereign state is always independent and equal as regards its rights. But not all states are completely independent and equal; only sovereign states are fully independent and equal. For instance, the states composing a confederation imply 'a surrender of sovereignty and independence in some degree'. Similarly, 'A state which is under the protection of another may be sovereign in some

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[92] *Ibid.*, p. 62.

[93] As late as the year of the treaty of Versailles the Department of State of the United States issued a confidential pamphlet written by W. W. Willoughby and C. G. Fenwick on the various types 'of restricted sovereignty and of colonial autonomy'. According to it, states are classified as 'sovereign and semi-sovereign states', 'protected independent states', 'guaranteed states'. 'neutralized states' and 'protected dependent states' including 'colonial protectorates' and 'spheres of influence'. Non-state categories are 'administered provinces', 'autonomous colonies and dependencies' and 'members of federal union and of confederacy'. Willoughby and Fenwick, *Types of Restricted Sovereignty and of Colonial Autonomy* (1919).

[94] Woolsey, *Introduction to the Study of International Law* (1860), pp. 82-83.

respects, but not absolutely sovereign'.[95]

Yet H. W. Halleck insists that the mere fact of dependence does not prevent a state from being regarded as a separate and distinct sovereignty. He admits that 'many European sovereign states do not exercise the right of self-government entirely independent of other states, but have their sovereignty limited and qualified in various degrees'.[96] Nevertheless, Halleck asserts that 'all sovereign states, without respect to their relative power, are, in the eye of international law, equal'.[97] George G. Wilson and George F. Tucker also emphasise that the state as 'a sovereign political unity' must possess sovereignty which is defined as 'supreme political power beyond and above which there is no political power'. According to them, it is not inconsistent with sovereignty that a state should voluntarily take upon itself obligations to other states.[98] Whether limited or not, all the sovereign states are equal as regards their rights and duties. For American jurists 'it is also a cardinal and axiomatic principle of international law that all states are equal, - absolutely equal, unquestionably equal . . . This applies as well to Hawaii as to Russia; to the smallest state as well as to the greatest.'[99]

William Ladd, president of the American Peace Society, illustrates the American model of international constitutionalism.[100] Ladd at once aimed for an international congress and the independence and equality of nations. He proposed a Congress of such nations as actually constituted and retaining equal votes.[101] Ladd's article was based on the analogy between men and nations and mutual consent of equal nations.[102] He writes:

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[95] *Ibid.*, p. 84.

[96] Halleck, *International Law* (1861), p. 65.

[97] *Ibid.*, pp. 97-98.

[98] Wilson and Tucker, *International Law* (1901), p. 45.

[99] Cushman K. Davis, *A Treatise on International Law including American Diplomacy* (1901), pp. 45-46. George B. Davis writes: 'a state possesses a certain number of sovereign rights and powers. These rights are possessed in precisely the same number and to the same degree by every sovereign state.' Davis, *The Elements of International Law* (1908), pp. 35-36. According to Charles H. Stockton, 'Legally all sovereign states within the purview of international law are equal, that is, equal in their rights and in their obligations, equal in their sovereignty and in their independence.' Stockton, *Outlines of International Law* (1914), pp. 62-63.

[100] By 'the American model' I mean a type of international constitutionalism which is mainly derived from the ideas of the US Constitution.

[101] James Brown Scott, 'Introduction' in William Ladd, *An Essay on a Congress of Nations* (1916), p. xxxviii. See also Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (1989), pp. 49-54.

[102] Ladd, *Essay on a Congress of Nations* (1840), pp. 8-10. Ladd's article is composed of 'all the matter worth preserving' taken from the rejected essays which were written for a competition organized by the American Peace Society. Ladd's originality is the division of the subject into two distinct parts, an international congress and a court of nations.

'The ascending scale of justice, from the mayor's or justice's courts, to the inferior and the superior courts, and finally to the Supreme Court of the United States' will be completed by 'a court which shall settle disputes between sovereign and independent nations'. The international court will function 'in the same manner as the Supreme Court of the United States which has settled many cases of disputes between several sovereign and independent States of North America'.[103] Ladd extended a gradation of sovereignty in the US constitutional system to the international field. This flexible conception of sovereignty is a classical manifestation of the American model of international constitutionalism.

Post Civil War International Law

The application of the US constitutional system to international society remained valid after the Civil War, while the premises of classical constitutionalism within the US became obsolete. As a result, it came to be emphasised that there were two kinds of sovereignty: internal and external.[104] Interactions of 'sovereign' states were now exclusively concerned with 'external sovereignty' in international law. The problem, whether sovereignty is divisible, limitable, and supreme or not, was understood with the help of the demarcation of 'internal' and 'international' laws. For instance, Robert T. Crane insists that the concept of sovereignty in constitutional law is supreme will which is indivisible, while sovereignty in international law is supreme power which is divisible.[105] According to Amos S. Hershey, 'On its external side, sovereignty may be limited in various ways'.[106] Edwin Maxely adds that the supreme power of a state viewed from the inside is sovereignty, while viewed from outside it is independence. The former is possessed by *de facto* as well as by *de jure* states, the latter only by *de jure* states. 'The former is a question of constitutional law, while the latter is a question of

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[103] *Ibid.*, p. 112.

[104] Hannis Taylor thinks that 'an internal sovereignty' is 'inherent in the people as a whole, whose exercise is vested in its rulers by virtue of its constitutional law', while 'an external sovereignty' is 'consisting of its right as an independent political community to deal with all others of its class upon equal terms under the rules of international law'. Taylor, *A Treatise on International Public Law* (1901), pp. 184-185.

[105] See Crane, *The State in Constitutional and International Law* (1907).

[106] Hershey, *The Essentials of International Public Law* (1912), p. 100.

international law'.[107]

The classical constitutional theories have become outmoded in American constitutional law. Accordingly, they began to be regarded as a topic of international law. As we shall see later, therefore, when the establishment of the League of Nations is discussed, the history of the United States is understood as a precedent of the federation of sovereign states.[108]

American traditions of constitutionalism changed its nature in the post-Civil War period. Domestically, the theory of national sovereignty overwhelmed the classical theory of divided sovereignty. Internationally, this process coincided with the rise of nationalism and the advent of the age of imperialism in international relations, with the United States emerging as one of the major imperial powers. Yet national sovereignty did not dominate all areas of political discourses and practice. In the domain of international law, the premises of classical constitutionalism remained. This aspect of American constitutionalism would lead to future plans for a federation of national states, reinforced by the hostility of Anglo-American liberalism towards German political thought.

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[107] Maxley, *International Law with Illustrative Cases* (1906), p. 85.

[108] See Scott, 'Preface' in *James Madison's Notes of Debates in the Federal Convention of 1787 and their Relation to a More Perfect Society of Nations* (1918); 'Preface' in *The United States of America: A Study in International Organization* (1920), p. x. Thomas W. Balch recognises the Supreme Court of the United States of America as a precedent of 'a Supreme Court of the World'. Balch, *A World Court in the Light of the United States Supreme Court* (1918), p. 6. In Britain H. G. Wells repeatedly reminds readers of the fact that 'thirteen various and very jealous states worked out the problem of a Union' and became the United States of America. See Wells, *In the Fourth Year* (1918), pp. 4-6.

Chapter 5 The Rise of International Constitutionalism

After the Vienna Conference in 1814-15 the growth of international activities demanded the establishment of a system of international law. Accordingly, there appeared two ways of understanding sovereignty in the international environment. If the nation-state is really supreme on earth, international law is nothing but the collection of agreements of the states; it has no legal effect. However, if the states are understood on the analogy of domestic society, there can be constitutional rules, just as the sovereign king or people are restricted as well as guaranteed by constitutions. The former may be termed absolute national sovereignty, and the latter international constitutional sovereignty.

At the beginning of the twentieth century many jurists expected a new era for international cooperation, which would encourage practitioners to build up a constitutional framework of international society. The belief in international constitutionalism was reinforced by the Hague Conferences of 1899 and 1907. The influence of German philosophy became less explicit as the Anglo-German confrontation proceeded. The US and British governments wanted to play major roles in 'the family of nations' and needed an international order which would encourage liberal economic system. The overwhelming power of the United States and Great Britain together with France after the First World War seemed to promise a great opportunity to establish a new system for the management of international society. All the more because the First World War was a serious blow to optimism regarding conventional international order, Anglo-American intellectuals pursued international constitutionalism as a missionary task to be achieved in the post-Great War era. This chapter deals with theories of sovereignty in the development of international constitutionalism around the time of the establishment of the League of Nations.

Sovereignty in the Anglo-American Debate on the League of Nations

When the First World War was over, it was obvious to many that the construction of a new international order would predominantly be in the hands of 'English speaking countries', the United States and Great Britain. The core intention of the project of the League of Nations was to establish an international constitution in the form of an international organization. It was quite significant in this sense that President Woodrow Wilson's original draft of the Covenant of the League of Nations expressed itself as 'the constitution'. The wording was deleted at the final stage of the drafting in order not to give the impression that the League was a super-state. However, it was quite common among publicists before and after the establishment of the League to discuss its 'constitution'. And this 'constitution' is evidently coloured by the tradition of Anglo-American constitutionalism.

Before examining the notion of sovereignty in the debate on the League of Nations in Britain and America, it is important to see that the main idea of the League originated from Anglo-American sources which are contrasted with the Continental tradition. American and British commentators were conscious or even proud of the exaggerated difference of their ideas from the German and French types of sovereignty. First of all, the image of the German tradition was militaristic and autocratic in comparison with the liberal and democratic Entente. William H. Taft, the former president of the United States who later became the president of an American association for the establishment of the League of Nations, the League to Enforce Peace, represents the typical view on German sovereignty in America. He writes:

> what is sovereignty? Well, I can give you the German view and I can give you the American view. The German view is that sovereignty is the power to overcome the sovereignty of other nations by force. That is all. What is the American idea of sovereignty? It is a sovereignty regulated by international law and international morality and international decency and international neighborly feeling. Do we wish any sovereignty greater than that? Sovereignty is analogous to the liberty of the individual. The latter is liberty regulated by law which protects that liberty: and

sovereignty is the same thing applied to nations.[1]

This crude image of German national sovereignty in contrast with American constitutional sovereignty was very common after the Great War among Anglo-American publicists.[2]

France's position is a mixed one. It is a major country on the side of the democratic Entente. But at the same time it is an alien from the Anglo-American point of view. In the drafting of the Covenant, the French view was in most cases overwhelmed by the Anglo-American. Alfred Zimmern, considering the drafting process, makes clear that the tendency of French internationalism is a construction of the world-community. That is the tradition of Saint-Simmon and Napoleon, which shares the theoretical characteristics of Bodin and Rousseau. If national sovereignty reveals serious problems, it must be denied and higher sovereignty must be established. This is a logical enlargement of national sovereignty. Either the national state or the world community possesses sovereignty. By contrast, Zimmern stresses, no matter how much Wilson looked a populist, he never entertained an idea of world government. Zimmern describes the conflict between the two views as the 'clash between World-Sovereignty and American Sovereignty, between a Rousseau enlarged by the experience of the World War and a Jefferson who had accepted, however reluctantly, the complete Union

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[1] Taft, 'Address at San Francisco, Feb. 19, 1919' quoted in Theodore Marburg (ed.), *Taft Papers on League of Nations*, (1920), p. 148.

[2] Theodore Marburg expresses the same view. He says: 'Sovereignty is shown to be just so much liberty of action on the part of States as is consistent with their obligation, under international law and morality, to permit of the exercise of equal sovereignty of liberty of action by their sister States. . . . and he who wants more is really seeking the license selfishly to disregard these obligations - to reject, for example, the just judgements of a properly constituted tribunal - which is the German conception of sovereignty.' Marburg, 'Introduction' in *ibid.*, p. vii. The former Secretary of State, Senator Elihu Root also says that 'The change involves a limitation of sovereignty, making every sovereign state subject to the superior right of a community of sovereign states to have peace preserved. The acceptance of any such principle would be fatal to the whole Prussian theory of the state and of government.' Quoted in Alfred Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (1939), p. 232. Dwight W. Morrow also explains: 'For three hundred years the world has been trying to get a rational understanding of State-sovereignty. If that phrase means that each State in its external relations has the *right* to do whatever it has the *power* to do, it is to be hoped that the defeat of Germany has marked the end of the doctrine.' Morrow, *The Society of Free States* (1919), p. 184. In Britain, Horace Samuel Seal, who discussed 'perfect' and 'imperfect' sovereignty in the age of imperialism, now explains two meanings of the state according to the difference between German and Anglo-American traditions. 'Teuton publicists' confuse the instrument of government with the people, the real sovereign. Seal then loftily proclaims; 'The British conventional idea is that the location of Sovereignty is in the people, and the Government - the so-called State - is their servant or governing instrument'. Seal, *The State* (1921), p. 3.

of the United States'.[3] American international constitutionalism neither repudiates state sovereignty nor establishes world sovereignty. It aims to *restrict* state sovereignty in an international constitution. In short, it is an expression of the tradition of constitutional sovereignty.

Sovereignty in the League Debate in Britain

In Great Britain as well as the United States, the League is not treated as a super-state. Sovereignty remains in the hands of states, though it is certainly restricted.[4] But there is a difference in the argument in Britain and that in America. Zimmern stresses that behind British thinkers there is age long Custom, the venerable Common Law, and the experience of the Concert of Europe; they are apt to be gradualists. There are the Declaration of Independence, the United States Constitution and the Monroe Doctrine behind American theorists; they are eager to establish institutions to realise ideals.[5]

The analogy between the League and the United States is nonsense for an authoritative British international lawyer, T. J. Lawrence. Americans forget the fact that the settlers in the thirteen colonies on the Eastern side of the American Continent 'were generally of British parentage'. The states in the League of Nations by no means have such a condition. It must be said that 'the United States of the World are, and must remain, the baseless fabric of a dream.'[6] On this line Oppenheim objects to a draft for the League by an American activist, Theodore Marburg, for it proposes 'a state-like

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[3] For example, see Zimmern, *op. cit.*, pp. 253-254. See plans for the establishment of a super-state composed by some French thinkers, Lepert and Otlet, in John H. Latané (ed.), *Development of the League of Nations Idea*, vol. II, pp. 767-768. However, the president of the French 'Association for a Society of Nations', Léon Bourgeois is more practical. He is an advocate of the Anglo-American type restricted sovereignty. An interesting difference between the English-speaking countries and France is illustrated by the fact that 'the League of Nations' in English is *Société des Nations* in French.

[4] Viscount Bryce writes: 'We propose, then, that existing States, retaining their sovereignty, should enter into a treaty arrangement with a view to the preservation of peace.' Bryce, *Proposals for the Prevention of Future Wars* (1917), p. 13. A proposal for the amendment of the Covenant of the League by the British delegation at the Paris Peace Conference reads as follows; 'Nothing in this Covenant shall be deemed to limit the sovereignty of the States members of the League or their right to decide their own domestic policy, except as herein expressly stated.' Lord Cecil of the British delegation said that 'only when sovereignty is *expressly* limited, is it limited.' David Hunter Miller, *The Drafting of the Covenant* (1928), vol. I, pp. 332, 306.

[5] Zimmern, *op. cit.*, p. 233.

[6] T. J. Lawrence, *Lectures on the League of Nations* (1919), pp. 27-28.

Constitution of the League'.[7] The difference between British and American attitudes towards the League stemmed from the difference between British and American constitutionalism.

Gradualist Sovereignty

The general attitude of British theorists towards the issue of sovereignty is very cynical. Oppenheim maintains the position that there has been no general agreement upon the contents of sovereignty. The definition of the word is always crucial. On the one hand, 'If sovereignty were absolutely unfettered liberty of action, a loss of sovereignty would certainly be involved by membership of the League'. On the other, it is possible to argue that 'in fact sovereignty does not mean absolutely boundless liberty of action'.[8] Then he expresses as 'my opinion' that the independence of a state is little infringed by an agreement to submit all its judicial disputes to the judgement of a Court. Furthermore, it would by no means be a serious problem if the entrance of a state into the new League of Nations did involve an infringement of its sovereignty and independence. Oppenheim proclaims: 'The Prussian conception of the State as an end in itself and of the authority of the State as something above everything else and divine - a conception which found support in the philosophy of Hegel and his followers - is adverse to the ideal of democracy and constitutional government.'[9]

It is noteworthy that Oppenheim is a self-conscious gradualist. When he contemplates 'a constitution' of international community inferred from the experience of the Hague Peace Conferences, he maintains that 'such a constitution can in no way infringe on the full sovereignty of individual states.' Sovereignty has no rigid meaning. Times and circumstances have influenced and shaped it in different ways. This development of the idea 'may go further still in the future.'[10]

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[7] 'Notes by Professor L. Oppenheim on the Tentative Plan for the Organization of the League to Enforce Peace as Submitted by Mr. Theodore Marburg (Referred to in Oppenheim letter of Nov. 29, 1917)' in Latané, *op. cit.*, pp. 804-805.

[8] L. Oppenheim, *The League of Nations and its Problems* (1919), p. 75-76.

[9] *Ibid.*, p. 78.

[10] Oppenheim, *The Future of International Law* (1921), p. 20. Geoffrey Butler also expresses his expectation of the future development of the League. '[I]n so far as the League of Nations supplies a mechanism for the preservation of those rights [of humanity] and values, the conception of sovereignty, with its necessary

A method taken by another famous international lawyer to justify sovereignty in the League of Nations is the distinction between 'limitation' and 'surrender'. T. J. Lawrence admits that the League of Nations is said to *derogate* from the independence and sovereignty of the states which compose it. Undoubtedly, a limitation is imposed upon the right of the states to resort to war. 'But would this limitation of its activities amount to a surrender of sovereignty? Assuredly not, seeing that the restriction is the result of a pact freely entered into in pursuance of its own right of self-limitation.' If it were a surrender of sovereignty, it would lead to the conclusion that there does not exist in the whole world a single state which is sovereign and independent. But that is 'palpable absurdity'. In the first place, 'To deny independence and sovereignty to Great Britain, the United States, Italy, and the other leading powers of the civilized world would be an act of supreme folly.'[11] It must be argued, therefore, that in the establishment of the League the states agree on 'self-limitation', not on a 'surrender' of sovereignty.

This remark on the inseparability of sovereignty from the several powers is important. It suggests that when the League was being justified, theorists like Lawrence resorted to the nature of great powers as sovereign states. Sovereignty is always supposed to be inherent in them. If their nature changes, it is not because they become non-sovereign states; this cannot happen. It is because the sovereign states modify the meaning of sovereignty. Lawrence represents a peculiarity of British constitutionalism. He modifies the notion of sovereignty in accordance with the *inequality* of nations. In relation to other small states, the several great powers must be said to be sovereign. Lawrence does not merely limit state sovereignty; he takes for granted the supremacy of the sovereignty of the several great powers. He maintains sovereignty; however, he *derogates* from the concept. This is a subtle but certain symptom of the demise of the *reification* of sovereignty.[12]

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implication of moral authority, can for the first time be applied to external affairs in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation.' Butler, 'Sovereignty and the League of Nations' (1920), p. 41. Gradualism also demands manipulation at the first stage of the League. Henry N. Brailsford argues that because 'Anglo-American' sovereignty may not fully be understood by other states in the League, 'we' must say in plain words in what particulars the court limits sovereignty. Brailsford, *A League of Nations* (1917), pp. 309-310.

[11] Lawrence, *Lectures on The League of Nations*, p. 22-24.

[12] The same symptom can be found in other publicists. J. G. S. MacNeil writes: 'The League of Nations involves, in the words of Lord Curzon, "a restriction, almost a derogation, of the sovereignty of sovereign States." . . . The argument, which is irrefragable, that the League of Nations would impair the sovereignty of its

The Derogation from Sovereignty

Lawrence remains in the mainstream of international law when he distinguishes between a limitation and a surrender. But the connotation of the *derogation* from sovereignty could go further. W. T. S. Stallybrass, a fellow at Oxford, asserts that under a League of Nations '[t]he derogation from sovereignty is therefore general.' A state has no choice whether it shall or shall not submit a particular question for judicial decision so long as it remains a member of the League.[13] According to him, in the name of these mystic words - sovereignty, independence and equality - much false doctrine has been advanced. He observes that the use of these words is expiring. 'The doctrine of the absolute sovereignty and independence of States . . . no longer serves a useful purpose, for it is not in conformity with fact'.[14] Although the League of Nations involves a rupture with the orthodox theory of sovereignty, it is not a great departure from the practice.

It is the Germans who have deviated from the fact and developed too logical theories of sovereignty. The Germans infer from the presupposition of absolute sovereignty that the preservation of its sovereignty entire and its aggrandisement at the expense of other states are its chief end. Stallybrass adds that 'All nations, however, are not so clear-headed or so logical as the German.' The British can easily say that 'law must be in conformity with fact . . . States are not in fact equal in every respect. It is scarcely more true that States are sovereign or independent in an absolute sense.' The facts in history tell the British that 'It is clear, then, that independence no less than sovereignty does not bear quite its face-meaning for the international lawyer.' The rights of equality are 'for

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members must be accepted subject to the understanding that sovereignty or independence in its very widest sense is not boundless liberty of a State to do what it likes without any restriction whatever.' MacNeil, 'Is a League of Nations Illusory?' (1918), p. 302. A typical intellectual assertion is 'that the legal, political, and diplomatic theories of the independence and sovereignty of States are illogical and the result of confused and timid thinking, and that the passion, directed and controlled only by false theory, is destructive of the best things in society which mankind has so slowly and so laboriously acquired.' L. S. Woolf, *International Government* (1916), p. 219. As regards Woolf's conception of sovereignty and interdependence, see Peter Wilson, 'Leonard Woolf and International Government' in David Long and Peter Wilson (eds.), *Thinkers of the Twenty Year's Crisis* (1995), p. 139.

[13] Stallybrass, *A Society of States or Sovereignty, Independence, and Equality in a League of Nations* (1918), 79.

[14] *Ibid.*, p. 16.

the most part illusory', or at most 'the rights of sovereignty, independence, and equality, were moral rights, not legal rights'. While 'To the Germans it is impossible to conceive that there should be a judge of a sovereign State not of its own choosing', 'English common sense . . . has determined that the rule of law is consistent with the retention by the State of its sovereign powers.'[15]

He observes and predicts the divisibility of sovereignty. 'The weight of modern authority is that internal legal sovereignty is divisible. . . . If we look at facts rather than theories we shall find examples which seem to prove that *de facto* it has already been recognized that external sovereignty also may be distributed in different organs for different purposes.' The formation of the League does not necessarily mean any radical alteration in the modified conception of sovereignty which was 'the received doctrine of the nineteenth century'. The League will develop the conceptions further. If 'the future prove [sic] that the League meets a human need and its legislative and executive power is extended, it may well be that we shall have an example of divided sovereignty on an incomparably larger scale than we have ever had before.'[16]

Stallybrass continues saying that as 'International Law is an evolutionary science', there is every reason to believe that the idea of sovereignty will be modified as it was in the past. Internal sovereignty may remain, while external may become dubious. But in defence of the League Stallybrass goes beyond the official line. It is certain for him that 'We shall speak not of the sovereign independent State but of the Free Self-Governing State'.[17]

The authority in the study of Common Law, Frederick Pollock, argues that in order to organise the League of Nations and to make a binding convention the 'renouncement of sovereignty' is necessary.[18] Earnest Barker, one of the leading idealists in political theory, constructs an ideal form of 'a Confederation of the Nations'. In his plan the powers of the League 'involves the surrender of independence or "sovereignty" by the States belonging to the League' in two ways; they surrender their right to make war, and

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[15] *Ibid.*, pp. 24, 25, 27, 58, 62, 67, 80.

[16] *Ibid.*, pp. 94, 112, 114.

[17] *Ibid*, pp. 117-121.

[18] Pollock, *The League of Nations and the Coming Rule of Law* (1918), pp. 5-6. He maintains, however, the official line after the League was actually formed. See Pollock, *The League of Nations* (1920), pp. 80, 128.

they accept the duty of making war.[19] He is so candid as to say that 'the mere existence of a League exercising any degree of power . . . is already *pro tanto* a diminishing and impairing of sovereignty.' When states enter a League, they surrender at least part of their sovereignty.[20] This surrender takes place only in the sphere of 'inter-State relations'. Barker's League of Nations is a 'confederation' in which states remain sovereign. Thus he can appeal to readers by saying, 'Do not fear the loss of sovereignty in the League of Nations.' 'You shall be masters of your fate', for force is never free; only the law is free.[21] It can be observed, however, that what Barker means by 'the loss of sovereignty' in a confederation of sovereign states leads to no less than Stallybrass's 'free self-governing states'.

We may argue that although British theorists shared with American counterparts the same tendency of what I call international constitutionalism, gradualism and the derogation from sovereignty were characteristics of British features. Constitutional rules in Britain originated from customs and common law. And they believed that history showed that the equality of states was no more than an artificial principle; reality approved of international order maintained by the supremacy of great powers. Now the necessity of the establishment of the League of Nations seemed to provide a new ground for the derogation from sovereignty (of small states). This was a theoretical discrepancy between Great Britain which remained in the League until its end and the United States which would not take part in the League.

Sovereignty in the League Debate in America

The official line of the American advocates of the League of Nations was almost the same as the British. Sovereignty should not be abolished; but it must be limited. The differences lie in the tendency among Americans to observe the principles of the equality of states. It led President Wilson to advocate that the League was an enlargement of the Monroe Doctrine, rather than the Concert of Europe. As a result,

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[19] Barker, *A Confederation of the Nations: Its Powers and Constitution* (1918), p. 18.

[20] *Ibid.*, pp. 29-30.

[21] *Ibid.*, pp. 30, 31, 36.

Article 21 of the Covenant clearly stipulates that the League will not affect the Monroe Doctrine.[22] The League of Nations was conceived by Wilson as nothing but the extension of US foreign policies and the US Constitution, which contained original American foreign policy and constitutional principles within itself. Although he faced the opposition from the people who were against such an enlargement, they all believed in the same value system.

The New Federalists

As early as January, 1915, the first meeting of the famous American organization, the League to Enforce Peace, was held. It is interesting that one of the two principles of the function of the future League agreed upon by the attendants reads 'Guaranteeing the territorial integrity and sovereignty of a member of the League as against outside parties.' Yet there was an opinion on this principle that this paragraph might cause war between some member of the League and an outside nation.[23] This shows that the issue of sovereignty was a critical problem in establishing the League. No American dared say that sovereignty should be abolished. But the supporters of the League also knew that the League would not accommodate the absolute notion of sovereignty.

Theodore Marburg, one of the chief organisers of the League to Enforce Peace, clarifies what needs to be done to the idea of sovereignty in order to establish a League of Nations. The notion of absolute sovereignty, which was originally set up to guard the state itself against interference by other states, must give way before the conception of a society of nations. He thus explains that if 'sovereignty unimpaired leads to disaster . . . it should not be suffered to continue. The state should retain only so much sovereignty as makes for the welfare of men organized in states.' The United States of America is 'really an application of this conception', for 'The Union was constituted of sovereign and independent states. They surrendered sovereignty but not self-government. . . . Absolute sovereignty was surrendered by them in the common

[22] The French delegates opposed the Article at the Paris Peace Conference, and the French text of the Covenant was contradictory to the English.

[23] Latané, *op. cit.*, vol. I (1932), pp. 704-705.

interest.'[24] Marburg does not insist that sovereignty be abolished. But the 'absolute' implication of sovereignty should be discarded; then restricted sovereignty will remain.

Taft as the president of the League to Enforce Peace repeatedly preaches the 'American' conception of sovereignty. He asserts: 'Sovereignty is only a matter of definition and degree.' He proclaims that the sovereignty of the United States has actually been limited by arbitrations and treaties prior to the League of Nations. He asks, 'Are we ashamed of that limitation on our sovereignty? Are we not on the contrary, proud of it?'[25] Taft strongly denies that the League of Nations is 'a super-sovereignty'. National sovereignty should be limited all the more because it is to be secured.

Sovereignty is defined by Taft as 'freedom of action of nations'. He addresses: 'The Sovereignty that we should insist upon and the only sovereignty we have a right to insist upon is a sovereignty regulated by international law, international morality and international justice, a sovereignty enjoying the sacred rights which sovereignties of other nations may enjoy, a sovereignty consistent with the enjoyment of the same sovereignty of other nations.' The sovereignty which goes beyond the limit 'is not in accord with American principles nor with the Constitution of the United States'.[26]

A professor at Yale University, Simeon E. Baldwin, gave an academic defence of sovereignty in a League of Nations. He unequivocally renounces Willoughby's doctrine that sovereignty cannot be divided and a League of Nations cannot possess any portion of national sovereignty. Willoughby's position of indivisible sovereignty is contrary to the past decisions of the Supreme Court of the United States.[27] Baldwin examines the possibility of 'sovereignty in a League of Nations' from the perspectives of the historical, philosophical and pragmatic schools. History provides many an example of the division

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[24] Marburg, 'Sovereignty and Race as affected by a League of Nations' (1917), pp. 142-143. Darwin P. Kingsley argues that 'Unconditioned sovereignty was the fundamental error in the civilization of 1914.' He insists that his country 'has shown how so-called sovereign states can be merged into a larger state without losing their individuality and without parting with democratic principles. . . . [If] the present doctrine of unconditioned sovereignty must be abandoned, if as a nation we must surrender what each Colony seemed to surrender in 1789, we should stand for that.' Kingsley, *Democracy vs. Sovereignty* (1915), pp. 10-12.

[25] Taft, *op. cit.*, p. 191.

[26] *Ibid.*, p. 279.

[27] Baldwin, 'The Vesting of Sovereignty in a League of Nations' (1919), p. 212. Willoughby was one of the attendants of the first meeting of the League to Enforce Peace, at which sovereignty was an object to be guaranteed by the League of Nations.

of sovereignty. As far as American conceptions are concerned, the philosophical school stipulates that 'the right of a sovereign to exist depends on the consent of his people' and 'they can retain part of' the sovereign power. If so, 'why cannot a division be made on a basis of vesting part of the whole of sovereignty exclusively in one public agency and the rest of that whole in another agency?' In addition, 'The American pragmatist does not have to look far for division of sovereign power which has worked well for over a century, and is working well to-day.'[28]

Baldwin seems to say that *Americans* do not find difficulty in the idea of sovereignty in a League of Nations, no matter what the traditional European theory of sovereignty suggests. This is not to say that the United States is an anomaly. Rather, it shows the future course for mankind. There is in Baldwin's insistence a kind of confidence in the leading role of the United States in world history. He can thus easily assert that 'As the life of mankind grows larger and reaches farther, it is logical and fit that nations should frankly recognize the movement by adapting their governmental institutions to it. They have surrendered the theory of a divine right of sovereign power in State or Church. They take but a short step further in asserting their right to associate on terms of dividing sovereignty.'[29]

This kind of implicit connection of the idea of 'sovereignty in a League of Nations' with Americanism is more explicit in some unknown earlier pamphlets on the issue. When an American lawyer, Joseph C. Clayton, wrote a plan for 'the United Nations' for the second Hague Conference in 1907, he strongly advocated American national sovereignty. The U.S. Constitution is a proof of national sovereignty. A plan for an international constitution by no means interferes with national sovereignty. Rather, it is a realisation of American ideals. His plan is a simple application of the U.S. Constitution to 'the United Nations' which is to be led by Americans.[30]

Raleigh C. Minor's plan for 'the United Nations' is also such an application of the U.S. Constitution, as the Constitution is 'the least centralized and nationalized'. He asks, 'Is any nation in the world today absolutely sovereign and independent?' His answer is

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[28] *Ibid.*, pp. 213-217. See also Baldwin, 'The Division of Sovereignty', (1918), pp. 57-59.

[29] *Ibid.*, p. 218.

[30] Clayton, *Pax Nobiscum: A Plan for a Tentative Constitution of the United Nations* (1907).

that an international League 'can hardly, if successful, be looked upon as a conservator of the sovereignty and independence of the nations.' Nevertheless, in accordance with Amendment X of the US Constitution, Minor adds that 'A clause is therefore inserted expressly declaring that the powers not delegated to the United Nations by the constitution, nor prohibited by it to the component nations, as well as the sovereignty and independence of the latter, are reserved to those nations, respectively.' Another direct application of the U.S. Constitution is that in 'the United Nations' 'the balance of the equal representation of sovereignty in the upper house against the unequal representation according to population in the lower'.[31]

It is noteworthy that the making of the 'constitution' of the League of Nations was many a time compared to that of the United States designed in the Constitutional Convention of 1787. However, the similarity between the supporters of the League and the 'Federalists' implies the existence of 'the Anti-Federalists' in 1919.

The New Anti-Federalists

The major stumbling block in Congressional approval was Article X of the Covenant which would involve the US in European wars.[32] A leading figure of the new 'Anti-Federalists', Senator Henry C. Lodge, replied to Taft's arguments. While admitting that in every treaty there is some sacrifice of sovereignty, he emphasises that 'The question and the only question before us here is how much of our sovereignty we are justified in sacrificing.' It is obvious for him that the participation in the League goes beyond 'one point of sovereignty which ought never to be yielded, the power to send American soldiers and sailors everywhere'.[33] Another 'Anti-Federalist' Senator accuses president Wilson of making concession to Europe by saying that 'Where Washington fought to establish the right of this Nation as a sovereign to control its own affairs, Woodrow Wilson counsels with the representatives of kings to transfer the sovereignty

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[31] Minor, *A Republic of Nations* (1918), pp. 28, xxiv, xxviii, 222, 240.

[32] It should be noted that it was President Wilson who finally abandoned the US application for the League of Nations.

[33] 'Speech of Henry Cabot Lodge in the Senate of the United States, August 12, 1919' in Henry C. Lodge, *The Senate and the League of Nations* (1925), p. 407.

Washington gained to a league which they will dominate.'[34]

Outside Congress Henry A. Wise Wood delivered an *Address Opposing the Ratification of the Constitution of the League of Nations*. He asked in a letter to Taft, 'Are you willing we should thus surrender into the hands of such a coalition of European and Asiatic Powers the security upon which depends the sovereignty of the United States? I am not.'[35] He conceives the League of Nations to be a world super-state exercising sovereignty over states. He asks, 'how then dare we trust this new dim covenant of half-measures and weak sanctions to take over our sovereignty and place it in the hands of a polygenous [*sic*] body of men sitting in the Tower of Babel 3,000 miles from our shores?' As war is a recurring phenomenon, he predicts that the 'idealist' will definitely fail.[36]

The victor at this time were the new 'Anti-Federalists'. In other words, although constitutional sovereignty won the day in 1788, it gave way to national sovereignty in 1919. But this does not mean that the 'Anti-Federalist' in 1919 never entertained constitutionalism. American constitutionalism as well as the Monroe doctrine was what they were proud of. The opposition between the 'Federalist' and the 'Anti-Federalist' was in this sense a civil war among Americans. David J. Hill, anti-League former US ambassador to Germany, shows an interesting argument concerning American sovereignty and international constitutionalism.

In 1915 Hill opposes absolute sovereignty both of the king and the people. In the French Revolution the sovereignty of kings was simply substituted by the sovereignty of the people. Absolute sovereignty is a denial of human rights and the opposite of the fruit of the American Revolution, which was 'a revolt against absolutism in every form'. He even says that 'Democracy, as well as monarchy, may be imperial and unconstitutional.' 'The real struggle is not between democracy and monarchy, it is between constitutionalism and imperialism'. What he aims for is not 'authoritative democracy', but 'constitutional democracy'. The former is 'the Napoleonic type of

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[34] *The League of Nations: Speech of Senator James A. Reed of Missouri in the Senate of the United States, September 22, 1919*, p. 47.

[35] Wood, *Address Opposing the Ratification of the Constitution of the League of Nations* (1919), p. 18. Almost the same sentence can be seen in 'Fellow Americans' published in *The Washington Post, Feb. 24, 1919*. See *ibid.*, p. 32.

[36] *Ibid.*, pp. 9-11.

democracy, the type which formerly prevailed in France, places confidence in *persons*'; the latter is 'the Washingtonian type of democracy, the type which has hitherto prevailed in the United States, places its confidence in *principles*.'[37]

But it is paradoxical that referring to Gierke's interpretation, Hill finds his theoretical starting point in a very Germanic theorist, Althusius. When he says that sovereignty is 'the foundation and the substance of a State' and 'it belongs not to the category of Might but to the category of Right', what he has in mind is an organic state. He believes that 'sovereignty first comes into being through a coördination of parts that are already in organic relations.'[38] In the name of '*Americanism*' as renouncing absolute sovereignty, Hill pronounces 'the organic unity of a coherent people, associated together for the security of their individual rights.'[39] All these suggest that while Hill is an American constitutionalist, the Constitution he means is no longer the constitution as a product of Classical knowledge. It is a manifestation of the organic unity of the American nation.[40]

It is not surprising that Hill unequivocally rejects the idea of American participation in the League of Nations. He asserts in 1919 that what the Entente needs is not a mere organ of power, but an institution of justice. The League of Nations creates 'a defensive alliance and an imperial syndicate for the regulation of the world under the control of a small group of Great Powers'; it is not pledged to 'the maintenance of International Law or to the recognition of the inherent rights of States.'[41] It is a logical antinomy for Hill to adopt 'a partial renunciation of national sovereignty and the complete attainment of self-determination' at the same time. The League creates nations which are too powerful and those which are too oppressed. It follows that 'the people of the United States would suffer more than any others'. The League is an extension of the system of the British Empire in which only the European powers gain great advantages.[42]

The only authority which can issue 'commands' to sovereign states 'would be a

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[37] Hill, *The People's Government* (1915), pp. 41, 106-107, 116, 215, 220-222.

[38] Hill, *World Organization as affected by the Nature of the Modern State* (1911), pp. 23, 100.

[39] Hill, *Americanism what it is* (1918), pp. 19-20.

[40] Thomas R. Powell criticises Hill by saying that he talks about something ideal rather than something actual; he confuses law and morals. See Powell's 'Review of *Americanism: What It Is* and *The People's Government*', (1916).

[41] Hill, *Present Problems in Foreign Policy* (1919), pp. x-xi.

[42] *Ibid.*, pp. 27, 32,

superstate'. The fact that the 'covenant' has been referred to as a 'constitution' as well as a 'treaty' indicates that 'the League created by this Constitution is not merely a corporate entity but in effect a super-government.' This means that 'It claims a sovereignty that nullifies the sovereignty of the States'. It is a super-state with a constitution which contains no guarantees for the rights of sovereign states. Its nature is imperialistic in defiance of international law.[43] Being an 'Americanist', Hill cannot accept international constitutionalism in which 'full sovereignty' of the United States is 'surrendered' to 'a new sovereign and imperial Power.'[44]

However, he explains that the American people have for the first time in human history shown that consent to the rule of law is not a surrender of sovereignty. He is rather proud of the American ideal.[45] These two positions are not contradictory for Hill. The expansion of the legal system implemented in the U.S. Constitution is part of 'Americanism'. But the British type of the rule of law, on which the League of Nations is founded, is imperialism, and therefore not part of 'Americanism'.

The notion of sovereignty in the debate between the new 'Federalists' and 'Anti-Federalists' is an application of American constitutionalism in the international field. The reasons for the support of and opposition to the U.S. entry into the League lie in the same history. The former stresses formal understanding of sovereignty. The latter esteems sovereignty as an expression of national existence. Despite their difference, however, both of them can find their predecessors in American history.

Wilson and Lansing

I have intentionally deferred discussing Woodrow Wilson's view on sovereignty, as it should be examined more carefully than any others. It is generally held that he was a proponent of popular sovereignty. But his discourses on sovereignty do not read so simply. In addition to Wilson's statement on sovereignty in his presidency, we shall examine an essay on sovereignty written by him when he was a professor of political

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[43] *Ibid.*, pp. 82, 104-105, 112, 126, 131, 255.

[44] *Ibid.*, p. 133.

[45] Hill, *The Problem of a World Court* (1927), pp. 9-10.

science. We shall also deal with several essays on sovereignty which Robert Lansing, Secretary of State of the Wilson administration, wrote when he was an international lawyer. It is widely known that Lansing resigned as Secretary due to his conflict with Wilson at the Paris Peace Conference. The issue of sovereignty was the very point of their discrepancy. We shall find that Wilson and Lansing respectively represented two types of views on sovereignty in twentieth century America: the constitutional and realist schools of thought.

Wilson's Views on Sovereignty

Wilson thoroughly discussed the problem of sovereignty in 'Political Sovereignty (1893)', before he launched his political career. Those who expect Wilson to advocate popular sovereignty will be disappointed when reading the essay. He makes qualifications about 'the orthodox creed' of the sovereignty of the people. He contemplates that the American people 'never have acted as a unit, nor ever can act as a unit under our existing constitution. They have always acted, and must always act, in state groups.' This means that 'They must be consulted concerning government, but they do not conduct it.'[46] The people do not have unlimited power, for there is not such a thing on earth. Sovereignty 'is not general vitality of the organism, but the specific originative power of certain organs.' Sovereigns exist, but they are not the state as a whole. They are not the community itself over which they preside.[47]

Wilson evidently stands on the position of a traditional constitutionalist. He is consciously opposed to Hegelian national sovereignty. He is thus able to admit that sovereignty can be limited. According to him, we must distinguish 'the powers and processes of governing' from 'the relations of the people to those powers and processes'. There always exists a distinction between 'the phenomena of command' or 'governing' and 'the phenomena of obedience' or 'being governed'.[48] The development of politics is not a history of the identification of the governing and the governed; instead, it is 'a

[46] Wilson, 'Political Sovereignty' (1893), p. 73-74.

[47] *Ibid.*, p. 80.

[48] *Ibid.*, pp. 80, 82.

process of differentiation'. The development of political liberty has enlarged 'the sphere of independent individual action at the expense of the sphere of dictatorial authority.' The identification of the two spheres is the world of the ancient states. Wilson witnesses in his age 'a gradual disintegration, a resolution of the State into its constituent elements, until at length those who govern and those who are governed are no longer one and the same'.[49]

Wilson accepts the Austinian definition of sovereignty as 'the *habitual obedience* of the community'. This definition does not contradict the fact that 'liberty has encroached upon sovereignty.' 'The conditions of sovereignty and the exercise of sovereignty' are quite different matters. To be sure, 'the will of the community, the inclinations and desires of the body-politic as a whole', is always the foundation of law. But these preferences of general body are exercised by way of approval or disapproval, acquiescence or resistance. Constitutions determine the relationship between those who govern and are governed. Constitutions are 'covenants' made by communities with their sovereigns.[50]

Now Wilson formulates the concept of 'control' in opposition to that of sovereignty by saying that 'Sovereign power is a positive thing; control a negative thing. Power belongs to government, is lodged in organs of initiative; control belongs to the community, is lodged with the voters. To call these two things by the same name is simply to impoverish language by making one word serve for a variety of meanings.'[51]

Wilson knows that traditional American constitutionalism needs to be modified. In the United States the right to self-determination of each state has been abandoned. Sovereignty resides in the federal state, especially its law-making organ.[52] But this position is maintained in the context of constitutionalism. In his masterpiece, *The State*, he says that 'with us sovereignty rests in its entirety with that not very determinate body of persons, the people of the United States, the *powers* of sovereignty resting with the state and federal authorities by delegation from the people'. Along the same lines of his contemporaries, Willoughby and Burgess, Wilson argues that 'Sovereignty resides in the

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[49] *Ibid.*, p. 83.

[50] *Ibid.*, pp. 84-88.

[51] *Ibid.*, p. 90.

[52] *Ibid.*, pp. 94-95.

community'. Yet, this is not an expression of the doctrine of national sovereignty; it is rather derived from Locke's classical model of the source and the exerciser of sovereignty. In the first place, Wilson confesses that 'Sovereignty, as ideally conceived in legal theory, nowhere actually exists'.[53]

Compared to his contemporaries, it is striking that Wilson maintains the basic line of rather old-fashioned constitutionalism. Considering the Declaration of Independence as well as English constitutional history, Wilson defines 'the philosophy of constitutional government' as the assertion that 'men have always the right to determine for themselves . . . whether the government they live under is based upon such principles or administered according to such forms as are likely to effect their safety and happiness. In brief, political liberty is the right of those who are governed to adjust government to their own needs and interests.' To designate 'a definite understanding between governors and governed' in constitutional rules does not mean the absorption of their relationship into an organic entity. As 'Nations are made up of individuals', 'A man is not free through representative assemblies, he is free in his own action . . . or he is not free at all. There is no such thing as corporate liberty. Liberty belongs to the individual, or it does not exist.' He continues saying that 'The theory of England and American law' stipulates that 'representatives of government have no authority except such as they derive from the law, from the regulations agreed on between the government and those who are to be governed.'[54] It is on this principle that Wilson understands the notion of sovereignty.

The element which distinguishes Wilson from old constitutionalists is his belief in social progress. If classical constitutionalism is based on 'the Newtonian theory of the universe' in which government is described as 'a machine', his contemporaries follow Darwin's 'theory of organic life'. Accordingly, Wilson finds several stages in the progress of constitutional government. Its final stage is either the English or American form.[55] Wilson is a traditional *and* progressive constitutionalist; and it is this type of constitutionalism that is the archetype of his internationalism.[56]

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[53] Wilson, *The State* (1889), p. 625, 635.

[54] Wilson, *Constitutional Government in the United States* (1908), pp. 4, 9-10, 16, 20.

[55] *Ibid.*, pp. 54-56, 40.

[56] While he maintains traditional constitutionalism in the international field, his progressivism does not know the pre-Civil War theory of divided sovereignty. For instance, considering the clause in the Covenant of the right to withdraw from the League, Wilson is reported to have said: 'The sovereignty of their country was the fetish of

Political statements by Wilson the statesman which are regarded by many as manifestations of his belief in popular sovereignty were in fact expressed in accordance with his original constitutionalism. He reinforced his academic view of the sovereignty of federal governments.[57] To be sure, he emphasises that 'every people has a right to choose the sovereignty under which they shall live.'[58] To repudiate the right to 'hand peoples about from sovereignty to sovereignty as if they were property' is to recognise that 'governments derive all their just powers from the consent of the governed'.[59] Although consent is the source of sovereignty, this does not mean that the organic nation is the sovereign. What he says is that the people have the power of consent coexistent with the sovereign power of government.[60]

Wilson sometimes spoke of the sovereignty of people. But popular sovereignty appeared in Wilson's comments only when he mentioned the people oppressed by 'the Imperial German Government' or 'a mere military despotism' in Mexico.[61] This attitude is consistent with classical constitutional theory. Locke justified the supreme power of the people as well as that of the legislative power. The power of the people can be

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many republic men. He thought that the clause would have no practical effects, while its omission might have very serious results. The time would come when men would be just as eager partisans of the sovereignty of mankind as they were now of their own national sovereignty.' Quoted in Florence Wilson, *The Origins of the League Covenant* (1928), p. 26. Wilson looks upon the US Constitution from the viewpoint of hindsight. Divided sovereignty is merely a transitory stage in the development of the Union which has revealed its complete form in his age. He observes regarding the US Constitution that 'Only the extraordinary foresight and sagacity of the men who framed and advocated the federal constitution, - only the prevailing force of such men as Washington, and Hamilton, and Madison, - could have secured so compact and strong a central government in the face of the jealousy of local interests.' Wilson, *Constitutional Government*, p. 45.

[57] 'The place where the strongest will is present will be the seat of sovereignty. If the strongest will is present in Congress, then Congress will dominate the Government; if the strongest guiding will is in the Presidency, the President will dominate the Government.' Address of Wilson in New York, May 13, 1912, quoted in Saul K. Padover (ed.), *Wilson's ideals* (1942), p. 40.

[58] Wilson's address at the first annual national assemblage for the League to Enforce Peace in Washington D. C., May 27, 1916., quoted in *ibid.*, p. 72. Wilson also expresses the traditional American view on international law by saying that 'the small states of the world have a right to enjoy the same respect for their sovereignty and for their territorial integrity that great and powerful nations expect and insist upon.' See 'Broader Aspects of the League Program' in *Enforced Peace* (1916), pp. 159-164.

[59] Wilson's message to the Senate, January 22, 1917, quoted in *ibid.*, p. 131.

[60] The fifth of 'the Fourteen Points' stipulates the principle 'that, in determining all such questions of sovereignty, the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.' Quoted in *ibid.*, p. 113.

[61] 'We believe that the intolerable wrongs done in this war by the furious and brutal power of the Imperial German government ought to be repaired, but not at the expense of the sovereignty of any people'. Wilson's Reply to the Pope, August 27, 1917., quoted in *ibid.*, p. 89. Justifying the intervention in Mexico in defiance of the unrecognised government of General Huerta, Wilson says that 'I wish to reiterate with the greatest earnestness the desire and intention of this Government to respect in every possible way the sovereignty and independence of the people of Mexico.' Wilson's comment in *New York Times*, April 24, 1914, quoted in Cynthia Weber, *Simulating Sovereignty*, p.64.

exercised only when a government violates the consent with the people; the sovereignty of the people is restored only when a revolution is justified.

Theoretical confusion arises when Wilson began to use the expression, 'self-determination', instead of 'the consent of the governed'. The problem with which many have been concerned is the subject of 'self-determination'. Who is the 'self'? Theoretically, the 'self' is the 'people' who live within a constitutional framework of a state. The 'self' is in the first place a very artificial entity formulated by a constitution. But the fact is that the 'self' was understood by most people as the 'nation' in the process of the peace settlement. Wilson himself confused his theoretical standpoint with the vindication of the independence of nations. The contradiction is shown by the fact that the independence of small states was the matter decided by the great powers, not by 'the consent of the governed'. While the national integrity of Germany was denied, the German people were taken as responsible for the *unconstitutional* acts of the government of Imperial Germany. That was the tragic confusion which perplexed many people including Wilson's Secretary of State, Robert Lansing.

Lansing's Views on Sovereignty

Lansing as an international lawyer wrote four essays on sovereignty before he was engaged in his career in the Department of State. Lansing's theory of sovereignty is significantly different from Wilson's. If we read his four essays, we do not have to wonder why Lansing could not come to terms with Wilson's position at the Peace Conference.

Lansing's notion of sovereignty is founded on force. Sovereignty *in* a state is defined as 'the power to the extent of the natural capacity of the possessor to do all things in a state without accountability.' It is 'real only when the possessor can compel the obedience to the sovereign will of every individual composing a state'. It arises from 'the possession of physical force superior to any other such force'. Its exercise is simply 'the application or the menace of brute force'.[62]

What is characteristic is that Lansing only talks about sovereignty *in* a state. He

[62] Lansing, 'Notes on Sovereignty in a State: First Paper' (1907) in *Notes on Sovereignty* (1921), pp. 6-7.

rejects the idea of the sovereignty *of* a state, for sovereignty is not possessed by a state but by 'the individual or body of individuals in the state possessing the physical strength' in a state. The sovereign force is not possessed by an abstract entity like a state, but by the possessors of the physical power to compel obedience. Thus he distinguishes between the *real* and *artificial* sovereigns. While sovereignty is legally attributed to the latter, the former possesses the actual force to compel obedience. Lansing's sovereignty is only concerned with *real* sovereignty, as the *artificial* sovereign is a fiction and not a sovereign in fact.[63]

It can be observed that this definition is a result of the *reification* of sovereignty. The abstract concept of sovereignty is now conceived as a substance distinct from the state. That Lansing seriously discusses the pure sovereignty of 'an Omnipotent and Eternal Being' is a proof of this phenomenon.[64] Lansing does not think that the state as a juridical person possesses such a force. There must exist somewhere real sovereign individuals who embody sovereignty; otherwise, a state cannot exist. A state does not constitute sovereignty; sovereignty constitutes a state.

Lansing believes that the real sovereign appears in the time of civil war or revolutions. It is certainly difficult to find the real sovereign in times of peace. The American Civil War has proved that sovereignty resides in the body of individuals who compelled obedience of the Southern States. 'Resistance that is absolutely and generally successful is essential to make resistance to law a disapproving act of the real sovereign.'[65] In other words, if secession had succeeded, sovereignty would have resided in the Southern States. No one knows the location of real sovereignty until political conflicts have ended.

Thus we cannot generalise sovereignty in the form of 'the consent of the governed'. To be sure, as long as the government needs the support from the real sovereign, the 'assertion' of the 'consent of the governed' is true. However, according to Lansing, as the real sovereigns 'never include all the members of the state, the assertion is never correct.' Such an assertion is an intellectual product.[66]

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[63] *Ibid.*, pp. 13-14.

[64] *Ibid.*, p. 3.

[65] Lansing, 'Notes on Sovereignty in a State: Second Paper' (1907) in *ibid.*, p. 52.

[66] *Ibid.*, p. 53.

It is not paradoxical that Lansing contemplates 'World Sovereignty'. Since the interdependence and mutual responsibility of states enable people to conceive of the human race as one body, 'there *must* be a certain body of individuals possessing a physical might sufficient to compel obedience by every member of the human race throughout the world.'[67] Even if it has not been organised, the sufficient union of the physical power is supposed to constitute 'World Sovereignty' in a still unorganised world community. In other words, in order to construct a world community Mankind must acknowledge the existence of 'World Sovereignty'. It is logically consistent to say that 'the sovereignty in a state is artificial when compared with the reality of World Sovereignty',[68] because the latter is able to compel the obedience of the former. As the 'sovereignty of God' was the only possibility to preserve absolute sovereignty in religious discourses, World Sovereignty is the real sovereign of the real sovereigns.

Lansing affirms Bodin as 'nearer the truth'. He asserts that 'the essence of sovereignty is physical power.'[69] This is 'a practical working theory' of which Lansing is proud, as he takes sides with 'actuality' in opposition to 'legal fiction'.[70] Lansing is not a theorist of Continental national sovereignty. Nevertheless, in his theory traditional American constitutionalism is collapsing. Since he has discovered the existence of the *real* sovereign who appeared in the time of the Civil War, constitutional sovereignty is now merely fictional.

Lansing's academic standpoint may not, at a glance, necessarily seem relevant to his opinions at the Paris Peace Conference. He was opposed to Wilson's draft of the Covenant which contained the use of force to settle international disputes. He was afraid that the League would lead to 'an international oligarchy of the Great Powers' and destroy the principle of 'the equality of nations'. Furthermore, he objected to the application of 'self-determination' as it would cause great turmoil in future. The system

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[67] Lansing, 'Notes on World Sovereignty' (1906) in *ibid.*, p. 57.

[68] *Ibid.*, p. 61.

[69] Lansing, 'A Definition of Sovereignty' (1913-1914) in *ibid.*, pp. 81-84.

[70] *Ibid.*, p. 93. In considering the issue of the islands of Spitzbergen which was known as a 'no-man's land', Lansing distinguishes between *territorial* and *political* sovereignty. The latter 'has to do with the ideas of nationality, allegiance, and kindred relations' without regard to the place of its exercise. His notion of real sovereignty is in fact political in contrast with territorial or legal sovereignty. See Lansing, 'A Unique International Problem' (1917), pp. 765-766.

of mandates also contained a serious problem in its legal character.[71]

A commentator remarks that Lansing's opposition to Wilson is rarely rigid, as he insisted on preserving the principle of the equality of nations, while renouncing self-determination.[72] It can be noted, however, Lansing's insistence as well as his academic doctrine is very consistent and simple, in view of the *reality* of sovereignty. In his academic works he sought for the location of invisible but absolute sovereignty. At Paris he objected to the Covenant, for he thought it derogated from sovereignty. The equality of nations should be observed, for it 'is imposed by the very nature of sovereignty'. Self-determination is also a violation of sovereignty, for it ignores the sovereignty over minorities. The system of mandates is misleading, because German sovereignty over territories cannot be transferred to the League which does not by itself constitute a sovereign state. These objections were inevitable, only because he cherished 'the very conception of national sovereignty both as a term of political philosophy and as a term of constitutional law'.[73]

During the period of the Conference in Paris, Wilson asked Lansing to prepare a resolution, which was never discussed. Lansing later suspected that Wilson had never intended to consider his ideas. It was just a measure to close Lansing's mouth and 'pigeonhole' his resolution. The main purpose of the resolution was to stipulate: 'all nations are equally entitled to the undisturbed possession of their respective territories, and to the full use of their respective sovereignties'.[74] Wilson could not accept Lansing's rigidity concerning sovereignty. Wilson stated that 'he did not intend to have lawyers drafting the treaty of peace.' Wilson also dismissed Lansing's concern about the location of sovereignty in the system of mandates as 'legal technicalities'.[75]

It is no wonder that Lansing who maintained so political and *realistic* a position in his academic essays was treated as a useless lawyer by Wilson. In Paris Wilson was an

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[71] Lansing, *The Peace Negotiations* (1921), pp. 81-105, 149-161.

[72] See Robert A. Klein, *Sovereign Equality among States* (1974), pp. 71-72.

[73] Lansing, *The Peace Negotiations*, pp. 58, 164. As early as May, 1916, Lansing opposed the use of force as a measure of the League of Nations and writes in a letter to Wilson that 'I do not believe that it is wise to limit our independence of action, a sovereign right, the will of other powers beyond this hemisphere'. *Ibid.*, p. 39. If sovereignty is the supreme physical power, coercive force on sovereignty is not only dangerous but also logically contradictory.

[74] *Ibid.*, pp. 113-121.

[75] *Ibid.*, pp. 107, 153.

international constitutionalist. He limited, modified, and reinterpreted the concept of sovereignty. He was a political scientist who constructed an international legal framework. Lansing saw politics beyond the sphere of law. Politics was the world of *reality*, while law was the accumulation of *artificial* principles. This meant for him that the reality of politics was unchangeable; sovereignty was untouchable. Lansing could not modify legal principles, all the more because he believed in the absoluteness of political reality which he believed sustained legal notions.

Lansing took for granted the *reification* of sovereignty. His consistency was based on the *reality* of sovereignty. No matter how difficult it was to find the *real* sovereign, no matter how necessary to the League to implement an 'affirmative guaranty' of the great powers, no matter how inevitable to the democratised world to adopt self-determination, sovereignty was always *real.* If *reality* was constructed upon sovereignty, anything which would violate sovereignty was against *reality.*

It is no wonder, therefore, that Lansing could not reconcile himself with Wilson who represented the tradition of constitutionalism when he constructed an international 'constitution'. Unlike Lansing who believed in the *reality* of sovereignty, for Wilson constitutional principles like 'the consent of the governed' could, or rather should, be implemented by the great powers which were willing to observe international constitutional rules. Wilson could easily argue that as the American States were under the protection of the federal union from foreign threat, the effective Executive of the League would protect the constitutionally equal rights of nations. By contrast, for Lansing constitutional principles were in the sphere of legal theory. To apply it to reality would cause great confusion. Although the 'World Sovereign' might decide the structure of world community, the 'oligarchy of the Great Powers' and the independence of small nations pointed in a quite different direction. It was neither realistic nor idealistic. To identify 'legal fiction' with 'actuality' is just 'an evil thing', to which Lansing felt he had to object. Lansing wondered if Wilson would have had permitted the Southern States to secede from the Union.[76] If Wilson asked why he should not use his power to implement international constitutional rules, Lansing could argue that those constitutional principles are merely legal fictions. He could not see any reality in

[76] *Ibid.*, pp. 147-148, 93-105.

international constitutionalism. What was *real*, the highest realisation of the *reality* of power, was sovereignty. Sovereignty was a harsh *reality* which could not be clothed with constitutional fictions.

This is a conflict between the Articles of Confederation and the experience of the Civil War on the one hand, and the Declaration of Independence and the Constitution of 1787 on the other. When sovereignty is reconciled with constitutional order, Wilson stands as a traditional constitutionalist. When constitutionalism is subordinated to sovereignty, Lansing insists on the *reality* of sovereignty. Lansing was inclined in the direction of national sovereignty, although he was by no means a philosophical nationalist, nor was he a theorist of the organic state.

After the French Revolution Maistre pointed out that 'to raise the world, you need a fulcrum outside the world.' In the twentieth century it was no longer possible to designate an eternal location of such a fulcrum. Some still felt, nevertheless, that a political community could not be constructed without such a fulcrum. As there seemed to be no person who could maintain such a fulcrum, the *reality* of the notion of sovereignty itself had to preserve it.

If the period during and after the First World War is characterised by the Anglo-American hostility towards Germany, it is no wonder that international constitutionalism inspired by traditional Anglo-American constitutionalism became a foundation of numerous plans for a new international order. Some of the Anti-federalists and Lansing adhered to nationalistic or 'realistic' notions of sovereignty and constituted struggles with the tendency of international constitutionalism. But the tide was on the side of the latter. This tendency continued at least for the first decade of the interwar period. However, the strength of international constitutionalism was destined to decline as world-wide economic and political crises in the thirties undermined the international order constructed upon Anglo-American power. We shall turn to this process in the next chapter.

Chapter 6 The Collapse of International Constitutionalism

This chapter deals with the Continental and Anglo-American discourses of sovereignty during the interwar period. It is the period which started with the optimism regarding the possibilities for realising international constitutionalism, but ended with the revenge of the Continental powers and the collapse of the international system. The establishment of the League of Nations and the Briand-Kellogg Pact of 1928 represented the optimism in the first decade of the interwar period, in which the concept of sovereignty was not abandoned, but considerably limited.[1] But as international society fell into political and economic turmoil, optimistic tendencies disappeared. In this Chapter we shall first briefly view Continental theories of sovereignty in order to better understand their influence upon Anglo-American scholars. Next we shall examine the development and the decline of the discourses on constitutional notions of sovereignty in Britain and the United States in the interwar period.

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[1] The Permanent Court of International Justice in the case of *S.S. Wimbledon*, 1923 'declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State' for 'the right of entering into international engagements is an attribute of State sovereignty'. In the case of the *Lighthouses in Crete and Samons* (1937), Judge Hudson more candidly expresses his Separate opinion that the theoretical sovereignty remaining in the State consenting to the limitation of its independence is 'shorn of the last vestige of power,' and in which 'a ghost of a hollow sovereignty cannot be permitted to obscure the realities of this situation.' Viscount Finlay stated in 1924 in the House of Lords respecting the case of *Duff Development Company, Limited*, v. *Government of Kelantan and Another*: 'It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power'. Quoted in Green H. Hackworth, *Digest of International Law, volume I*, pp. 51-53; Georg Schwarzenberger, *International Law, volume I*, (1945), p. 50. In the age of imperialism a restriction of sovereignty necessarily meant a semi- or half- or even non- sovereign state. In the interwar period, however, derogation does not diminish sovereignty. The principle of sovereignty in the interwar period is not a matter of substance which has degrees. It is a formal concept which survives any restriction in reality. 'Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.' *United States v Curtiss-Wright Export Corporation et al., US 304, 316-171* (1936), quoted in Michael Ross Fowler and Julie Marie Bunck, *Law Power, and the Sovereign State* (1996), p. 69.

Continental Theories of Sovereignty in the Interwar Period

The *reification* of sovereignty declined even in the Continental countries around the time of the First World War. Many theorists and publicists began to doubt the supremacy of the sovereign state. One exemplar of this development was the sociological claim that the state was merely one of several social associations. Another was the legal claim that the sovereign state was subordinated to the system of international and constitutional laws. Although they grew from quite different roots, both of them were highly critical of the theory of sovereignty.

In France, Leon Duguit set out a serious attack on sovereignty from the sociological perspective. According to him, sovereignty is an historical product. In the seventeenth and eighteenth centuries sovereignty was a property of the king. As it was so deeply rooted in absolute monarchy that sovereignty was to disappear with the circumstances which gave it birth. The reason why it survived the changes in circumstances is that the legislators of the Revolution replaced the king with the nation. Like the king, the nation became a person, a subject of right, the holder of the sovereign power. Throughout the nineteenth century, in France and in the whole world influenced by political events in France, national sovereignty spread as an almost religious dogma.

Duguit identifies the doctrine of national sovereignty to be 'a belief in a myth' which is contrary to fact. In the first place, there is no correspondence between state and nation. In addition, the two facts of the modern world, decentralisation and federalism, have made the principle of national sovereignty inconsistent. Previous thinkers were so hypnotised by the dogma of sovereignty that they did not see the contradiction between the concept and the facts of actual life. What most characterises Duguit's insistence is his idea of public service. Duguit finds it contradictory for the 'sovereign' state to provide public service. The dogma of sovereignty as 'a subjective right to command' cannot explain the state as having duties to perform activities for the individual well-being and the prosperity of the nation. Modern institutions take their origin, not from the theory of sovereignty, but from the notion of public service. Duguit also emphasises

the existence of 'a mass of rules' which governs the organisation of public utilities.[2] But this does not mean that he belongs to the tradition of Anglo-American constitutionalism. Rather he foresees a modern welfare state. He stipulates that the government is a public servant and people are the recipient of the service. And the obligation of public service is the rule which government must observe.[3]

In the German speaking world, the Austrian school including Hans Kelsen developed highly formalistic ideas of sovereignty. Kelsen proclaims the primacy of international law over the legal order of the state. Sovereignty constitutes the binding validity of the legal order. But it does not constitute a kind of natural reality. It is a purely juristic idea. To be sure, the sovereign state is a highest system of norms. However, as sovereignty is only in juristic construction, a legal system of the state is not free from the norms of international law. There is no sovereign state which is completely free in the actual world.[4] In other words, 'In the world of physical reality, there is no such thing as sovereignty.'[5]

The doctrine of the 'sovereignty of law' is put forward by H. Krabbe. According to him, 'the old idea of the state' is based on the sovereign person, whether he is the king, the people, or even the state itself. By contrast, 'the modern idea of the state' is the doctrine of the 'sovereignty of law'. Historically speaking, the sovereign authority was at first limited by the positive law. Then the mere will of the sovereign began to be replaced by law. Finally, the 'unconditional victory of the law' was brought about by the exclusion of all original sovereign authority. 'The modern idea of the state' recognises the impersonal authority of law as the ruling power. The authority of the state is nothing other than the authority of law. Krabbe says that in the modern age we no longer live under the dominion of persons, either natural persons or fictitious legal persons, but under the dominion of norms, of spiritual forces.[6]

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[2] Duguit, *Law in the Modern State*, pp. 1-32, 49; *Les Transformations du Droit publie* (1913), pp. 1-34, 52.

[3] Nicolas Politis, professor at the University of Paris, is driven to 'the necessity of utterly abandoning the notion of sovereignty and looking facts in the face.' Politis, *The New Aspects of International Law* (1928), pp. 4-13.

[4] Mattern, *op. cit.*, pp.121-134; Rupert Emerson, *op. cit.*, pp. 167-173.

[5] Kelsen, *Law and Peace in International Relations* (1942), p. 78.

[6] Krabbe, *The Modern Idea of the State* (1922), pp. 1-11; *De Moderne Staatsidee* ('S-Gravenhage: Martinus Nijhoff, 1915), SS. 3-10.

Despite these strong arguments against the absolute notion of sovereignty, the Continental tradition of sovereignty was never completely subdued. Carl Schmitt, who is famous for his later support for Hitler, revitalises the absolute theory of sovereignty. According to him, 'he who decides on the exception' is the sovereign. In the case of an extreme emergency there exists the sovereign whose action is not subject to controls, nor hampered by checks and balances. According to Schmitt, every legal order is based on a decision and not on a norm. When unlimited authority appears in an exceptional situation, law recedes while the state remains. The constitutional tendency is misleading, for 'The rule proves nothing; the exception proves everything.'[7]

It is evident that Schmitt reverses the arguments of formalists like Kelsen and Anglo-American constitutionalists. The 'decisionist', Schmitt, thoroughly renounces the idea of 'the rule of law'. He asserts that 'What matters for the reality of legal life is who decides'.[8] No matter how much constitutional rules seem to diminish sovereign authority, the sovereign appears when an emergency terminates legal constraint. Sovereignty always coexists with the sovereign person, even if it is latent in normal situations. Liberal constitutionalism may be valid, as long as normal situations last. But normal situations are not essential in the operation of the state. The exception is the vital moment for the state. A decision makes norms; not vice versa.

Schmitt developed his theory referring to the Weimer Constitution. However, the political implication of his theory is obviously tremendous. In the age of the dominance of Anglo-American international order, Schmitt denies the superiority of legal sovereignty. When the exception occurs, the fragile structure of international constitutionalism will give way to the decision of the sovereign who is normally latent. The theorists who see the restriction of sovereignty will know in the exception that the international constitution established by the Anglo-American world is not permanent. They will know that when normal situations collapse, there will emerge the sovereign who makes a decision in order to restore or reestablish a constitution. It is no wonder that Schmitt welcomes the rise of Hitler who proves the validity of Schmitt's theory by making exceptional decisions against the structure of Anglo-American international

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[7] Schmitt, *Political Theology*, pp. 5-15; *Politische Theologie* (1922), SS. 9-15.

[8] *Political Theology.*, p. 34; *Politische Theologie*, S. 33.

society.[9]

Discourses on Sovereignty in Interwar Britain

Political theory was the field which was most characterised by hostility towards the nineteenth century doctrine of national sovereignty. Pluralism in connection with guild socialism and pragmatism marked a strong intellectual tradition against national sovereignty. Although they had diverse theoretical foundations, they all agreed on the point that the theory of sovereignty was too fictitious and no longer sustainable. They contended that 'realistic' insight into actual social forces revealed that the notion of sovereignty was a false belief of the politically dominant class. In the sense that they all emphasised the existence of multiple social forces, we shall see that their claims eventually converged into the position of constitutionalism. This was the case in the works of Harold J. Laski, who had great influence in both America and England.

Laski's Pluralistic Attack on Sovereignty

In order to understand Laski's rejection of sovereignty, it is important to understand what he is arguing against. *Studies in the Problem of Sovereignty* (1917) shows that the target of his criticism is German philosophy, especially that of Hegel. Laski observes that 'the monistic theory of the State' became dominant in the late nineteenth century due to the doctrine of the Germans like Hegel and Treitschke. It is the doctrine of the unity of the state. It ordains that the state be one and indivisible. Trade-unions, churches, universities etc. must be embraced in the Absolute or Oneness, i.e. the state. Sovereignty is the expression of this philosophical tradition.

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[9] It is true that the fascists stressed the typical Continental theory of the organic state. According to Alfred Rocco, a leading Italian fascist theorist, 'Fascism discovers sovereignty to be inherent in society when it is juridically organized as a state.' Alfred Rocco. 'The Political Doctrine of Fascism' [1925] in Margaret Spahr (ed.), *Readings in Recent Political Philosophy* (1935), p. 687. An influential German jurist, Ernst Huber asserts that the Führer's will is 'the collective national will . . . The Führer unites in himself all the sovereign authority of the Reich.' Quoted in Richard H. Cox, *The State in International Relations* (1965), p. 58. But the antagonism against liberal democracy led the fascists to deny the constitutional roles of the people as well as limited government. Like Schmitt's theory, Fascism is a doctrine of the inversion of normality in Anglo-American constitutionalism.

In the midst of the Great War, Laski identifies the theory of sovereignty with a pure notion of national sovereignty. Laski implements constitutional measures to object to the 'monistic' notion of sovereignty. Political rule is not founded on sovereign forces. Its validity depends upon the consent of the members of the state. Law is obeyed, not because it is a command, but because it is a rule of convenience. Where sovereignty prevails and the state acts, there must be the consent of men. Furthermore, the state is merely one of the associations to which men feel allegiance. If the state obtains pre-eminence over other groups, it is because the state is expected to act to coordinate social forces. It is a matter of degree and not of kind that the state may have more usual acceptance than any other association. Laski admits that his idea of sovereignty is far wider that which lawyers recognise. He says that he does not challenge the juristic definition of sovereignty, but is concerned with sovereignty in reality. He begins with the statement that the real rulers of a society are undiscoverable. As sovereignty must go with the real rulers, sovereignty is also beyond the reach of human insight. Laski thus asserts that 'in a time when the State enjoys its beautification', it is worth while advocating the 'deepest harmony' of 'consent to disagreement'.[10]

Critics argue that Laski's notion of sovereignty is not attributed to the state, but the government. Moreover, 'monistic' Anglo-American jurists from Hobbes to Austin never insisted on the omnipotence of sovereign power, but only the need for sovereign authority.[11] Indeed, what Laski intends to destroy is the absolute sovereignty of the unitary state. According to him, the state is always 'a territorial society in which there is a distinction between government and subject.' This standpoint of pluralism excludes 'the oneness of society and the state.' Laski stresses that the sovereignty of the state in fact means governmental sovereignty. This implies the necessity of a limitation upon

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[10] Laski, *Studies in the Problem of Sovereignty* (1917), pp. 1-25.

[11] Johannes Mattern defends Willoughby's sovereignty of the state, not the government. See Mattern, *op. cit.*, pp. 101-120. F. W. Coker argues that Bodin and Austin have the restraint of natural and divine law or of opinions and sentiments of the community, and that the pluralistic writings supplement the traditional theories by giving emphasis upon the field left inadequately covered. Coker, 'Pluralistic Theories and the Attack upon State Sovereignty' (1924), pp. 80-119. P. W. Ward makes clear that 'The sovereign State in political theory corresponds to the Absolute of metaphysics'. This means that the attacks on sovereignty are not aimed so much at Austin as at Hegel. Ward, *Sovereignty* (1928), pp. 105, 175. See also Kung Chuan Hsiao, *Political Pluralism* (1927), pp. 9-31, 126-145; Raymond G. Gettell, *Political Science* (1933), p. 139; Francis G. Wilson, *The Elements of Modern Politics* (1936), pp. 579-584; Chester C. Maxey, *Political Philosophies* (1938), p. 622; G. N. Sarma, *The Political Thought of Harold Laski* (1965), pp. 48-53.

the sovereignty of the state.[12] It seems fair to say that his argument is along the lines of Anglo-American constitutionalism. Although Laski denies the validity of sovereignty, his conceptions of the formal sovereignty of the government and real forces in society are derived from the Lockean dichotomy. Laski is not an anarchist, but a constitutionalist who opposes the government to society.[13]

What Laski contributes to traditional constitutionalism is the addition of social associations to the constitutional structure. The state does not merely stand against individuals. Society, composed of various social groups, is faced with the state. While the crux of political theory in the nineteenth century was the antithesis of 'the state versus man', in the twentieth century it becomes that of 'the state versus groups'.

Laski shifted from pluralism in the early 1920s to Marxism in the 1930s. In the second decade of the interwar period, disillusionment with liberalism was generally shared by intellectuals. The Great Depression deprived economic liberalism of credibility. The conflict of interests between economic classes became acute in the United States as well as Great Britain. The Roosevelt administration of the New Deal and the 'national' government after the collapse of the Labour government drastically changed the nature of Anglo-American democracy. In the international field, fascist Italy, Nazi Germany and militant Japan challenged the established international order.

Having experienced these incidents, Laski in 1935 attacked the capitalist state as such. It remains sovereign merely in order to protect the interests of capitalism and may resort to war as the supreme expression of sovereignty. He therefore proclaims that sovereignty a nd capitalism are incompatible with an effective world-order.[14] Observing 'a growing movement towards a less formal, and more realistic, jurisprudence' in this era, Laski adds that pluralism was a stage on the road to Marxism.

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[12] Laski, *Authority in the Modern State* (1919), p. 26, 65, 119. Laski argues elsewhere that the political philosopher will be driven to 'the perception that, politically, there is no such thing as sovereignty at all.' Instead, 'the starting-point of enquiry is the relation between the government of a state and its subjects.' Laski, 'Popular Sovereignty' (1921), pp. 229-230. In the interwar period pluralism was proud of 'realism', for it recognises only the sovereignty of the government which is a merely formal concept. For example, see Laski, 'Law and the State' (1929), pp. 267-295. Sociologists reinforced the view by emphasising the limitations upon sovereignty. See Franklin H. Giddings, *The Responsible State* (1919), pp. 46-48; Harry E. Barnes, *Sociology and Political Theory* (1924), p. 139.

[13] In 1925 Laski insisted that state sovereignty should be abolished for the interests of humanity, but still admitted that the state was an inevitable organisation. See Laski, *A Grammar of Politics* (1925), pp. 44-88.

[14] Laski, *The State in Theory and Practice* (1935), p. 209.

Only Marxism can explain the real nature of the state as an expression of class-relations; the abrogation of sovereignty necessarily involves a revolution in the economic structure of the modern world.[15] In the beginning, Laski stressed the discrepancy between the state and society which could not be concealed. In the time of a more serious constitutional crisis, he naturally identifies the state with an economic class in opposition to other classes.

Although it was the case that not many intellectuals followed Laski in the direction of Marxism, neither were they able to maintain confidence in international constitutionalism in the 1930s. The events in the second decade of the interwar period revealed the sour fact that international order was collapsing. It is the shift from optimism to the recognition of the failure that we shall see in the interwar Anglo-American discourses on sovereignty in Britain and the United States.

Sovereignty of the Constitution in Britain

The discourses on internal sovereignty in Britain during the interwar period show that the traditional constitutional relationship between the state and the individual came to be a minor issue. The crux of constitutionalism, the relationship between the ruler and the ruled, became ambiguous in the twentieth century.[16] The pluralists were a kind of new constitutionalist who responded to this reality, for it can be said that they pointed to the more comprehensive notion of the state.[17] Whether being a pluralist or not, the theorist of sovereignty had to face the reality in the era after democratic reforms.

The most characteristic doctrine is 'the sovereignty of the constitution'. It is propounded by A. D. Lindsay who reconciles the theories of Austin and Bosanquet. According to Lindsay, the people do not merely obey a determinate person or persons. The distinction between the ruler and the ruled has more or less been dissolved in the

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[15] Laski, 'Introduction' in *A Grammar of Politics*, fourth edition (1938), pp. iii-xxi.

[16] B. M. Laing observes that the traditional notion of sovereignty depended on the constitutional distinction between state and individual or class of individuals, between state and society. But such a distinction is a little difficult to understand in the context of the theory of popular sovereignty. Laing, 'Aspects of the Problems of Sovereignty', (1921), pp. 5, 16. See also C. A. Hereshoff Bartlett, 'The Sovereignty of the People' (1921), p. 508.

[17] K. H. Hsiao emphasises that as the pluralists are finally compelled to restore sovereignty, 'the real problem of the pluralists is not to destroy sovereignty, but to reorganize it, so that political power shall become the true expression of the community.' Hsiao, *op. cit.*, p. 140.

modern state. But the constitutional relationship between them did not completely disappear. This means that what people really obey is the constitution.[18] Lindsay insists that 'If the sovereign is that whose recognized authority makes government and force-sanctioned law possible, then the constitution is sovereign'. The constitution retains the unity, indivisibility, and supremacy which have been maintained to be of the essence of sovereignty.[19]

Another way to express almost the same idea is that it is 'not sovereignty but the law and the constitution that wear the legitimate armour of might.' R. M. MacIver reasons that the government is supposed to have power as the guardian of the constitution, as the executor of law, not in its own right. The mere command of a government has no attributes of political sovereignty. The modern state points to 'the definite assertion of the limited and relative character of sovereignty.' This position is in fact an implicit doctrine of the sovereignty of the constitution, as MacIver mentions 'the sovereignty of law' over 'the proper sovereignty of the state'. The state is a mere organ of the community.[20]

William S. Holdsworth insists that England never accepted the Continental theory of sovereignty, due to the existence of Parliament, the supremacy of the law and the system of local government. The constitutional rights of Englishmen and division of the sovereign power assumed a position of greater importance than the theory of sovereignty. To be sure, the changed industrial and intellectual conditions of the late eighteenth and nineteenth centuries made inevitable the sovereignty of the Legislature. But this rather proves that in 'our legal history' it is possible to recognise constitutional rights without abandoning sovereignty. English sovereignty and constitutional rights coexist and share the same history.[21]

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[18] Lindsay, 'Sovereignty' (1924), pp. 235-254. See also Lewis Rockow, 'The Doctrine of the Sovereignty of the Constitution' (1931). This view was accepted by many scholars in the interwar period. For instance, C. F. Strong stresses that ultimately 'The legal sovereign in a federation is the constitution itself, which sets out the division of power between the federal and state authorities.' Strong, *Modern Political Constitutions* (1930), p. 83.

[19] Lindsay, *The Modern Democratic State*, vol. I (1943), pp. 224, 226. Lindsay also says that his theory of the sovereignty of the constitution gives an intelligible account of international relations. See *ibid.*, pp. 229.

[20] MacIver, *The Modern State* (1926), pp. 15-16, 468, 479. He was in the University of Toronto.

[21] Holdsworth, *Some Lessons from Our Legal History* (1928), pp. 123, 126, 130-131, 137-140. William K. Wallace finds in the evolution of English constitutional government the establishment of modern state sovereignty. See Wallace, *The Passing of Politics* (1924), pp. 59-61. As regards the role of economic adjustment for the state in England, see Morris R. Cohen, 'Property and Sovereignty' (1927), pp. 8-30.

It has become rather orthodox in Britain to admit that sovereignty is no longer unlimited and indivisible.[22] However, this kind of argument had no influence upon the Axis powers. If sovereignty coexisted with constitutional rights in England, that notion of sovereignty might be simply English and have nothing to do with German national socialism. The dream of universalisation of the English rule of law collapsed at the outbreak of the Second World War. It is no wonder, therefore, that in the same year E. H. Carr struck a death blow to 'utopianism', namely, Anglo-American constitutionalism which many a publicist hoped would lead to the implementation of the international rule of law. We shall return to this point later.

British Discourses on Sovereignty in the International Environment

The attack upon sovereignty in the field of international studies was harsher than in political science. Philip Kerr, an international political theorist and practitioner, argued in 1923 that 'the fundamental cause of war' was the division of humanity into separate sovereign states, while sovereignty was groundless in an interdependent world. Kerr asserts that 'Do sovereign national states really exercise sovereignty in the world sphere now? They manifestly do not.' In a lecture in the United States, Kerr referred to the history of the establishment of the US Constitution as a precedent of the federation of states. According to Kerr, between 1781 and 1789 the people of America were not free. But after 1789 'they were free and had dominion, because they had brought themselves under the reign of a single sovereign law.' Kerr's argument was that 'the only method [to end international war] is the substitution of the reign of law over all nations for the present reign of force.'[23] Representing the standpoint of the international rule of law in the interwar period, Kerr continues;

> The peoples of the world today are neither sovereign nor free, in any real sense of the word. Their only power is to fight, and that is not freedom. They cannot control the world in which they live. The only way in which they can become free and become sovereign is to pool their sovereignty, so to speak, in that sphere which lies beyond

[22] See L. Bartlett, *Questions and Answers on Jurisprudence* (1934), p. 23.

[23] Kerr, *The Prevention of War* (1923), p. 67, 50.

national rights, and create an organism, responsible to themselves, through which they can control world issue by law, instead of by the savage and often meaningless means of war.[24]

International lawyers in the interwar period shared almost the same standpoint. While they were more optimistic than Kerr about the future of the League of Nations, they also needed to demystify the absolute notion of sovereignty in a formalistic manner. Robert Jones and S. S. Sherman expect that 'No single state, no empire, will in the near future dare to claim, or wish to claim, full sovereignty.' They assert that a League of Nations is a federation; and 'there is no complete sovereignty allowed to any constituent part'. The League is 'a public disavowal of the Renaissance [absolute] theory of the sovereign state'.[25] According to C. Howard-Ellis, sovereignty is nothing but 'a mystic sentiment expressed in abstruse legal doctrines' which is a kind of lay theology of the old dogma of absolutism and of the new religion of nationalism. That international law is based on the principle is its most serious defect.[26]

In the first place, the orthodox interpretation of the 'constitution' of the League shows that while the Covenant recognises national sovereignty, it limits the exercise of state sovereignty. It is a product of 'the old conception of the absolute sovereignty of States and the newer and bolder conception towards which the world is moving - that States must accept some limitations of their sovereignty.'[27] A conspicuous tendency among publicists is revealed in H. R. G. Greaves's assertion that for economic and security reasons 'the theory of the sovereign state is out of line with the facts of to-day'.[28]

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[24] *Ibid.* Two points are worth noting here. One is that Kerr's argument is based on the logic of 'positive liberty' unlike the American 'Federalists'. He does not intend to 'limit' or 'divide' sovereignty like thinkers in the Classical age. Instead, he argues that his idea will fulfill the content of sovereignty. Second, although he favourably mentions the history of the United States in the lecture in America, he also stresses that 'it will repay you to study the constitutional theory, and still more, the practice and spirit of the modern British Commonwealth. . . . The British Commonwealth, indeed, shows that the idea of world unity is not so far-fetched as at first appears, and involves far less interference and change in the existing national system, than people believe.' *Ibid*, p. 71. As regards the relationship of Kerr with the American Federalists, the British Empire and 'the British federalist tradition', see Andrea Bosco, 'Lord Lothian and the Federalist Critique of National Sovereignty' in Long and Wilson, *op. cit.*, pp. 247-253.

[25] Jones and Sherman, *The League of Nations from Idea to Reality* (1927), pp. 66-67, 70, 72.

[26] Howard-Ellis, *The Origin, Structure & Working of the League of Nations* (1928), p. 120, 304.

[27] League of Nations, *The Aims, Methods and Activity of the League of Nations* (1935), pp. 23-24. Hugh Dalton predicts that 'The national myth must fade and national sovereignty, in its old rigid form, must gradually wither away.' Dalton, *Towards the Peace of Nations* (1928), p. 284.

[28] Greaves, *The League Committees and World Order* (1931), p. 244.

According to the words of L. P. Mair, the concept is 'an illusion' of the nineteenth century.[29]

In international law the anomalies of sovereignty were rather familiar. For instance, it was claimed that the mandate system produced areas over which there was no sovereignty.[30] The peace settlement after the First World War also brought about the concern of the autonomous status of the British Dominions. They had truly entered into the sphere of international law, but at least until the time of the Statute of Westminster of 1931 their status was not the same as that of other 'sovereign' states. The issue necessarily shows that sovereignty can be divided and that in any country both internal and external sovereignty may be shared by various authorities.[31] According to Philip J. N. Baker, the Dominions are not 'fully sovereign independent states', even if they have the right to make treaties. The Dominions and Great Britain are separate persons in International Law; but they are bound together in British constitutional law and act together in international society. Baker asserts that one and indivisible sovereignty is 'the aged fallacy'. It is enough for him to say that the Dominions have a special relationship with Great Britain. Baker contends that the sovereignty of the Dominions is not perfect, but other sovereign states are not entirely free either.[32]

In the light of such a critique it became evident that the notion of sovereignty could not remain untouched. F. A. Váli argues that there are two alternatives: either to separate the conception of sovereignty in its international aspect from that of the State or, to alter the original meaning. Although the former is more logical, the latter is more convenient and in accordance with actual terminology. The modified notion of international sovereignty is defined as 'only a *certain* legal order or competence'. In line

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[29] Mair, *The Protection of Minorities* (1928), p. 22.

[30] See James C. Hales, 'Some Legal Aspects of the Mandate System' (1938), pp. 94. M. E. Lindley adopts the theory of limited sovereignty by attributing sovereignty to the mandatory powers. According to him, sovereignty is limited by the conditions laid down in the respective mandates. It is not an anomaly, as general international law imposes limitation upon sovereignty. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 266-267.

[31] See Arthur B. Keith, *The Sovereignty of the British Dominions* (1929), pp. 1-2.

[32] Baker, *The Present Juridical Status of the British Dominions in International Law* (1929), pp. 190-191, 371. H. Goitein see the similarity between the British Empire and the League of Nations. He concludes that 'the customary hard-and-fast distinction between Constitutional and International Law should be relaxed. If the investigation is conducted in this spirit and along these lines there is no reason why, in time, there should not emerge a new theory of the proper division of functions to replace the outworn and dangerous notion of sovereignty, and a brighter era open in the study of International Law.' Goitein, 'Some Problems of Sovereignty' (1928), p. 93.

with this definition it is said that 'all communities having international personality are sovereign'. This can be called the doctrine of 'the sphere of sovereignty'.[33] In other words, sovereignty simply demarcates 'a certain legal order', but does not mean omnipotence.

But it was the 'sphere' of sovereignty which was of vital importance in international society especially after the Great Depression. 'The economic aspect of sovereignty' becomes a crucial topic for the survival of nations.[34] During the 1930s optimism was gradually replaced with pessimism. The Marquis of Lothian (Philip Kerr) argues that 'economic nationalism, the characteristic expression of state sovereignty' is the very cause of the international economic plight. He furthermore emphasises that 'the League cannot save us from war and that we can never escape from war as long as we build on the sovereignty of the national state'.[35] John F. Williams argues that as sovereignty originates from the relationship between rulers and ruled in a community, sovereignty is the most troublesome word in international relations.[36]

In the 1930s the focal point of the debate was the issue of national sovereignty *versus* 'the rule of international law'. Then Williams asserts that 'What is sovereignty is not law; what is law is not sovereignty.'[37] Political as well as economic investigations suggest that sovereignty is deteriorating 'the rule of international law'. George W. Keeton finds that even if sovereignty is limited, sovereign states are able to withdraw the consent to the limitation, as Japan, Germany and Italy withdrew from the League.[38] Edward Jenks writes that sovereignty is 'one of the greatest stumbling-blocks in the path

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[33] Váli, *Servitudes of International Law* (1933), p. 8-9. John F. Williams also mentions 'spheres of sovereignty'. If this is not the case, sovereignty cannot find its place in international law. Williams, *Chapters on Current International Law and the League of Nations* (1929), p. 10-11, 288.

[34] See R. G. Hawtrey, *Economic Aspects of Sovereignty* (1930).

[35] The Marquis of Lothian (Philip H. Kerr), *Pacifism is not Enough nor Patriotism either* (1935), pp. 12-13, 26-27. F. N. Keen believes that 'The theory of the sovereignty of national states has been a fertile source of misconception, . . . Of course that is really nonsense.' Keen, *A Better League of Nations* (1934), p. 20. Arnold J. Toynbee recognises that 'the devotion of each state member to its own local sovereignty has been one of the principal obstacles to success in making the Covenant work.' Toynbee, 'The Nature and Paramount Aim of the League of Nations' in The Royal Institute of International Affairs, *The Future of the League of Nations* (1936), pp. 12-13.

[36] Williams, *Some Aspects of the Covenant of the League of Nations* (1934), pp. 48-49.

[37] Williams, *Aspects of Modern International Law* (1939), p. 26. By contrast, however, Edward Mousley still believes that sovereignty and law are interdependent. This means that sovereignty operates only internally. In the external arena to the state, there is as yet no reign of law, neither can there be sovereign power operative, as sovereignty only can operate within the realm of law. Mousley, *Man or Leviathan?* (1939), pp. 251-253, 260.

[38] See Keeton, 'National Sovereignty and the Growth of International Law' (1938), p. 394.

of international progress.'[39] The establishment of a super-state may be the only answer.[40]

In retrospect, the League was too compromising. David Davies thinks that if the pooling of sovereignty is not enough, a further contribution should be added.[41] W. Friedman insists that there must be a definite choice between 'national sovereignty, with the consequence that there can be no international legal order' and 'international sovereignty, which means the supremacy of International Law and the subordination of the State'. According to him, the experiences of the last twenty years have proved that all solutions which want to have both ways are disastrous.[42]

The discrepancy between the two sovereigns identified by Dicey appears to remain unsolved despite the victory of Anglo-American power. There are in international relations the legal sovereignty ordained by the Anglo-American powers and the political sovereignty pushed by the Continental powers. For instance, international law limits the action of the sovereign states, but guarantees their territorial sovereignty at the same time. But Hitler's national sovereignty under which he claims the allegiance of all Germans, wherever situated, abandons theories of territorial sovereignty.[43]

When E. H. Carr describes 'utopianism' and 'realism' in *The Twenty Years' Crisis* (1939), he means by 'utopianism' Anglo-American international constitutionalism and by 'realism' Continental nationalism. Bentham and Locke to whom Carr attributes the characteristic of 'utopianism' are, of course, the main figures of British constitutionalism. On the other hand, Hegel is the prominent figure of the 'realist' camp as well as other German intellectuals including Marx. 'Utopianism' which Carr says 'bears clear marks

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[39] Jenks, *The New Jurisprudence* (1933), p. 82. F. N. Keen urges that the notion of absolute sovereignty is an anachronism and should be surrendered. Keen, *Crossing the Rubicon or the Passage from the Rule of Force to the Rule of Law among Nations* (1939), p. 17.

[40] In *The Times*, July, 1938, there appeared several correspondences which discussed the necessity of a super-state. Lord Lothian wrote that the only way of ending world war was 'to pool enough of their sovereignty to create a common representative Government'. The Archbishop of York replied, 'the root evil is unlimited national sovereignty'. But W. R. Bisschop said, 'An international police force could only exist if emanated from a sovereign power over and above the nations which could enforce its sovereign will. . . . The rule of law without a sovereign power to enforce it is devoid of all substance.' Quoted in George W. Keeton, *National Sovereignty and International Order* (1939), pp. 156, 153, 160.

[41] Davies, *The Problem of the Twentieth Century* (1930), p. 201. Arnold Foster also expects further curtailment of the 'sovereign rights' of League members after the war, and hopes for 'Progress towards the goal of world order through world government'. Foster, 'National Sovereignty and the Covenant' (1939), p. 5.

[42] Friedman, *What's Wrong with International Law?* (1941), p. 13.

[43] See Geroge W. Keeton and Georg Schwarzenberger, *Making International Law Work* (1939), p. 72.

of its Anglo-Saxon origin[44] is the belief of 'the satisfied states'. By contrast, 'realism' is the anti-constitutional attitude of 'the dissatisfied states'.[45]

What is 'utopian' is not the theories of Bentham and Locke as such. It is the application of their thoughts to international society, which Carr observes was mainly conducted by the Americans.[46] It is the dream of the universalisation of Anglo-American principles in international society. Similarly, 'realism' does not stand for the actuality of the philosophy of Hegel. It is the cynical attitude towards the international application of the Anglo-American rule of law. In so doing, Carr describes the fundamental opposition between the Anglo-American and Continental camps.

Carr's remarks on sovereignty are not a deviation of his realist 'statism', to which he by no means commits himself. To think so is simply to look at Carr from the viewpoint of the post-war North American realists. Carr writes that:

> The concept of sovereignty is likely to become in the future even more blurred and indistinct than it is at present. . . . It was never more than a convenient label; and when distinction began to be made between political, legal and economic sovereignty or between internal and external sovereignty, it was clear that the label had ceased to perform its proper function as a distinguishing mark for a single category of phenomena. . . . It is unlikely that the future units of power will take much account of formal sovereignty.[47]

Carr understands 'formal sovereignty' as a product of nineteenth century liberalism which is destined to disappear. There is no contradiction between Carr's sympathy with 'realism' and his prediction of the disappearance of 'formal sovereignty' as an analytical tool. In the interwar period, there was a common understanding that reality did not correspond with 'formal sovereignty'. Political scientists and international lawyers also recognised the discrepancy between 'reality' and 'formal sovereignty'. While constitutionalists aimed to construct a notion of sovereignty within a constitutional framework, Carr did not trust it in the time of the resurgence of Continental national

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[44] Carr, *The Twenty Years' Crisis 1919-1939* (1939), p. 51.

[45] For instance, Carr says that 'For the past hundred years, and more especially since 1918, the English-speaking people have formed the dominant group in the world; and current theories of international morality have been designed to perpetuate their supremacy and expressed in the idiom peculiar to them.' *Ibid.*, pp. 79-80.

[46] See *ibid.*, pp. 27, 51.

[47] *Ibid.*, pp. 230-231.

sovereignty. Carr does not share the 'reality' of Continental national sovereignty, but at the same time rejects the 'formal sovereignty' of international constitutionalism.

The Twenty Years' Crisis was written at the end of the interwar period. Its tone does not overlap with the 'political realism' of post-war North American realists. It was written before the Second World War and when the resurgence of German power was at its peak. It was a book for appeasement. It was a record of self-reflection of a British intellectual and a proposal for reconciliation with the dissatisfied Continental powers.

Discourses on Sovereignty in Interwar America

The same attitude of international constitutionalism and its decline existed in interwar America. Although most of them were sceptical of Laski's attack upon sovereignty, they still pursued the possibility of constructing an international constitutional framework. It was in America, led by refugees from Germany, that political realism emerged to dominate ~~the discipline of~~ international studies.

Sovereignty and the Rule of Law in America

In America, political theorists did not respond favourably to Laski's theory. Their concerns were the political implications of pluralism. In the face of international as well as domestic socialist movements, the curtailment of the central authority of the liberal state might involve a serious damage to domestic and international liberal order. In America national unity was still something for which the sovereign people had fought.

Traditional constitutionalism never denied the validity of sovereignty; it simply restrained sovereign power within its rules. It is too hasty to thoroughly abandon the notion, for the sovereign territory is needed to protect American values.[48] Marshall E. Dimock therefore argues that although 'Sovereignty is a fiction', 'it seems to have some practical value.'[49] Edgar Bodenheimer insists that it could even serve as 'a weapon

[48] 'The boundaries of sovereignty, therefore, are the boundaries of morality.' Stephen C. Pepper, 'The Boundaries of Society' (1922), pp. 440-441.

[49] Dimock, *Modern Politics and Administration* (1937), p. 24.

against syndicalist anarchy'.[50] If pluralism goes so far as to ignore the importance of state authority, the constitutional instinct takes sides with the sovereign authority and defends the value of order. That is the reaction of American theorists to the curtailment of sovereignty by the pluralists.

William E. Hocking deduces that so 'realistic' a dogma as pluralism would lead to a dominance of the strongest private force. No person can live without 'a supreme authority of ideas'. Minorities should be protected by the sovereign state. The dualism in England which Laski takes for granted is not evident in America where popular sovereignty has been an orthodox dogma. Thus Hocking criticises pluralism by stressing the importance of 'an alternate strengthening of whole and part, not a relative weakening of the whole'.[51] Sovereignty in the country where the sovereign central authority coerced local authorities to abolish slavery is an issue of 'the whole' rather than the dominant class.[52]

While admitting the validity of pluralism, W. Y. Elliot recognises the significance of sovereignty. It is idle to consider adequate 'the formal or intellectualistic conception of legal sovereignty'. Yet it is no less idle to attack the concept while such a unifying principle is present and actually operative in law. Constitutional history after the American Civil War exposes the weakness of the pluralists. It proves 'the essential unity of the rule of law.' Elliot then asserts that 'Constitutionalism is the necessary context of single laws.' And the acceptance of the rule of law implies a delimitation of rights.[53]

C. H. McIlwain argues that sovereignty is a purely juristic idea and it has no proper meaning if carried beyond the sphere of law. He says that 'Sovereignty is authority, not might.' He even rejects the distinction between legal and political sovereignty as 'the nineteenth century form of an ancient confusion of thought'. There is no such thing as

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[50] Bodenheimer, *Jurisprudence* (1940), p. 70. F. W. Coker warns that if pluralism risks discarding the concept of sovereignty, it falls into anarchism and syndicalism. Coker, *op. cit.*, pp. 80-119.

[51] Hocking, *Man and the State* (1926), pp. 389-403.

[52] For instance, Baron S. A. Korff finds that despite the tradition of the rule of law, the Anglo-American tradition does not know the sovereignty of law proclaimed by Kelsen and Krabbe. The concept of *law* in contrast with *Droit* and *Recht* is so limited that it does not interfere with individuals. Thus there is no need to be afraid of sovereignty, so long it is of a purely legal character. Korff, 'The Problem of Sovereignty' (1923), pp. 407-408, 412. On the same line Arthur N. Holcombe adopts the traditional British distinction between legal and political sovereignty. Legal sovereignty is merely 'a fiction of the lawyers'. Holcombe, *The Foundations of the Modern Commonwealth* (1923), p. 115.

[53] Elliot, 'Sovereign State or Sovereign Group?' (1925), pp. 494-498. See also Elliot, *The Pragmatic Revolt in Politics: Syndicalism, Fascism, and the Constitutional State* (1928).

political sovereignty. Sovereignty is always legalistic, and from the practical point of view, a fiction. The clear thinking is that sovereignty may be destroyed or limited, but by power only, not by law. This indicates that the pluralists are right, but overemphasise the case. Sovereignty, being a legal fiction, has a certain function. McIlwain finally insists that 'the legal conception of sovereignty is still useful and must be kept'.[54]

John Dickinson's 'working theory of sovereignty' is also along this line. The legal doctrine of sovereignty is a demand for the unified organisation of authority in order to provide the necessary basis for a system of legal order. He insists that 'a régime of positive law' must be accepted as the normal status of civil society; and 'a régime of positive law' presupposes and requires the existence of juristic sovereignty.[55] The pluralists confuse legal with moral, social, and factual considerations. All the more because divergent competing interests exist in a nation-state, a central authority ought to hold legal superiority. It does not matter whether such an authority really exists. Legal sovereignty may come into existence, be transferred, or disappear, even though a sovereign *de jure* but not *de facto* is to all political intents no sovereign at all. What is important is not the definite location, but the function of sovereignty. Sovereignty is 'a prerequisite of legal order'. It is impossible to assume that civil society can exist without state sovereignty.[56]

In this historical context Max Radin explains an 'intermittent sovereign'. He says that the single unlimited sovereign is a fiction. To act as sovereign is therefore to be sovereign. When the sovereign functions he comes into existence, and he lapses when he ceases to function. In the intervals, if the conditions are not fulfilled, there is simply no sovereign at all. 'The full sovereign' is an inference from a past event and can be recognised only when it is past. 'The pro-sovereign' is occasional, intermittent, and conditional. Even though the sovereign may be intermittent, a sovereign is needed as

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[54] McIlwain, 'Sovereignty Again' (1933). According to W. W. Willoughby, sovereignty is always a legal notion and political sovereignty should be called 'public opinion' or 'general will'. It is also meaningless to talk about 'the sovereignty of the constitution' or 'the sovereignty of the law'. The constitution limits the government, but not the state. See Willoughby, *The Fundamental Concepts of Public Law* (1924), pp. 112, 89, 117-118. See also Raymond G. Gettell, *Political Science* (1933), pp. 124-125, 135.

[55] Dickinson, 'A Working Theory of Sovereignty I' (1927), pp. 527, 548.

[56] Dickinson, 'A Working Theory of Sovereignty II' (1928), pp. 37, 41, 44, 47, 51-55. According to George E. G. Catlin, sovereignty means 'only final authority to arbitrate', which we can say is obviously associated with the role of the federal government in the United States. Catlin, *A Study of the Principles of Politics*, (1930), p. 434.

soon as emergencies are contemplated.[57] Radin's argument is a logical result, if we satisfy two demands: on the one hand, sovereignty is a fiction; on the other, sovereignty must exist.

The search for the universal theory of sovereignty has now been abandoned and 'a relativistic view of sovereignty' has become inevitable. Francis G. Wilson finds that the monistic position is more reasonable as a long-run interpretation of the state, while pluralism asserts itself to be pragmatic and scientific. The enduring value of the idea of sovereignty is in its adaptation to particular moments. Thus both monism and pluralism are in fact particular and relativistic. No one interpretation or organisation of sovereignty is exclusively true. Monism must be localised, while it is difficult to universalise the attack on sovereignty. A pragmatic and localised conception of monism is the conclusion of the relativism of the theory of sovereignty.[58]

As long as sovereignty is in danger of being denied, the 'golden mean' principle encourages publicists to defend and formulate it within the constitutional framework. In the 1930s there was no need to defend the idea of sovereignty. The antithesis of 'national sovereignty versus the rule of law' became the object of considerations in America too.[59] Publicists resumed seeing sovereignty as an obstacle to the rule of law. They attempted to reconcile sovereignty with the established order.[60]

While arguing that 'the contemporary crisis in the theory of sovereignty' is caused by the concept of sovereignty becoming 'homeless' as a result of 'the depersonalization' in the modern constitutional state, Heinz H. Eulau urges in 1942 that the crisis must be solved as soon as possible.[61] Authoritarian regimes are overturning constitutional

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[57] Radin, 'The Intermittent Sovereign', (1930), pp. 522, 530.

[58] Wilson, 'A Relativistic View of Sovereignty', (1934), pp. 388, 398-400, 409-410.

[59] Walter Sandelius, 'National Sovereignty versus the Rule of Law' (1931).

[60] Douglas W. Campbell defines sovereignty as 'that power within a social unit which decides between the rules and regulations which the organization, and force, of the social unit as a unit will sponsor and those it will not sponsor - that is, which both organizes a social unit into a working political unit and denotes that it is a working political unit.' Campbell, 'Sovereignty and Social Dynamics' (1934), p. 832. He hopes that if sovereignty is redefined sociologically, it may be properly dealt with. Another commentator believes that there is no need for controversies over the nature of sovereignty, once law is proved to be immune from the validity of the concept of sovereignty. Roland Pennock, 'Law and Sovereignty' (1937), p. 637. The point is that if law is thoroughly independent of sovereignty, it will become possible to let the former prevail and the latter perish. As regards the advocation of the sovereignty of the moral law, see Nicholas M. Butler, *The Path to Peace* (1930), p. 162; *The Family of Nations* (1938), pp. 12, 125, 258.

[61] Eulau, 'The Depersonalization of the Concept of Sovereignty' (1942), pp. 3-16.

achievements and taking advantage of the inability of theorists to give an explicit formula of sovereignty to the rule of law. There is no time for playing with the ambiguity of sovereignty, because 'the struggle between the two political systems of democracy and dictatorship' has already begun. Therefore, Eulau strongly appeals by writing that:

> the democratic constitutional State, based on the consent of the people to be governed by its elected or appointed representatives, needs an alternative theory to that of Carl Schmitt, a theory which will also serve as a fighting weapon in the struggle of ideologies. The issue between autocracy and democracy, avoided on the whole for more than a century, can hardly be evaded any longer. . . . The proposition advanced here is that the political and legal theorist in the still existing constitutional democracies is obliged to pronounce his belief in the existence and workability of popular sovereignty.[62]

Sovereignty is not just an academic problem. The survival of constitutional democracies is at stake in the midst of the theoretical predicament of the antithesis between national sovereignty and the rule of law. Eulau's appeal is a prediction of the post-war usage of sovereignty as a weapon in the struggle of ideologies.

American Discourses on Sovereignty in the International Environment

The limitation of sovereignty is a common topic for American international lawyers too. It is difficult to deny the fact that the establishment of the League of Nations was, even though the United States did not participate in it, a historic event in international law. It was supposed to control the activities of sovereign states. Although it was not regarded as a super-state, it demanded the limitation and modification of the idea of absolute sovereignty. The idea of sovereignty did not correspond with the existence of the League. One international lawyer declares that he does not use such an ambiguous word.[63] Another expects that sovereignty, the source of international anarchy, must

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[62] *Ibid.*, p. 18.

[63] Roland R. Foulke proposes 'to waste no time in chasing shadows, and will therefore discard the word [sovereignty] entirely. He substitutes 'independence' for 'sovereignty'. Foulke, *A Treatise on International Law*, vol. I (1920), p. 69.

disappear or be so qualified as to admit that states are bound by international law.[64] To say the least, as Charles G. Fenwick argues, sovereignty is restricted 'as a direct consequence of the binding character of the rules of international law'.[65]

It is not easy to understand the principle of sovereignty in harmony with the League. Therefore, a commentator observes in accordance with the logic of the US Constitution that the League possesses 'some attributes of sovereignty'. While the states grant to the League 'certain so-called rights of sovereignty formerly belonging to themselves, they retain 'the residue of sovereignty'. And this is the application of 'the rule of law' to the international field.[66] Another goes so far as to say that we are compelled to recognise the League as a super-state. It is 'a new nation with certain powers of sovereignty, however limited, superior to those of the sovereign nations composing the League.'[67]

The mandate system under the terms of Article XXII of the Covenant of the League perplexes international lawyers, as it seems impossible to decide the location of sovereignty. Quincy Wright asserts that 'From the practical point of view perhaps it is unnecessary to solve these problems.' Like the divided sovereignty of the United States and the ambiguity of the location of sovereignty as to the self-governing Dominions of the British Commonwealth of Nations, 'the mandatory system may work without ascertaining whether sovereignty resides in the mandatory, the mandated community, the League of Nations, or elsewhere.'[68]

In 1930 Wright confirms that the mandate system has worked successfully for nearly a decade without an official assertion of the location of sovereignty. Although territorial division has been the most convenient method for organising government, 'it is neither necessary nor is it a condition actually existing in every part of the world.' The notion does not correspond with the diverse political structures of the day. From the standpoint

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[64] E. M. Borchard, 'Political Theory and International Law' (1924), pp. 122, 139. See also Oscar Newfang, *The Road to World Peace* (1924) pp. 35-44.

[65] Fenwick, *International Law* (1924), p. 89. James Brown Scott argues that 'law does not mean restriction upon sovereignty, but restriction upon the agents of sovereignty'. Scott, *Sovereign States and Suits before Arbitral Tribunals and Courts of Justice* (1925), p. 8.

[66] John E. Harley, *The League of Nations and the New International Law* (1921), pp. 41, 56-59. It is also possible to say that although national sovereignty is limited by the League, it is an extension of an old principle. The Covenant is a treaty; every treaty contains a limitation of sovereignty. See Lindsay Rogers, 'The League of Nations and the National State' (1919), pp. 88-93.

[67] Edward A. Harriman, *The Constitution at the Cross Roads:* (1925), p. 23.

[68] Wright, 'Sovereignty of the Mandates' (1923), p. 691.

of international law, sovereignty is susceptible to analysis, division, and limitation. The line between a fully sovereign and a partly sovereign state is not precise and is continually changing with the development of international relations. The difference between 'corporations of quasi-sovereigns' like the British Dominions and 'corporations or unions of full sovereigns like the League of Nations' is not great. Wright concludes that 'Sovereignty in international law is thus a relative term.'[69]

Aaron M. Margalith observes that while Continental scholars tend to invest sovereignty in either the principal Allied and Associated Powers or the League of Nations or the mandatory Powers or inhabitants of the mandated territories, Anglo-American scholars like Wright attribute it to 'a combination of these'. Article XXII of the Covenant is historically regarded as 'a typical child of the Anglo-Saxon mind'. Although Margalith is not entirely satisfied with the 'Anglo-Saxon' theory of the mandatory system, he admits that it is the 'best theory'.[70] This does not mean, however, the principle of sovereignty itself has become invalid. While in his time 'it has become the fashion to assault the sovereignty of the state, qualify it, diminish it, or even destroy it altogether', Margalith considers sovereignty to be an indispensable as well as useful principle.[71] In other words, the principle of sovereignty can coexist with anomalies like the mandate system.[72] Clyde Eagleton has argued that sovereignty as well as independence is 'a relative term'. Independence would be measured by responsibility more easily than responsibility by independence. He insists that absolute and irresponsible sovereignty is in international relations merely 'a figment of the imagination', logically impossible in the face of the facts of practice. According to Eagleton, the idea of sovereignty is thoroughly out of harmony with modern theories necessarily resulting from an age of increasing interdependence between men and between geographical and economic areas. In short, 'The old arguments based upon

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[69] Wright, *Mandates under the League of Nations* (1930), pp. 265, 268, 277, 286, 294, 305-306. Leonidas Pitamic also describes sovereignty as 'something relative'. Pitamic, *A Treatise on the State* (1933), p. 25. Wright's definition of sovereignty is 'the status of an entity subject to international law and superior to municipal law'. He also suggests the possibility of further changes or even the disappearance of the notion of sovereignty. See Wright, 'National Sovereignty and Collective Security' (1936), pp. 94-103.

[70] Margalith, *The International Mandates* (1930), pp. 145-170, 179.

[71] *Ibid.*, p. 174.

[72] As regards the chaotic confusion of the Anglo-American theory of sovereignty in the mandate system caused by the Japanese withdrawal from the League of Nations, see Paul H. Clyde, *Japan's Pacific Mandate* (1935), pp. 178-201.

sovereign irresponsibility have been replaced by a very definite responsibility'.[73]

The modification of the meaning of sovereignty is inevitable, for international society has been experiencing great changes. James W. Garner argues that the society of states is by no means an anarchy of sovereignties. The absolutist conception of sovereignty ought to be abandoned along with other useless fictions such as the equality of states. The term, sovereignty, is not only 'inapt, unscientific and confusing, but the notion itself is misleading and even dangerous'. As the harmony of interests of states has become evident, 'states in general have found it to their advantage to accept limitations upon their freedom'.[74]

Despite 'the apparent logical and or theoretical difficulty', Pitman Potter thinks that the reconciliation of international authority with national sovereignty is 'perfectly plain and perfectly practical'. An original agreement whereby states agree to be bound solves the problem.[75] But even this deduction is 'idle' for Edmund C. Mower. The fact is that the state cannot escape legal restraints in international society. The age of absolute sovereignty is over. The world of interdependence has produced 'the new conception of sovereignty'.[76] When the conception is to be restated in international law, it must accept limitation.[77]

However, as we have seen, international crises in the 1930s changed the optimistic attitude of publicists. During this period, sovereignty became a matter of the survival of states. In 1932 another 'new conception of sovereignty' is constructed by Felix Morley. According to him, once we recognise that the vital issue of the modern state is not the extension of its power but that of its services, we realise that the League is

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[73] Eagleton, *The Responsibility of States in International Law* (1928), pp. 11, 16, 41-42, 206. See also Eagleton, *International Government* (1932), pp. 24-30.

[74] Garner, 'Limitations on National Sovereignty in International Relations' (1925), pp. 20, 24. Compare this with his opinion before the First World War which justified Willoughby's views in Chapter 4, note 80. Charles Pergler also stresses that 'in actual international life there is no such thing as absolute sovereignty'. But a limitation upon sovereignty is 'not a limitation of independence of states'. As long as there is no superior, the relative position of the members of the society of nations remains unchanged; if powers are equally limited, the situation in effect remains the same. He also suggests that while constitutional law implements absolute and indivisible sovereignty, in international law sovereignty is limited and divisible. Pergler, *Judicial Interpretation of International Law in the United States* (1928), pp. 34-40.

[75] Potter, *This World of Nations* (1929), p. 230.

[76] Mower, *International Government* (1931), p. 109-116.

[77] The definition of sovereignty in international law merely presumes that 'action taken by the state within certain recognized limits is justifiable. International law may and does set the limits of this presumption.' Ellery C. Stowell, *International Law* (1931), p. 59.

promising an extension of national controls. 'The society of nations' has been established not to override the independence of the nation-state, but to avert the deterioration and submergence of the national contribution in the interdependent world. The League is 'an expression of the new concept of sovereignty as demanded by the facts of the post-war and depression-ridden world.'[78]

But it was rather evident to many that the existing League was not an appropriate organisation to maintain international order in the critical age. Traditional American constitutionalists might think that a stronger international government was needed. An example of such an attitude in the year of Hitler's seizing of power was a 'Constitution of the United Sovereignties of the World' proposed by Joseph P. Tanney. The proposed constitution, which began with 'We, the people of the sovereignties of . . . ', was intended to set up strong legislative, executive and judicial bodies of the world. Ideas and wordings in Tanney's Constitution were almost a direct application of the US Constitution. But his tone was rather grave. Tanney's belief was that the crisis in the world was so critical that the people of the nations could not afford to reject his plan.[79]

Reflecting the international crisis in the second decade of the interwar period, in a newly developed discipline, International Relations, the concept of sovereignty began to be understood in an old-fashioned way. In the same year in which Tanney revealed his plan while Hitler assumed power, Frederick Schuman expressed the view that the concept of state sovereignty and the politics of the balance of power were the two cornerstones of the Western state system. He argues that while sovereignty may have become a myth as some commentators affirm, 'it nevertheless remains a myth enormously potent to stir peoples and governments to action in international affairs.' He concludes that 'The sovereignty of the territorial State remains in the twentieth century, as in the sixteenth'.[80]

As the discipline of International Relations grew out of the study of international history, it is not surprising that sovereignty was the key to the making of a theoretically consistent narrative of international relations. Even if sovereignty might have become

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[78] Morley, *The Society of Nations* (1932), pp. 602-603, 628.

[79] Tanney, *Sovereignty* (1933), pp. 131-159.

[80] Schuman, *International Politics* (1933), pp. 49, 53.

obsolete as a philosophical doctrine, it was still indispensable for some scholars of international relations or politics. Two international relations scholars thus admit that the doctrine of absolutely unrestrained sovereignty 'is false when measured by actual facts of international life.' Yet, 'it is an influential doctrine because it may be offered to an ignorant, unthinking, and emotional nationalistic mass of people as an excuse for illegal acts by their government.'[81] These scholars of international relations did not take the absolute theory of sovereignty at face value. But they conceived the issue of sovereignty to be purely political and felt that they could not afford to abandon the concept in light of the reality of international politics. In this respect, although they did not cherish any dogmatic understanding of sovereignty, they were the predecessors of the post-1945 political realist.

The interwar period shows a history of disillusionment in which constitutional sovereignty was betrayed by national sovereignty. The hope for constitutionally limited sovereignty was lost in the face of the political revenge of national sovereignty. It was this bitter experience as well as the power politics of the Cold War which would determine the attitude of theorists after the second Great War. However, it should be noted that international constitutionalism in this period was based on a product of nationalism in the modern age: the anthropomorphism of nations. Although scholars in this period considerably derogated from the notion of sovereignty, they tended to resort to the method of applying domestic constitutional laws to international society. The pluralist attack upon sovereignty only coincided with a pluralistic understanding of a society of nations. This form of international constitutionalism which was founded upon an analogy between men and nations was prevalent because *the sovereignty of the nation-state* was a given fact.

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[81] Frederick A. Middlebush and Chesney Hill, *Elements of International Relations* (1940), p. 43. In the twenties, Sterling E. Edmunds understands that the 'inherent vice' of the society of nations lies in 'its fraudulent organization of ruling politicians throughout the world disguised and glorified as Sovereign, that is, omnipotent States, whose power no people can limit, constitutionally or otherwise.' He finds no reconciliation but only the contradiction between constitutional rights of individuals and 'the evil political genius of Sovereignty'. Edmunds, *The Lawless Law of Nations* (1925), pp. 11-13.

Chapter 7 The Containment and Formalisation of Sovereignty

This chapter examines the transformation of notions of sovereignty through the three decades during and after the Second World War. In addition to the bitter experience of the collapse of international constitutionalism in the interwar period, the new reality of the Cold War gradually forced Anglo-American intellectuals to change their optimism regarding the possibilities for international projects which revived to some extent in the post-1945 era. The rise and dominance of political realism can be interpreted in this historical context of international politics. National sovereignty, which communists and newly independent states vigorously advocated, was accepted in the process of this emergence of political realism. National sovereignty was not an object to be limited by constitutional rules. Instead, national sovereignty would challenge national sovereignty. In other words, *our* national sovereignty *contains their* national sovereignty. This was the method to maintain peace and order in the Cold War era. I characterise this phenomenon as the *containment* of national sovereignty.

However, this does not mean that most scholars regarded sovereignty as a uncontroversial notion. They did not take the absolute concept of national sovereignty at face value. In consequence, they began to avoid or ignore the issue of sovereignty, because strategically as well as scientifically the issue of sovereignty appeared to be irrelevant. Strategists and social scientists recognised the necessity of the principle of sovereignty, but they lost the incentive to seriously analyse and discuss the problem of sovereignty. Sovereignty was accepted, but only as a formal notion. I call this process the *formalisation* of sovereignty.

In this chapter the first section deals with the discourses on sovereignty in the Anglo-American world in the 1940s. The next focuses on Morgenthau's epoch-making theory of sovereignty. The third section sees the process of the formalisation of sovereignty in the 1950s and 1960s.

The Revival of Constitutional Sovereignty

National sovereignty was seldom regarded as an indisputable principle in the 1940s, before the outbreak of the Cold War.[1] While the Second World War had a serious impact on interwar 'idealistic' projects, it was also clear to British intellectuals that Carr's appeasement was not satisfactory.[2] It was not strange, therefore, to see that Leonard Woolf still insisted in 1940 that sovereignty, which he characterise as 'criminal idiocy', must be limited under the rule of law. The idea that the peace of the world can be maintained without some kind of world organisation is 'a dangerous illusion'.[3] William Beveridge thus proposes 'the world-wide rule of law', which involves 'no surrender of sovereignty'. He believes that 'the rule of law increases national independence .... Just as the freedom of citizens is made greater and not less by the rule of law, so is the independence of nations.'[4]

Robert Federn goes so far as to speak of the 'quasi-sovereignty' of the nation-state given by 'the Federation of Mankind, the democratic World Federation'. He claims that 'What was hitherto called sovereignty and should be called self-government, depends not only on the will of the society which wants to be self-governing, but also on recognition by other states.'[5] Politicians as well did not fail to propose limitations on state sovereignty. In the House of Commons during November 1945, in reply to former Foreign Secretary Anthony Eden who alleged that 'Every succeeding scientific discovery makes greater nonsense of old-time conceptions of sovereignty,' Foreign Secretary

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[1] Concise historical summaries of various doctrines of sovereignty are found in Marek Stanislaw Korowicz, 'Modern Doctrines of the Sovereignty of States'-I, II (1958).

[2] According to Emery Reves, 'hopeless utopians who live entirely in the past... call themselves realists and practical men and deride any attempt at rational thinking as "idealism".' What is at stake is 'the correct interpretation and application of sovereignty'. Reves, *The Anatomy of Peace* (1947), pp. 115-129.

[3] Woolf, *The Future of International Government* (1940), pp. 4-12. By advocating 'functionalism', David Mitrany emphasises that sovereignty would be preserved after international integration, although its content and working 'could be modified'. Mitrany, *A Working Peace System* (1943), p. 29. Allan G. B. Fisher's suggestion was also to construct international institutions but not to impair 'the formal apparatus of sovereign power'. Fisher, 'International Institutions in a World of Sovereign States' (1944), p. 14.

[4] Beveridge, *The Price of Peace* (1945), pp. 50-53. But Alfred Cobban rejects national self-determination as a foundation of sovereignty. The two principles have their separate spheres. Sovereignty is concerned with the preservation of law and order and the social fabric, not with nationality. Cobban, *The Nation State and National Self-Determination* (1945), pp. 130-142.

[5] Federn, *Peace Prosperity International Order* (1945), p. 117.

Ernest Bevin provided a radical plan. He emphasised the necessity of 'world law' and a 'world assembly' elected directly from the people of the world as a whole, who Bevin articulated is 'the great world sovereign'.[6]

In America too, it was asserted that in international law sovereignty was 'an impossible postulate'.[7] About one hundred and fifty American and Canadian jurists and other scholars argued that 'constitutional international law' should limit the sovereignty of the states.[8] But the Americans, whose own soil was not sacrificed during the war, were not ready to surrender sovereignty. While they agreed that 'the classical idea of sovereignty' had to be 'modified', they still discussed and sought for 'a middle ground between the superorganization and individualism run riot'. It was not sovereignty, but 'the abuse of sovereignty' that had made for war and tragedy.[9]

In the United States, sovereignty was still an inviolable principle.[10] Sovereignty should not be abandoned; but should not be misused either. Wendell L. Willkie, former Republican presidential candidate, writes that 'we shall have to give up the idea that sovereignty is something simply to be conserved . . . it is an active force to be used.' This means that 'our use of our sovereignty to create an effective instrument of peace is the best way of protecting our sovereignty'.[11]

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[6] But Bevin explained that his plan did not lead to the surrender of sovereignty. Referring to the history of the United States, he said, 'no one ever surrenders sovereignty: they merge it into a greater sovereignty.' His idea of the world law and a world assembly as well as his plan of the 'United States of Europe' in the interwar period was supposed to be set up with 'a limited objective - the objective of peace'. *Parliamentary Debates, Fifth Series, vol. 416* (1946), pp. 612, 781-787. A month later, Canadian Prime Minister, Mackenzie King, declared that a world government should be created. However, a Soviet view is that Bevin's idea of a world government is a capitalist conspiracy. See George W. Keeton and Georg Schwarzenberger, *Making International Law Work*, second edition (1946), pp. 172-175; Elliot R. Goodman, *The Soviet Design for a World State* (1960), p. 396; Korowicz, *op. cit.*, pp. 98-100.

[7] Jackson H. Ralston, *A Quest for International Order* (1941), p. 55.

[8] Carnegie Endowment for International Peace, *The International Law of the Future* (1944), pp. 29-31.

[9] Ben M. Cherrington, 'Must Sovereignty be limited' and R. E. Pattison Kline, 'Must Sovereignty be limited?' in Julia E. Johnsen (ed.), *World Peace Plan* (1943), pp. 204, 207-208. As regards sovereignty and the Pan-Americanism, see Ezequiel Padilla, Secretary of State for Foreign Affairs of Mexico, 'Sovereignty and Peace' (1942).

[10] Many believed that it was the isolationist understanding of the word which had prevented the US from joining the League and incurred the Second World War. For instance, Kenneth E. Appel, psychiatrist, analyses that isolationism is an unhealthy sign. The vocabulary associated with sovereignty is of the delusions of grandeur of the manic patient or the paretic. Then he makes a diagnosis by writing that 'The peace which follows this war will be psychologically unsound and provocative of another war, unless a *new concept* of shared - cooperative - contributing *sovereignty* forms the basis of our thinking and dealings with other nations.' Appel, 'Nationalism and Sovereignty: A Psychiatric View' (1945), pp. 357, 359, 361.

[11] Willkie, 'Our Sovereignty: Shall we use it?' (1944), pp. 347, 360, 361. Like President Roosevelt some publicists were drawn upon regionalism as a 'middle ground' to use American sovereignty. But their plans were evidently 'American'. For instance, Haridas T. Muzumdar believes that 'the doctrine of Nation-State sovereignty

This orientation towards a 'middle ground' was part of a further search for a constitutional theory of sovereignty. Edward S. Corwin thinks that the right to make war distinguishes the doctrine of unlimited from legally limited sovereignty. He also emphasises that total war is the price of total sovereignty. Thus he concludes that inasmuch as law always implies the existence of institutions to support the obligations which it imposes, there is no obstacle in the way of the participation by the United States in an international organization for peace. He insists that rather, American statesmen have generally espoused such a relationship between sovereignty and international law.[12] Charles E. Merriam also stresses that 'Sovereignty must make friends with constitutional values, scientific values, idealistic values, which are the heart of our new civilization.'[13] As Pitirim A. Sorokin argues, it may follow from this that if an explicit limitation of sovereignty is impossible, 'a lasting peace is impossible'.[14] Frank G. Tyrrell furthermore asserts that 'the timidity and aversion shown by those who think they are opposed to a world federation' arises from taking the definition of sovereignty at its face value. But in the sense of abstract definitions there is not and cannot be a sovereign nation anywhere. '[T]o extend our sovereignty in combination with that of other nations, is merely to extend and initiate the reign of law in an area where at present there is no vestige of authority, or coercive power of law.'[15]

The very traditional themes of the rule of law and individual liberty were also prominent among American writers. Margaret Spahr offers 'a possible redefinition of

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must be modified to conform to the actual status of the forty-eight states in the United States of America.' He thus foresees five regional sovereignties in the united nations of the world, which is 'a logical culmination' of the USA. Muzumdar, *The United Nations of the World* (1942), pp. 26, 44, 129. According to Ely Culbertson's plan, the world is divided into nine 'Sovereign Regional Federation' led by nine powers. The united nations at war play significant roles. For instance, the USA is allocated the largest portion of 'the National Contingents' and Great Britain and Russia the second largest. But Culbertson's world constitution stipulates that this highly hierarchical world federation does not impair the sovereignty of each state. Culbertson, *Total War: What makes Wars and how to organize Peace* (1943), pp. 242-257.

[12] Corwin, *The Constitution and World Organization* (1944), pp. 1-6.

[13] Merriam, 'Sovereignty' (1944), pp. 24-25.

[14] Sorokin, 'Cause of War and Conditions of a Lasting Peace' (1944), p. 105. Amos J. Peaslee also says that 'If we are still not prepared to admit the basic fact that sovereignty is merely a relative term, that unrestricted sovereignty means merely a license to outlawry, and that any effective international organization will mean an exchange of some national sovereignty for something else, then we shall still be merely trying to fool ourselves and others.' Peaslee, *United Nations Government* (1945), p. 60.

[15] Tyrrell, 'Sovereignty not impaired by World Federation' (1944), p. 43. As regards the concept of sovereignty subject to international federation, see also Pitman B. Potter, *An Introduction to the Study of International Organization* (1948), pp. 183-194.

sovereignty in the light of Locke's theory of liberty'. According to her, 'sovereignty under law for the state is no more absurd than liberty under law for the individual.' Her logic is a direct application of Locke's liberalism to international society in analogy of individual liberty with state sovereignty. She insists that 'Once it is granted that liberty is subject to limitation even in the state of nature, and that sovereignty is limited even in an unorganized world community, it follows easily that liberty is more effectively enjoyed in a civil state and sovereignty in an international organization.'[16]

In the 1940s Western publicists and practitioners repeatedly confirmed that sovereignty was and should be limited in international society.[17] The United Nations Charter was interpreted in line with a constitutional understanding of sovereignty.[18] The majority of international lawyers found no difficulty in such an argument. Article 14 of the Draft Declaration on Rights and Duties of States adopted by the International Law Commission of the United Nations in June, 1949, reads that 'Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.'[19] All these statements demonstrate the consistency of the discourses on the limitation of sovereignty after the Second World War, which were destined to face the reality of the Cold War and the theory of national sovereignty of the political realist.

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[16] Spahr, 'Sovereignty under Law' (1945), pp. 350, 354.

[17] For instance, in the military field, General Omar N. Bradley, Chairman of the US Joint Chiefs of Staff, said in 1950, 'With such an agreement [NATO], of course, a small bit of sovereignty is relinquished.' British Field Marshall Bernard L. Montgomery also said in India in 1949, 'It is quite illogical for nations to agree on a common cause and then not to pool their sovereignty in order to pursue that cause, when it may well be a matter of life and death to them.' Quoted in Norman D. Palmer and Howard C. Perkins, *International Relations* (1954), p. 65.

[18] '[S]overeignty in the Charter must obviously mean sovereignty subject to the provisions of the Charter. This implies that the Member States are free and sovereign within the limitations imposed upon them by the Charter. . . . [T]he "sovereign equality" of the Member States does not mean that they are absolutely sovereign or absolutely equal.' Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations* (1946), pp. 64-66.

[19] Sohn, *op. cit.*, p. 27-29. *Essentials of Peace*, the UN General Assembly Resolution 290 (IV) of 1949, calls upon every nation 'to agree to the exercise of national sovereignty jointly with other nations to the extent necessary to attain international control of atomic energy which would make effective the prohibition of atomic weapons and assure the use of atomic energy for peaceful purposes only.' *Ibid.*, pp. 29-30.

The Counterattack of Political Realism

When Hans Morgenthau published 'The Problem of Sovereignty Reconsidered' in 1948, which was later included in *Politics among Nations*, the Cold War had already begun. Morgenthau argued that the theory of sovereignty was not immune from the necessity for change. According to him, 'The concept of sovereignty, being relative to the political situation existing in a particular period of history, is in need of periodical re-examination in the light of the actual political conditions of the time'.[20] This implies that the theory of sovereignty which accords with the Cold War must now be established.

What are the characteristics of realist discourses on sovereignty during the Cold War? Morgenthau conceives sovereign states to be 'the supreme law creating and law enforcing authorities, independent of legal restraint'.[21] What is striking in this definition is that it is thoroughly inward-looking. Namely, sovereignty is determined mainly by domestic conditions; it presupposes a domestic power relationship between the ruler and the ruled. This highlights three fundamental aspects of Morgenthau's notion of sovereignty.

First, the concept of sovereignty is autonomous. It has little relevance to international conditions. This signifies that Morgenthau's notion of sovereignty is not derived from a set of universal principles like natural law; instead, sovereignty is prior to any international norms. Morgenthau sees no contradiction between sovereignty and international law, not because the former exists within the framework of the latter, but because the complete decentralization of the legislative, judicial, and executive functions in international law is but so many manifestations of sovereignty.[22] Thus the principles of independence, equality and unanimity are said to be the synonyms of sovereignty. In Morgenthau's deduction, the principle of sovereign equality is just redundant language.[23] However, he also finds that 'Sovereignty is not equality of rights

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[20] Morgenthau, 'The Problem of Sovereignty Reconsidered' (1948), p. 343.

[21] *Ibid.*, p. 343.

[22] *Ibid.*, pp. 344-345.

[23] *Ibid.*, pp. 345-347.

and obligations under international law. . . . The actual inequality of states and their dependence upon each other has no relevance in so far as the legal status called sovereignty is concerned.[24] The inequality of states, which brings about a harsh reality of the struggle for power in international politics, is rather an inevitable result of the absolute notion of sovereignty.

Second, the subject of Morgenthau's sovereignty is not the state as usually conceived in international law. Morgenthau unequivocally attributes sovereignty to the government in a traditional way. It cannot be overemphasised that Morgenthau defines only 'states being sovereign', but not sovereignty. The sovereign government is the supreme authority *within* the state. Sovereignty is a purely domestic matter. It is no wonder that this sovereign state cannot be accommodated in the international sphere. It is not contradictory that Morgenthau identifies a government as representing a whole nation-state.[25] Morgenthau identifies government sovereignty with state sovereignty. For him, whatever the American tradition is, there is no such thing as sovereignty other than government sovereignty.

Third, in Morgenthau's theory sovereignty is an absolute and indispensable attribute of the state. If there is a state, there must be sovereignty within it. Whatever the political fact is, sovereignty always resides in the state. But Morgenthau never looks for 'limited' or 'half-sovereign' or 'quasi-sovereign' states; he denies a possibility of the degree of sovereignty. Sovereignty exists as an inviolable fact regardless of the difference of political power, while it is 'the quality of the government's political control which determines the issue of sovereignty.'[26] Later, he would insist that he was not a statist and the nation-state was not a proper unit of political analysis. But the point is

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[24] *Ibid.*, p. 348.

[25] Morgenthau also equates 'nations' with 'states' and contemplates 'politics among nations'. In other words, Morgenthau believes that a nation as an autonomous and self-sufficient entity is tantamount to a state which is perfectly represented by a sovereign government. It is noteworthy that Morgenthau regarded seventeenth and eighteenth century aristocratic diplomacy as 'international' or 'supranational' in contrast to 'nationalistic' politics in the modern age. It follows from this that 'the content and objectives of today's ethics of nationalistic universalism' is not similar to the Westphalian system, but to 'those of primitive tribes or of the Thirty Years' War'. See Morgenthau, *Politics among Nations* (1948), pp. 260-274 Compare it with publicists like G. F. Hinman who maintains that the 'sovereignty of politicians must be vanquished.' Hinman, *War is Preventable* (1945), pp. 130-136. The 'Westphalian system' was not considered as the origin of international anarchy in this age. For instance, for Peter W. Berger, the Peace of Westphalia is a symbol of international peace which embodies (relative) sovereignty, international law and the balance of power. See Berger, 'National Sovereignty and World Unity' (1945).

[26] Morgenthau, 'The Problem', p. 353.

that he believes in the sovereign 'quality' of government that must exist in a state.

These characteristics of Morgenthau's notion of sovereignty are illustrated in his denial of divisibility of sovereignty. His method of proof is based on his reasoning of the logic of domestic politics. According to him,

> that authority within the state is sovereign which in case of dissension among the different law making factors has the responsibility for making the final binding decision and which in a crisis of law enforcement, such as revolution or civil war, has the ultimate responsibility for enforcing the laws of the land. That responsibility must rest somewhere - or nowhere, but cannot be both here and there at the same time. . . . If it rests nowhere . . . in times of constitutional crisis either one of the constitutional authorities will usurp that responsibility, or else revolution will invest somebody . . . with supreme authority to end chaos and to establish peace and order. If the location of sovereignty seems to be held in abeyance because the constitution lends itself to different interpretations on that point, a struggle, political or military, between the pretenders to supreme authority will decide the question one way or the other. The struggle between the federal government and the states, issuing in a civil war which decided the question in favor of the federal government, is a classic example of this situation.[27]

This is a manifest invasion of the Anglo-American world by the spirit of Carl Schmitt. Sovereignty always functions in an autonomous entity. It decides the location of the supreme government. It is an invisible substance which must exist somewhere in a state. If it cannot be found, it will appear in a crisis. There is no room for constitutional rules binding upon sovereignty. Nor is any possibility of the limitation of sovereignty. Morgenthau's attempt was intended to be a complete overthrow of the Anglo-American constitutional theory of sovereignty in the name of power politics.

This point is also highlighted when Morgenthau repudiates the idea of the rule of law. Morgenthau criticises 'the popular constitutional doctrine' for confounding the subjection of the sovereign authority to legal controls and political restraints with its elimination. They have forgotten that in any state 'there must be a man or a group of men ultimately responsible for the exercise of political authority.' The Anglo-American tradition of constitutionalism replacing the rule of men with the rule of law is a wrong doctrine. The sovereign in America has not been law, but people like Lincoln, Wilson,

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[27] *Ibid.*, p. 361.

and Franklin D. Roosevelt.[28] Morgenthau goes on to say that:

> Since it is constitutionally and politically impossible to deny that the federal government is sovereign and since it is psychologically impossible to admit that the individual states are no longer sovereign, constitutional theory simply divides sovereignty between the federal government and the states, thus trying to reconcile political realities with political preferences. . . . It is owing to a similar need for building an ideological bridge between political realities and political preferences that the doctrine of divided sovereignty has gained wide acceptance in the field of international relations. . . . The doctrine of the divisibility of sovereignty makes it intellectually feasible to reconcile not only what logic proves to be incompatible: to give up sovereignty while retaining it, but also what experience has shown to be irreconcilable under the condition of modern civilization: national sovereignty and international order. Far from expressing a theoretical truth or from reflecting the actuality of political experience, the advice to give up "a part of national sovereignty" for the sake of the preservation of peace is tantamount to the advice to close one's eyes and dream that one can eat one's cake and have it, too.[29]

However, in practice, it is not impossible to 'eat your cake and have it too' if the cake can be divided. Morgenthau is right only if the cake cannot be divided. It is Morgenthau's own conception of sovereignty formulated in the atmosphere after the two total wars that denies the history of pre-Civil War America. It is his own definition of sovereignty that proves the validity of his argument. It is his own distaste of the principle of a 'golden mean' that renounces the constitutional theory.

How was this revolutionary attempt accepted as a new orthodoxy of the Anglo-American world? The answer is that it became dominant according to the change in the perception of 'reality'. There were times when the perception of 'reality' which pluralists and international lawyers discovered invalidated the absolute and invisible notion of sovereignty. But another perception of 'reality' now took sides with a once outmoded understanding of sovereignty. International institutions were defeated by power politics that led to another world war. New efforts to construct international order met power politics between the major allies in the war. International constitutionalism did not look powerful enough to secure the interests of the United States in the face of the hostility of the communist bloc. The revolution embodied by Morgenthau was a reflection of the

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[28] *Ibid.*, pp. 362-363.

[29] *Ibid.*, pp. 363-365.

change in the perception of 'reality' as a result of the two total wars and the ongoing Cold War.

After Morgenthau the study of international relations produced plenty of strategic works. National sovereignty was then used to *contain* national sovereignty. The strategic way of thinking is that it was only national sovereignty which could challenge national sovereignty. Constitutional rules do not limit national sovereignty. In fact, international constitutionalism gradually ceased to be a design to maintain order. This does not mean, however, that Morgenthau's idea of sovereignty was never challenged. On the contrary, it was subject to incessant criticisms. Behaviourism soon undermined dogmatic aspects of Morgenthau's theory. But the significance of the Morgenthau revolution lay at a deeper level. His revolution made the attempts to limit sovereignty look unrealistic and obsolete, at least in the field of international politics. National sovereignty became an undeniable reality, although it still had to be watched over. Thus sovereignty became an object to be *contained.* The struggle between national sovereignty versus the rule of law was now an outmoded topic. National sovereignty versus national sovereignty characterised the nature of international studies, in accordance with the practical interest among politicians and strategists in the containment of national sovereignty of *others* by *our* national sovereignty. Sovereignty shook hands with *reality*, as the age of the derogation from it was over.

From Limited to Formal Sovereignty

In this section we shall examine the development of notions of sovereignty in the 1950s and 1960s in the UK and in the USA. In this period the Morgenthau revolution influenced political realists, who took sovereignty as a given fact in international politics. But the advent of behaviourism made the problem of sovereignty obsolete. The abstract and ambiguous nature of the concept of sovereignty did not fit in with scientific analyses of politics. We shall see that the result was that sovereignty ceased to be 'limited'; it was either reaffirmed in classical terms or accepted as a formal notion.

Formalisation of Sovereignty in Britain

Great Britain after the Second World War was caught up in the debates surrounding European integration.[30] However, the British 'golden mean' was searched for in relation to the US and the Commonwealth as well as Europe. These complex British interests were alien to Continental European countries that sought to establish a strong regional supernational community. France and West Germany as the core advocates of the integration went far ahead of Britain.[31] With decolonisation and the decline of the Empire, Britain was eventually forced to apply for the membership of the European Communities, although French President Charles de Gaulle rejected the application twice in the 1960s. By that time Britain had lost a privileged position to limit sovereignty in Europe and in the Commonwealth.[32]

During the 1950s political scientists who were not under the influence of the Morgenthau revolution still regarded sovereignty as a confusing concept. There were a few attempts to clarify its ambiguity. W. J. Ress classifies sovereignty in six categories such as supreme legal authority, a supreme coercive power exercised by a

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[30] For instance, a congress held in 1948 with Winston Churchill as Honorary President in its resolutions declared: 'for the people of Europe the hour has come to hand over and merge a part of their sovereign rights'. Quoted in Forest L. Grieves, *Supranationalism and International Adjudication* (1969), p. 154.

[31] The Preamble of the French Constitution of 1946 declares: 'On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defense of peace.' Amos J. Peaslee (ed.), *Constitutions of Nations* (1956), p. 7. The French Foreign Minister Robert Schuman proclaimed in an address to the Consultative Assembly of the Council of Europe, August 10, 1950: 'For my part, I accept the principle of the renunciation of sovereign rights not for itself, not as an end in itself, but as a necessary, as the only means we have of rising above the national egotisms, antagonisms, and narrowness which are killing us.' Quoted in Palmer and Perkins, *op. cit.*, p. 65. Basic Law for the Federal Republic of Germany of 1949 also stipulates the federation may 'transfer sovereign powers to international institutions' and 'consent to the limitations of its sovereign powers which will bring about and secure a peaceful and lasting order in Europe and among nations of the world.' Peaslee, *op. cit.*, p. 34. When the European Coal and Steel Community Treaty was ratified in all six countries, the German Chancellor Konrad Adenauer among others remarked to the Bundestag that for the first time in history nations were voluntarily 'giving up a portion of their sovereignty' to a supranational institution. Quoted in Grieves, *op. cit.*, p. 129. Adenauer advocated an integrated 'Defense Community' to which member states 'give up their sovereignty in the field of defense'. Adenauer, 'The Political Unification of Europe' (1953), pp. 489-490. By contrast, in a debate in the House of Commons in 1950, British Prime Minister Clement Attlee explained the decision of the Labour Government to stay out of the European Communities by saying: 'It is quite true in the world as it is placed today it is ridiculous to try to stand for the absolute sovereignty of the individual state . . . but the question arises when there is to be a surrender of sovereignty, to what body that surrender should be made.' Attlee believed that 'Schuman plan' was not the international arrangements, but to set up 'a supra-national authority' which is not 'responsible to Parliaments'. *Parliamentary Debates, Fifth Series, vol. 476* (1950), pp. 2163-2164. He only finds the 'surrender of sovereignty in the British Commonwealth'. Atlee, 'The Perils of Absolute Sovereignty' in Cox, *op. cit*, p. 92.

[32] As regards the lost sovereignty of parliament in the Commonwealth, see Edward McWhinney, '"Sovereignty" in the United Kingdom and the Commonwealth Countries at the Present Day' (1953); Geoffrey Marshall, 'What is Parliament? The Changing Concept of Parliamentary Sovereignty' (1954).

determinate body of persons possessing a monopoly of certain instruments of coercion, the strongest influence, etc.[33] But Stanley I. Benn exposes the defects in Ress's complicated and perplexing distinctions of sovereignty. Benn concludes that 'there would seem to be a strong case for giving up so Protean a word'.[34] It was common in the field of political theory that sovereignty was denied for the sake of liberty or conceptual clarity.[35]

In the field of international studies, H. Lauterpacht, a main target of Carr's attack upon 'utopianism', challenged state-centric international law. Despite the outbreak of the Cold War, the Nuremberg and Tokyo tribunals and the Universal Declaration of Human Rights of 1948 provided considerable momentum for the establishment of a world-wide constitutional framework.[36] In his *International Law and Human Rights* written in the year of the European Convention on Human Rights in 1950, Lauterpacht takes advantage of the momentum and challenged the conventional premises of international law. His main purpose is to explore the possibility of adopting 'an international Bill of Rights', which necessarily involves 'some sacrifices of sovereignty'. Lauterpacht maintains the traditional Anglo-American liberal premises by confirming that the purpose of the State is to safeguard the interests of the individual human being. Therefore, it is inadmissible that the state claims to be the protector of all these interests and exclude individuals and non-governmental bodies from the international legal sphere. And it is possible that Great Britain will 'resume the position of leadership to which she is entitled by virtue of her historic contribution to the ideas and the practice of the rights of man.'[37]

Lauterpacht's argument partakes of a 'utopian' tendency when he talks about 'the constitution of the Federation of the World'. However, it can be noted that in the time of world-wide reconstruction, even Morgenthau mentioned a world government as a

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[33] Ress, 'The Theory of Sovereignty Restated' (1950).

[34] Benn, 'The Use of "Sovereignty"' (1955), p. 122.

[35] For instance, see Isaiah Berlin, 'Two Concepts of Liberty' (1958), pp. 162-166; F. A. Hayek, *The Constitution of Liberty* (1960), p. 106.

[36] It is interesting that the Universal Declaration of Human Rights contains the wording of the 'limitation of sovereignty'. Article 2 stipulates that no distinction shall be made on the basis of the country or territory to which a person belongs, 'whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.' Brownlie, *op. cit.*, p. 257.

[37] Lauterpacht, *International Law and Human Rights* (1950), pp. 68, 305-310.

future, although probably unforeseeable, goal. Lauterpacht does not simply propose a plan of a world federation.[38] What he seeks to establish is a global constitutional framework which means 'the curbing of the pretensions and aberrations of the doctrine of sovereignty, and the effective protection of human rights as part of the constitution of international society.' In line with the Grotian tradition,[39] Lauterpacht asserts that 'no integration of international society is possible without far-reaching limitations of the sovereignty of its component units. At the same time such limitation of sovereignty, profound as they are, can be achieved without interference with their international personality and status.'[40]

In the light of 'sovereignty within the law', C. Wilfred Jenks also explores a possibility of 'the common law of mankind'. According to him, 'the concept that sovereignty is limited by the law' is familiar to all of the major legal systems in the world with the exception of Soviet Law.[41] Sovereignty cannot achieve peace, security, justice, freedom, prosperity, welfare, etc. The newly independent states are in 'a snare and a delusion'. So Jenks proclaims that 'I prefer to abandon it as misleading.' To say the least, it must be recognised that sovereignty is 'the creature and not the master of the law'.[42]

By contrast, another prominent international legal scholar, Georg Schwarzenberger, offers a pessimistic account in the face of the harsh reality of the Cold War. He critically describes the history of the concept of sovereignty. But he cannot end up with a simple accusation of the principle. He calmly observes that his country is in the middle ground 'between States which, in the atomic age, are still politically sovereign

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[38] Lauterpacht contemplates that the difference of the typical forms of unions of States are matters of degree; that any substantial measure of success does not postulate the disappearance of the international personality of existing sovereign states; that there is no practical limit to the abandonment of rights of sovereignty within a state association; and that there is no contradiction between the notion of sovereignty in international law and the gradual approximation of the federation of the world. Lauterpacht, 'Sovereignty and Federation in International Law' presumably written in 1940, p. 25. See also Lauterpacht, 'State Sovereignty and Human Rights' (1950).

[39] See Lauterpacht, 'The Grotian Tradition in International Law'.

[40] Lauterpacht, *International Law and Human Rights*, pp. 310, 460, 461. Lauterpacht expects a 'European Court of Human Rights' to be a regional bridge to a world constitution. See *ibid.*, pp. 453-456. See also D. R. Gilmour, 'The Sovereignty of Parliament and the European Commission of Human Rights' (1968), pp. 62-73.

[41] Jenks, *The Common Law of Mankind* (1958), pp. 123-129.

[42] Jenks, *Law in the World Community* (1967), pp. 6, 23, 31-40. See also Arthur Larson, C. Wilfred Jenks and others, *Sovereignty within the Law* (1965), chapters 1, 2, 3, 24, 25; Jenks, *A New World of Law?* (1969), pp. 131-137, 295.

and others who can claim sovereignty only under international law.' In the age of ideological struggles he recognises that 'international society has reached the penultimate stage in the process of complete concentration of political power in one world State.' Sovereignty has not been extinct, as there are values more important to states than the well-being of international society or even the maintenance of peace. He concludes in a cool tone that 'the doctrine of state sovereignty is more than a relic of the past. The old bottles have been filled with a new and virulent vintage.'[43]

Before the First World War international lawyers distinguished between sovereign and other non-full sovereign states. Under the United Nations legal system it has become politically incorrect to call minor states non-full sovereigns. So what was implemented in line with a British tradition of the *inequality* of states is a variety of the forms of sovereignty, which demonstrated the ranks of sovereign states.[44] Sovereignty constitutes 'bottles' and states are 'vintage'. It is the latter which decides the ranks of goods. In other words, Schwarzenberger supposes that nations are a 'reality', and sovereignty is 'merely ideological symptom'.[45]

This highlights the dilemma. Sovereignty was just an old idea with no substance in contemporary international society. However, it seemed to be indispensable as well. Sovereignty was a groundless, but principal notion. There were two ways to get out of this dilemma. One was to understand sovereignty in a formal way. In 1965 John Burton insists, by criticising 'orthodox' theories of international relations that have sought to limit sovereignty, that 'Any realistic system in current world politics must assume the continued existence of sovereign States'. But by sovereignty the theorist who will write *World Society* seven years later means 'territoriality', and nothing else.[46] This territoriality is a fact in international relations. If there are many states that demand

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[43] Schwarzenberger, 'Sovereignty: Ideology and Reality' (1950), pp. 1-22.

[44] Schwarzenberger attempts to explain the contemporary world by using six forms of sovereignty by using such categories as positive-negative, political-legal, and absolute-relative. In so doing, he identifies the use of sovereignty corresponding to actual power politics. He recognises that while between 'ordinary' members of the United Nations 'sovereign equality' means reciprocal respect for the legal and negative sovereignty of member States, between the 'overmighty' members and others in a state of *de facto* dependence it means 'sovereign inequality' and acceptance of the political and positive sovereignty of those above the law of Charter. Schwarzenberger, 'The Forms of Sovereignty' (1957), pp. 264-295. See also Schwarzenberger, *International Law and Order* (1971), pp. 57-83.

[45] *Ibid.*, p. 20.

[46] Burton, *International Relations* (1965), pp. 67-71, 116-118.

sovereignty, it is better to give it to them in a formal way. Sovereignty is not an uncontrollable power. It is 'the basic constitutional doctrine of the law of nations.'[47]

It was not accidental, even though paradoxical, that F. H. Hinsley's affirmation of the classical theory of sovereignty appeared in such circumstances. His method of restoring the classical authority was the other way to escape from the dilemma. Hinsley's 'modern theory of sovereignty' is mainly devoted to explaining the classical doctrine of Bodin. Indeed, Hinsley asserts that the history of the concept after Bodin is 'a history of its use and misuse in varying political conditions.'[48] This is timely conservatism to the effect that it is intended to put an end to fluctuations of the idea of sovereignty.

Hinsley defines sovereignty as 'the idea that there is a final and absolute political authority in the political community . . . and no final and absolute authority exists elsewhere.' Hinsley understands that the age of reification is over in the West and emphasises that sovereignty is an idea. But it is also noteworthy that Hinsley identifies a condition for the concept of sovereignty so defined to emerge. Sovereignty appears in full when the interest of society is identified with that of a state. Sovereignty is a symbol of the unification of the state and society.[49] Hinsley also emphasises that sovereignty is the doctrine located between universalism and absolutism; it justifies both national and international politics.[50] In short, sovereignty is a theory of the identification and nationalisation of the state and society in the family of nations.

It can be noted in this context that European countries had adopted welfare policies after the Second World War. The Labour government in the UK implemented a series of policies for nationalisation and welfare systems. The continental European countries also took major steps in the same direction.[51] In this sense it is of importance that Hinsley emphasises the identification of the interests of the state and society. In the year Hinsley's book was published, de Gaulle withdrew French forces from the integrated

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[47] Ian Brownlie, *Principles of Public International Law* (1966), p. 280.

[48] Hinsley, *Sovereignty* (1966), p. 125.

[49] *Ibid.*, pp. 1-26.

[50] Hinsley, 'The Concept of Sovereignty and the Relations between States' (1967), pp. 242-252.

[51] J. D. B. Miller says that the combination of 'people's ancient need for order and their modern search for welfare' helps to explain 'why the sovereign state, instead of becoming outmoded (as many hopeful people have suggested at various times in this century), has become the model and aim of every community which is denied its benefits.' Miller, *The Nature of Politics* (1962), p. 139.

NATO command structure. In the previous year, European integration fell into a serious crisis as a result of the French Gaullist policy.[52] As a consequence, the character of the European institution dramatically changed. By the time the UK finally succeeded in joining the European Community in 1973, the enthusiasm for a super-state had gone. This does not mean that nationalism as ideology was resurging in Europe throughout the 1960s. But it seemed true that the nation state presented itself to be too strong a unit to wither away.

W. J. Stankiewicz explains the political connotation of Hinsley's attempt. Contemporary political scientists decry sovereignty and analyse government solely in terms of power. But behind such a tendency, according to Stankiewicz, there is 'a serious gap between government and the governed, and between society and the state', which leads to 'a persistent decline in the sense of obligation felt by the governed' and 'a growing lack of purpose' on the part of government. That is why 'The harmony of interest which Bodin and Hobbes sought by developing a logical theory of sovereignty needs now to be revived.'[53] There might be a sense of decaying political morals in the late 1960s when a revolution of culture among younger generations was in progress. For Stankiewicz sovereignty is a tool to restore Bodin and Hobbes's theory of harmony.[54]

As the enthusiasm for nationalism declined, the classical doctrine of sovereignty revived. While behaviourists lost interest in the problem of sovereignty, the authority of Bodin and Hobbes was reiterated. The intellectual movements to cultivate new meanings of sovereignty were over. The formalisation and the atavism of sovereignty were the two sides of the same coin.

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[52] Fancis Rosenstiel, who might be said to represent a kind of idealised French position, dismissed in 1963 'supranationality' of the European community as it was still the Europe of the Communities made up of concurrent sovereignties. He writes that 'it is impossible for an entity without any sociological basis to aspire to the slightest sovereignty. "Supranational" communities are only technical extensions dependent upon the exercise of national sovereignty.' His argument is that sociological bases of nation states on which sovereignty is founded 'are never reduced to the secondary level of administration'. Rosenstiel, 'Reflections on the Notion of "Supranationality"' (1963), pp. 128-130.

[53] Stankiewicz, 'In Defense of Sovereignty: A Critique and an Interpretation' (1969), p. 38. He was a Polish who was educated in Britain and later became a professor at the university of British Columbia.

[54] Stankiewicz believes that 'when the need for action in the face of an implicit threat of conflict arises, the logic of sovereignty prevails over the logic of democracy. . . . On balance, democracy may be prone to this type of "defeat"; the shortcomings inherent in its pronouncements about social order - in particular the anti-social nature of its individualism - may tend to produce conditions propitious for the full-fledged classical theory of sovereignty.' *Ibid.*, pp. 6-7.

Formalisation of Sovereignty in America

In America the tendency towards the formalisation of sovereignty became more conspicuous. The United States enjoyed supreme power after the Second World War, although the US government had to pay formal respect for sovereignty in order to keep its allies on its side and maintain 'peaceful coexistence' with the communist camp. But whatever the definition of sovereignty was, the US and the USSR continued to manage the bipolar world.

There were also some political theorists who advocated the abandonment of the word 'sovereignty'. According to Jacques Maritain, sovereignty means a natural and inalienable right to supreme independence and power which are absolute and transcendent. But neither a body politic nor the state as a part of it possesses such a right. Thus 'political philosophy must eliminate Sovereignty both as a word and as a concept.'[55] But this elimination itself partakes of the abstractness of political philosophy for empirical political scientists. When Harold D. Lasswell and Abraham Kaplan define sovereignty as 'the highest degree of authority' in their inquiry into empirical political research, they have no intention of arguing for sovereignty. Their definition of sovereignty is just an 'attempt to specify a clear meaning for the term which will be useful for inquiry into the political process, without regard to its function in political philosophy.' Sovereignty is only concerned with the 'formal basis' of the justification of power. They insist that 'the highest degree of authority' is far from being unlimited, absolute or complete. Their definition of sovereignty enables them 'to deal with it on the basis of observable practices and perspectives - those of "habitual obedience" . . . or, more precisely, of habitual *formalized* obedience.' With their notion of the state being 'a formal one', they see no difficulty in accepting Schmitt and Bluntschli's theories. This represents the dominant approach of social scientists to sovereignty in the latter half of the twentieth century.[56]

In a constitutionalist vein, a leading student of international relations argued for the possibility of a modification of sovereignty. Quincy Wright warned in 1951 that a world

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[55] Maritain, 'The Concept of Sovereignty' (1950), pp. 343-357.

[56] Lasswell and Kaplan, *Power and Society* (1950), pp. 177-185.

'safe for democracy' might not mean a world all of which is democratic as Americans interpret the term. In order to secure the world constitution, the United States must be ready to modify the exercise of sovereignty, or sovereignty itself.[57] Wright points out that while national capitalists have developed powerful movements for world government, cosmopolitan communists are strongly advocating national sovereignty. On the one hand, the unstable world has converted nationalism and sovereignty into terms of reproach. On the other hand, the attention of most thinkers has highlighted the potentialities of a world state for oppressing humanity and for frustrating progress. He thus emphasises that the United Nations may develop into something different from national sovereignties or world government, namely, a more complex balance of power.[58] As the two superpowers somehow maintained a fragile 'peaceful coexistence', Wright proclaims in 1961 that 'legal sovereignty' is not hostile to international cooperation. He argues that 'The problem of the world is, therefore, one of educating governments and peoples of the diverse civilizations and ideologies to an appreciation of the nature and value of sovereignty under law'.[59]

Sovereignty is by no means omnipotent, but may well be 'useful'. Charles P. Schleicher argues that it should be left open to many interpretations. He exemplifies absolute, conventional (limited), partial, and conditional sovereignty.[60] In a more constitutional vein, in *World Peace through World Law*, dedicated 'to all those who seek the rule of law in world affairs', two international lawyers, Grenville Clark and Louis B. Sohn, propose a revision of the UN Charter. Under the revised Charter sovereignty is modified to the extent that 'certain enumerated and limited powers' would be granted to the United Nations; the exercise of a few other sovereign powers relating to military

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[57] Wright, *Constitutionalism and World Politics* (1951), pp. 7-8, 19-20.

[58] Wright, *Problems of Stability and Progress in International Relations* (1954), pp. 206-207. As examples of the discussion of limited sovereignty, see Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (1951), pp. 10-12; P. E. Corbett, *Law and Society in the Relations of States* (1951), p. 265.

[59] Wright, 'Sovereignty and International Cooperation' (1961), pp. 14-37. As examples of the argument of the compatibility of sovereignty and international cooperation, see also Karl Loewenstein, 'Sovereignty and International Co-operation' (1954); Wolfgang Friedmann, 'National Sovereignty, International Cooperation, and the Reality of International Law' (1966), pp. 508-522. Friedmann observes that 'there is no clear-cut alternative between national and international sovereignty, but a complex, evolving and checkered relationship'. Friedmann, *Changing Structure of International Law* (1964), pp. 113-114.

[60] Scleicher, *Introduction to International Relations* (1954), pp. 173-183. Norman Coussins insists that there are two kinds of sovereignty: absolute and relative. The conditions of a new world enabled the former to perish and the latter to prevail. Coussins, *In Place of Folly* (1961), pp. 105-109.

affairs would be prohibited to all nations, while the revised Charter calls for a reservation to all nations of 'all powers inherent in their sovereignty, except such as are delegated to the United Nations'.[61]

These attempts show that the theme of the constitutionalisation of international society was still an undercurrent issue in the early 1960s. 'Sovereignty under law'[62] and 'sovereignty within law (except Soviet law)'[63] are the phrases that drew attention from international lawyers. In 1961 Clarence K. Streit contrasts 'the true democratic concept of sovereignty' in the free world with absolute national sovereignty in the communist world. Contrary to the latter, the former prevails under the rule of law. 'Freedom's sovereignty', which is always subject to the will of the citizens, has a historical example in American history. In order to cure 'cancer cell no.1 in the free body politic', it is imperative to substitute this 'freedom's sovereignty' for the false concept of national sovereignty.[64]

However, neither the vigorous national sovereignty nor traditional constitutional sovereignty enjoyed a complete victory in the 1960s. No one enthusiastically defended the sacredness of sovereignty as Morgenthau had, while sovereignty was no longer seriously challenged. Academia was dominated by the scientific and 'neutral' methods of behaviourism. The issue of sovereignty was not solved, but it was accommodated through benign neglect.[65]

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[61] It goes without saying that this provision is an application of the US Tenth Amendment to the UN Charter. Grenville Clark and Louis B. Sohn, *World Peace through World Law* (1958), p. 9. See also *World Peace through Law: The Athens World Conference* (1964), p. 105-106. In 'Preliminary Definitions' at the conference Cipriano Codas from Paraguay defines sovereignty as 'an attribute of the will of the people of the nation, and which consists in its supreme juridical authority, based on natural law and exercised in the framework of the rules necessary for the peaceful and harmonious co-existence of nations.' In opposition to the movement of 'world peace through world law', a left wing organisation, the International Association of Democratic Lawyers, insists that 'The principle of sovereignty is by no means out-moded, since the number of sovereign States continues to grow. It is, on the contrary, a prior condition for the constitution of a legal community of nations sprung from different civilisations and invested with different institutions.' According to them, the advocates of 'world peace through world law' in the American Bar Association 'are thinking in terms of an international law <made in the U.S.A>'. The International Association of Democratic Lawyers, *Law in the Service of Peace* (1963), p. 7, 15.

[62] Arthur Larson, *When Nations Disagree* (1961), pp. 28-35.

[63] Larson and Jenks, *op. cit.*

[64] Streit, *Freedom's Frontier* (1961), pp. 91-129. The contrast between (American) sovereignty of the individual and absolute national sovereignty (of communism) is seen in Whitney H. Slocomb, *The Sovereign Individual vs. Communism and Fascism* (1951), p. 3; Arthur Freud, *Of Human Sovereignty* (1964), chapters 1, 10, 11, 16.

[65] The expansion of state activities in the post-1945 era was seldom linked with the issue of sovereignty. 'What is meant by the "state" in both the Gaullist and neoliberal reaction is,' as Carl Joachim Friedrich observes, 'a strong government rather than a state in the classical sense. . . . Hence even though we observe in

As a result, the concept of sovereignty in the study of international politics receded to a minimum standard. J. Roland Pennock and David G. Smith maintain that a sovereign state must have not only legal but also political independence. They define sovereignty as 'that quality or characteristic of a state by virtue of which its legal system is unified, self-consistent, self-defining, self-contained, and capable of change.' The 'self-contained' conception of sovereignty leads them to proclaim that it is not concerned with the location of final authority, for 'Sovereignty is a quality of a state.[66] What they actually say is that a state is sovereign. It matters little whether the sovereign really exists within a state. A state must be unitary as it is *a* sovereign entity; therefore, sovereignty means unity.

K. J. Holsti recognises that sovereignty is one of the fundamental rules of the modern international system.[67] Whether or not it constitutes a substantial aspect of international society, it is a useful term to systematise international relations. Thus E. Raymond Platig argues that while the 'utility as an analytical concept' of such a controversial concept as sovereignty is limited, 'it is useful word for designating that class of states in which can be found most of the major centers of power on the contemporary global scene.'[68] Sovereignty is here justified to the effect that it is useful for study.

That sovereignty is recognised as a formal principle might mean that 'reality' should be found somewhere behind sovereignty. Morton A. Kaplan and Nicholas DEB Katzenbach suggest that in order to bypass much of the inconsistent and confusing usage of language, 'First, we must think of sovereignty in relational terms. . . . Second, the claim to sovereignty is a claim to formal authority and not necessarily to effective

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contemporary politics a certain reemergence of "sovereignty" in the classic meaning of the term, few are willing to claim that a state depends upon it and is well governed only if it possesses such a sovereign.' Friedrich, *Man and His Government* (1963), pp. 553-554. In the sixties a belief in popular sovereignty also hinders the government from claiming on sovereignty. Dell Gillette Hitchner and William Henry Harbold explain: 'Only the continuing concentration and liberation of authority expressed in sovereignty will enable us to live with the tensions inherent in the dynamic pluralism of modern life, with its rejection of custom in favor of continuing innovation.' Hitcher and Harbold, *Modern Government* (1963), p. 181. Robert Dahl deduces multiple non-absolute sovereigns from the American dogma of popular sovereignty and pluralism. See Dahl, *Pluralist Democracy in the United States* (1967), pp. 18-24.

[66] Pennock and Smith, *Political Science* (1964), pp. 131-134. Concerning the location of the sovereignty of the USA, Andrew Hacker asserts that 'The real answer is that sovereignty is not something that can be identified or discovered. It is, on the contrary, a *process*.' Hacker, *The Study of Politics* (1963), p. 41.

[67] Holsti, *International Politics* (1967), p. 82.

[68] Platig, 'International Relations as a Field of Inquiry' (1969), p. 15.

control.' States may increase effective control by limiting formal authority.[69]

In the late 1960s, the decline of US economic and political power, and lost confidence ushered in the sense of national disruption. The Vietnamese War invoked mass protests against the government on the one hand, and the *realpolitik* of Nixon and Kissinger on the other. Accordingly, behaviourism was attacked for its indifference to moral issues. In place of constitutional harmony, or even of Morgenthau's realism, there was a clear discrepancy between legal norms and political reality. It is no wonder that American jurists politicised their work in the realistic *and* progressive vein.[70] New American legal realism arose to modify traditional American constitutionalism.[71] Traditional constitutional issues like divided sovereignty were almost forgotten.

Eventually, an expanded central government in the 1960s produced the Nixon-Kissinger administration that disrupted and unified the nation in substantially 'realistic' terms. It secretly bombed and invaded Cambodia to end the war in Vietnam. Like the US intervention in its 'backyard' of Guatemala (1954) and the Dominican Republic (1965), the operations in breach of international law were, of course, conducted without a revision of the theory of sovereignty.[72] Sovereignty was there as a simply formal or even nominal principle. Behind it 'real' politics worked. What was needed was not to contemplate how to limit or constitutionalise sovereignty. It was to leave it aside and do politics. With its declining power, the United State was ceasing to be the champion of the international rule of law.

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[69] Kaplan and Katzenbach, *The Political Foundations of International Law* (1961), pp. 136-140. According to Karl Deutsch, 'The naïve assumption of concentrated sovereignty may even be more misleading in international politics.' The fact is that 'The higher the actual degree of concentration, the greater the actual degree of vulnerability is apt to be'. Deutsch, *The Nerves of Government* (1963), pp. 212, 211.

[70] Richard Falk, active critic of the US involvement and operation in Vietnam and Cambodia in defence of sovereignty, advocates 'legislative intervention by the United Nations in the internal affairs of sovereign states'. He asserts that 'Sovereignty only confers a primary competence upon a nation; it is not, and never was, an exclusive competence. Intervention in some form is an unavoidable concomitant of national existence.' Falk, *Legal Order in a Violent World* (1968), p. 339. He also tries to discard the principle of sovereign immunity. Falk, *The Role of Domestic Courts in the International Legal Order* (1964), pp. 139-169.

[71] As regards the difference between British and American international law, see Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968).

[72] Paragraph 12 of the *Final Declaration of Geneva Conference* of 1954, which the US government refused to sign, stipulated respect for the sovereignty of Cambodia, Laos and Vietnam. See The Consultative Council of the Lawyers Committee on American Policy towards Vietnam, *Vietnam and International Law* (1967). See also *the Declaration of Inadmissibility of Intervention* adopted by the UN General Assembly in 1965, which expresses its concern about armed intervention threatening the 'sovereign personality' of states. See Sohn, *op. cit.*, p. 31.

In the period after the Second World War the fledgling of international constitutionalism was overwhelmed by the political realism led by refugees from Germany like Morgenthau. There was the historical necessity of the dominance of political realism in this period. After the projects of international constitutionalism failed and the Cold War began, many Anglo-American intellectuals including policy-makers in the Truman Administration turned to political realism as a necessary basis for maintaining a desirable international order. The theory of national sovereignty was revitalised in the post-1945 era. However, this does not mean that the idea of national sovereignty became a scientific truth. It was still an outmoded doctrine. Many theorists, including the behaviourists, failed to address the question of sovereignty arguing either that it was not worth discussing or it should not be challenged. An anachronistic victory of political realism eventually led Anglo-American theorists to accept a highly formalistic notion of sovereignty.

Chapter 8 Sovereign Equality and National Sovereignty in Communist and Third World Countries

It is now necessary to look into non-Anglo-American discourses on sovereignty in order to understand international conceptual struggles in the post-1945 era. We have seen in the last chapter that the emergence of political realism led Anglo-American theorists to admit and formalise the notion of sovereignty. There was also the reality of the Cold War which reinforced the academic trend. With the confrontation between the West and the East, it was impossible for both camps to implement any projects to 'limit' sovereignty in the international field. Although the US led camp was able to establish international institutions for its benefit, they were not powerful enough to completely dominate the whole world. While Germany ceased to be a major ideological enemy of Britain and America, the Soviet Union and other communist countries became the serious ideological threat in the Cold War period. In addition, newly independent states were more or less hostile to former colonial powers. To accommodate their demand for national sovereignty was an indispensable task for the Anglo-American powers in order to contain the communist threat.

The era is symbolised by the principle of 'sovereign equality' that appeared in the Charter of the United Nations and became an indispensable pillar of international society. From immediately after the Second World War, the Soviet Union interpreted this principle in a peculiar way so that it challenged the Western bloc led by the United States. China and other socialist states followed suit to reinforce the challenge. Newly independent states also endeavoured to put the principle into practice. Sovereignty was no longer an outmoded idea of Western international society. It was a vital element of global international society. It was the very conceptual field in which power politics in the age of the Cold War and decolonisation took place. In this chapter we shall trace the discourses on sovereignty in socialist and Third World states in order to identify the necessity of a re-establishment of the principle of sovereignty after the Second World

War.

The Principle of Sovereign Equality

The milestone of the post-war era in the history of the idea of sovereignty is the principle of 'sovereign equality' in Article 2 (1) of the Charter of the United Nations. This particular combination of words was unfamiliar in the long history of the idea of sovereignty.[1] The phrase 'sovereign equality' was derived from the terminology of Latin American diplomats who were the hard-line advocates of the equality of states. They had perplexed European delegates at the Second Hague Peace Conference of 1907; then one of them invented and used the phrase. José Tible Machado of Guatemala opposed the composition of the arbitral court as it was a violation of 'the fixed principle of the sovereign equality of the States as political entities'.[2] Sovereignty was a catchword for Latin American states during the period of the 'Roosevelt corollary' of the Monroe Doctrine until it was finally repudiated in 1930.[3]

When F. D. Roosevelt took office in the turmoil of the Great Depression, the US government adopted a foreign policy of respecting non-intervention and equality among all the American states in pursuit of economic and political cooperation of the region. Several documents that were produced during the period of the 'Good Neighbor' policy emphasised the principle of national sovereignty.[4] The famous Montevideo Convention clarified the components of state personality in such an atmosphere. The phrase, 'sovereign equality', which reappeared in the 1930s, was incorporated into US postwar

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[1] Before the myth of the Peace of Westphalia was combined with the principle of sovereign equality in the post-1945 period, scholars in the interwar period acknowledged that state sovereignty was by no means tantamount to the equality of states. In his well cited book published immediately after the establishment of the League of Nations, Edwin E. Dickinson has proved neither Grotius nor the Westphalian system knows natural equality of states. According to Dickinson, Grotius 'held that important limitations upon the exercise of political power were consistent with the enjoyment of international personality and even of perfect sovereignty. Feudal vassals might be sovereign. Sovereignty was not infringed by an unequal alliance which imposed a permanent obligation upon the inferior state'. Dickinson, *The Equality of States in International Law* (1920), p. 58.

[2] Quoted in Klein, *op. cit.*, p. 57.

[3] For instance, in the spring of 1919 the Mexican Foreign Office sounded off on Article 21 of the Covenant guaranteeing the Monroe Doctrine, declaring 'that Mexico had not recognized and would not recognize the Monroe Doctrine . . . since it attacks the sovereignty and independence of Mexico and would place the nations of America under a forced tutelage.' Quoted in Perkins, *op. cit.*, p. 326. See also pp. 342-343.

[4] See *ibid.*, pp. 352, 353, 355, 356.

policy planning to secure the cooperation of small states with the future plan of the Great Powers. Then on 30 October 1943 the Moscow Declaration of the Four Nations was issued, paragraph 4 of which made public the necessity of establishing an international organisation based on the principle of 'the sovereign equality of all peace-loving states.'[5] Immediately after the Declaration, US Senator Tom Connaly offered a resolution approving the creation of 'a general international organization, based on the principle of the sovereign equality of all peace-loving states'. The proposal for an amendment to the resolution in order to define all the key words was rejected. The resolution was accepted by the Senate on 5 November.[6]

These events show that the incorporation of the principle of 'sovereign equality' into the postwar system was a major factor in committing great as well as small states to a new international organization. However, this does not mean that there was a universal understanding of the content of the principle. When the leaders of the three great powers met at Dumbarton Oaks during the summer of 1944 and agreed on the main structure of an international organisation, the conceptual gap between the great powers and small states became evident. The privileged position of the great powers in a security council showed that 'sovereign equality' meant only 'equality before the law' or at best 'equality of capacity for duties and rights'. By objecting to great power primacy, small states articulated an understanding of 'sovereign equality' as 'equality of duties and rights'.[7]

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[5] Cárlos Saavedra Lamas, the Argentine delegate at the Inter-American Conference for the Maintenance of Peace in 1936, praised the non-intervention protocol for reiterating 'the application of the principle of the sovereign equality of all the States on this Continent'. Sumner Wells of the US delegation at the Conference used a variation of the term in two addresses in 1942. In the same year he became active in the State Department's postwar policy planning preparations and was involved in the drafting of the Moscow Declaration. See Klein, *op. cit.*, pp. 104, 108, 111-112. Compare the Moscow Declaration with the Wilsonian terms of 'the Atlantic Charter' of 1941, which stipulated 'the right of all peoples to choose the form of government' and 'sovereign rights and self-government'.

[6] See *ibid.*, p. 113, and Denna Frank Fleming, *The United States and the World Court* (1945), pp. 174-175. When the UN Charter was ratified in the US Senate, Senator Raymond E. Willis declared: 'We have protected the sovereignty of the United States of America.' Quoted in Cox, *op. cit.*, p. 71.

[7] Hans Kelsen explains that 'sovereign equality' is correct only if equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights. Kelsen, *Peace through Law* (1944), pp. 36-37. See also Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (1949), p. 100. An UNCIO (United Nations Committee on International Organization) Committee interprets 'sovereign equality' as including the following elements; (1) that states are juridically equal; (2) that each state enjoys the rights inherent in full sovereignty; (3) that the personality of the state is respected, as well as its territorial integrity and political independence; (4) that the state should, under international order, comply faithfully with its international duties and obligations. Quoted in *ibid.*, p. 99. *The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the*

It is fair to say that the structure of the United Nations remained open to these two aspects; the constitutional sovereignty of great and small states and the national sovereignty of absolutely equal states. While the United States and Great Britain more or less continued to take sides with the former after the Second World War, the Soviet Union moved in the direction of the latter. While formally respecting the principle of sovereign equality, the Anglo-American conservative camp responded to the challenge of revolutionary communist and Third World states by implementing policies to limit the national sovereignty of small states.[8] We shall now look more closely at the challenge of the communist and Third World countries.

Discourses on Sovereignty in Socialist States

The Soviet Union

As soon as the UN organisation was established, the ideological confrontation between the United States and the Soviet Union became evident. The US government attempted to use the UN system in order to stabilise the international order in which the US held a paramount position. But the USSR repeatedly vetoed the proposals led by the US camp. For instance, when the US government sought to institute the Atomic Development Authority to control atomic energy, the USSR, which had not yet developed an atomic bomb, vigorously opposed the US proposal. Andrei Gromyko, the representative of the USSR at the UN atomic energy commission, stated as early as July, 1946, that the proposed Atomic Development Authority could not be reconciled with the sovereignty of member states. He said that the principle of sovereignty was one of the cornerstones on which the United Nations structure was built and if this were

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Charter of the United Nations adopted by the United Nations General Assembly in 1970 added another provision: 'Each State has the right freely to choose and develop its political, social, economic and cultural systems'. See Ian Brownlie (ed.), *Basic Documents in International Law*, p. 44. See also Aleksandar Magarašević, 'The Sovereignty Equality of States' in Milan Šahović, *Principle of International Law Concerning Friendly Relations and Cooperation* (1972), pp. 171-218.

[8] An example of the usage of 'sovereign equality' of a small state against great powers is the Egyptian government's complaint about the presence of British troops in Egyptian territory. See *Egypt and the United Nations* (1957), pp. 76-83. See also Mohamed El-Hadi Afifi, *The Arab and the United Nations* (1964), pp. 40-50; Ezzeldin Foda, *The Projected Arab Court of Justice* (1957), pp. 91-123.

touched the whole existence and future of the United Nations would be threatened.[9]

In the early stages of the Cold War the US led camp dominated the organisations of post-war international society. The USSR formed a revolutionary camp and remained on the defensive. Despite its official internationalist position, the USSR adhered to the principle of sovereignty with its veto to block US initiatives. By so doing, the USSR claimed to be a protector of small states in defiance of imperial powers. The USSR frequently resorted to the principle of sovereignty to thwart the objectives of the West and gain ground in the world-wide Cold War.

The Soviet Union had a quite peculiar concept of sovereignty from its birth. The 1936 Constitution of the USSR expresses that 'the sovereignty of the Union Republics is limited' by the USSR. But 'the USSR protects the sovereign rights of the Union Republics.'[10] This was intended to respect national self-determination as well as the dictatorship of proletariat. Yet Soviet jurists never favored the idea of divided sovereignty. They explained that due to 'the singular nature of the Soviet federation', there was 'a joint and fully compatible sovereignty of the USSR with the sovereignty of the Union Republics'.[11] The centralisation of power in the Kremlin was understood as an achievement of national self-determination and class struggle in the name of the dictatorship of the proletariat.[12] In other words, the nations of the autonomous units 'do not possess their own state sovereignty' but realise 'national sovereignty, that is

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[9] The Department of State, *International Control of Atomic Energy* (1946), p. 219. This obstinacy can be seen in numerous Soviet statements. On the US proposal of the Atomic Development Authority, A. Vyshinsky, head of the Soviet delegation in the United Nations, expressed the view that it was a question 'of totally liquidating the state sovereignty, as such, of all other states.' Quoted in Goodman, *op. cit.*, p. 401. A reply of *Pravda* to Bertrand Russell's cry for the creation of a world state is that 'Russell is shouting about the inevitable end of the world unless nations give up their national sovereignty and replace it by a world state headed by the U.S.A. and Britain.' Quoted in *ibid.*, p. 399. As regards the Soviet opposition to the Western states on the issue of state sovereignty and human rights, see *The United Nations and Human Rights* (1968), pp. 65, 127. By contrast, the appeal to the limitation of sovereignty by Western states in the General Assembly is seen L. Larry Leonard, *International Organization* (1951), p. 285.

[10] Amos J. Peaslee, *Constitution of Nations*, vol. III (1956), p. 487. *The Declaration of Rights of the Peoples of Russia* on November 15, 1917 stipulates the 'equality and sovereignty of the peoples of Russia'; the 'right of the peoples of Russia to free self-determination up to and including withdrawal and the formation of an independent state'. See P. Yudin, 'Socialism and Law' (1937), p. 289.

[11] Quoted from I. P. Trainin and I. D. Levin (eds.), *Sovetskoe gosudarstvennoe pravo* in Goodman, *op. cit.*, p. 122.

[12] See T. A. Taracouzion, *The Soviet Union and International Law* (1935), pp. 26-47; Julian Towster, *Political Power in the U.S.S.R. 1917-1947* (1948), pp. 46-49, 109-115.

independence in utilizing all of their national capacities and abilities'.[13] In order to explain the sovereignty of the component republics two of which obtained UN membership, some Soviet international lawyers advocated that 'The USSR possesses sovereignty because it is an expression of the sovereignty of the Union Republics. The sovereignty of the USSR is a result of the sovereign will of the Republics.'[14] This means that 'within the framework of the Union, each republic had all the attributes of a sovereign State and enjoyed full sovereign rights.'[15] Only within the USSR does the national sovereignty of the union republics realise its higher capacities.

In the external sphere, Soviet jurists maintained that it was important to distinguish between two kinds of states: proletariat-democratic and capitalistic-imperialistic. Any intervention conducted by the latter cannot be permitted, while the former has genuine popular sovereignty. Intervention to help people in capitalist states and oppressed nations under imperial regimes does not deny the principle of sovereignty, but assists in its realisation. E. Korovin, one of the most influential Soviet jurists, stated in a lecture delivered in 1947 that 'sovereignty, as conceived by Soviets, is a weapon in the struggle of the progressive-democratic forces against the reactionary-imperialistic ones.'[16]

The difference between the two is explained by another Soviet jurist, Levin, who writes that 'In the bourgeois state the proclaimed form of "the sovereignty of the people" conceals class dictatorship of the bourgeoisie. . . . For the first time in history the Soviet

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[13] Quoted from Trainin, 'Questions of Sovereignty in the Soviet Federal State' (1945), in Towster, *op. cit.*, p. 113.

[14] Nedbailo and Vassilenko, 'Soviet Union Republics as Subjects of International Law' (1963), quoted in Ivan Bernier, *International Legal Aspects of Federalism* (1973), p. 23.

[15] The views of the representatives of the USSR, Byelorussia and the Ukraine at the United Nations Conference on the Law of Treaties in 1969. Quoted in *ibid.*, p. 24. This argument clearly indicates the logic of positive freedom in contrast with negative. The logic of positive liberty was used in a notorious way when the Baltic states were incorporated into the USSR in 1940. The Soviet puppet government in Lithuania declared; 'The People's Sejm of Lithuania is confident that only admission into the Union of Soviet Socialist Republics will insure the real sovereignty of the Lithuanian State.' In the same vein a member of the Central Committee of the Rumanian Communist Party responded in 1951: 'Only now, when the reins of power are in the hands of governments led by Communists, have the peoples of these countries acquired, with the fraternal aid of the Soviet Union, genuine national independence and state sovereignty'. Quoted in Goodman, *op. cit.*, pp. 119-120.

[16] Quoted in Mintauts Chakste, 'Soviet Concepts of the State, International Law and Sovereignty' (1949), p. 31. This position leads Korovin to demand the supremacy of national over international law. See Hans Kelsen, *The Communist Theory of Law* (1955), pp. 158-161.

state has realized the real sovereignty of the people.'[17] While the capitalist state disrupts the content and form of sovereignty, the communist state unifies them into one real popular sovereignty. Soviet jurists think that the Soviet Union realised true sovereignty. It ~~could~~ can not indulge a bourgeois and imperial deceit of limited sovereignty; the true organic realisation of sovereignty in the communist state discloses and surpasses the hypocrisy of the bourgeois constitutional state.[18] All these suggest that while Soviet solidarity is supposed to be superior to national sovereignty, the organic basis of its justification in contrast to constitutional formality accords with the logic of national sovereignty in the traditional Continental theory.[19]

The Soviet adherence to absolute sovereignty as 'a reliable means of defending the small States'[20] also concurred with the demands of the newly independent states. The socialist members of the International Court of Justice acted as the shields of state sovereignty.[21] The communist bloc conceived as the challenger of imperial international order thus emphasised the revolutionary importance of the principle of sovereignty. A Soviet textbook of international law states that national sovereignty is 'the right of each nation to self-determination and independent development . . . regardless of whether or not it has its own statehood.'[22] This revolutionary but vague stipulation of the subject

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[17] Quoted in Chakste, *op. cit.*, p. 32. As regards several Soviet statements which identified socialist sovereignty as the only popular sovereignty, see Bernard A. Ramundo, *The (Soviet) Socialist Theory of International Law* (1964), pp. 35-39. Andrei. J. Vyshinsky said in 1946 on purpose to challenge the sovereign right of Holland over Indonesia that the UN Charter represented 'certain limitation of sovereignty of sovereign states'. Quoted in Goodman, *op. cit.*, p. 114. In 1949 *Izvestiia* recognised: 'The Lenin-Stalin teaching on independence . . . of states by no means implies the acceptance of the principle of absolute sovereignty' in terms of a treaty of alliance. Quoted in Jan F. Triska and Robert M. Slusser, *The Theory, Law, and Policy of Soviet Treaties* (1962), p. 211. By contrast, in 1948 Vyshinsky insisted: 'Propaganda against national sovereignty disguised by attacks against absolute sovereignty was nothing but an ideological preparation for a country's political surrender to a more powerful State and its economic might.' Sovereignty was 'the sole protector of the smaller countries against the expansionist dreams of more powerful States.' Quoted in Werner Levi, *Fundamentals of World Organization* (1950), p. 32. The Foreign Minister W. M. Molotov in 1947 warned Poland and Czechoslovakia against the Marshall Plan for the sake of their sovereignty; the Cominform asked communists to grasp national sovereignty in their own countries. The same anti-imperial and anti-US position led Stalin to remark in 1952, 'Today the bourgeoisie sells the rights and independence of nations for dollars. The banner of national independence and national sovereignty has been thrown overboard. There is no doubt that you, the representatives of Communist and Democratic Parties will have to pick up this banner and carry it forward'. Quoted in Goodman, *op. cit.*, pp. 114, 117.

[18] See Jones, *The Soviet Concept of 'Limited Sovereignty' from Lenin to Gorbachev* (1990), pp. 1-19.

[19] Korovin wrote in 1923 that 'While the general movement of the evolution of the European international law was towards restriction of the notion of sovereignty . . . Soviet Russia appeared to be a champion of the classical conception of sovereignty.' Quoted in Kazimierz Grzybowski, *Soviet Public International Law* (1970), p. 33.

[20] V. V. Yevgenyev, International Law (n.d.), quoted in Cox, *op. cit.*, p. 61.

[21] See Grzybowski, *op. cit.*, pp. 459-464.

[22] V. V. Yevgenyev, 'The Subject of International Law' (1962), p. 98.

of international law was not immune from political abuse. In the face of the Hungarian uprising in 1956, *Izvestiia* justified the Soviet intervention as a measure to keep Hungarian people's sovereignty against 'the Fascist cutthroats'.[23]

According to Korovin's 1956 article, the 'restriction of sovereignty' or other euphonious conceptions like the 'common interest' and the 'common good' is 'nothing more than the diplomatic screen hiding the avaricious and predatory aims of the strongest imperialist Powers'. The bourgeois conception of sovereignty is merely the formal recognition of certain rights of a state which often serves to cover actual inequality. The socialist countries not only recognise these rights but also ensure that all material conditions are available for their realisation. As far as Soviet sovereignty (the first people's sovereignty in world history) is concerned, national sovereignty is by no means dangerous. Under socialism there are not and cannot be radical contradictions between individual and collective builders of socialism and between the national interests of a socialist nation and the interests of international co-operation. Korovin hailed this as 'the new conception of sovereignty.'[24]

According to Korovin, the unity among socialist states is contrasted with the policies of the US government.[25] Korovin insists that the Soviet Union has never championed the 'concept of absolute, unrestricted sovereignty' that the 'US ruling circles' are demonstrating. Korovin thus implies that as long as the US ruling class dominates international society, the sovereignty of the Soviet Union must not be restricted.[26] E. Kuzmin adds that the contemporary contempt for sovereignty among Western intellectuals is due to the fact that sovereignty has become a fetter on the bourgeois class. The bourgeoisie now wishes to pursue the expansionist designs of capitalism at its highest stage. The real reason behind the calls to give up sovereignty lies in that the most powerful monopolies want to derive maximum profits from economic and political integration and exploit the socialist and newly independent states. From the Soviet

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[23] See Goodman, *op. cit.*, pp. 121-122.

[24] Korovin, 'Respect for Sovereignty - An Unchanging Principle of Soviet Foreign Policy' (1956), pp. 32, 37-39.

[25] See Korovin, 'Sovereignty and Peace' (1960).

[26] See Korovin, 'Disarmament and Sovereignty' (1961).

perspective national sovereignty is a guarantee of stable peace and national security.[27]

The invasion of Czechoslovakia did not change the official position of the Soviet Union. The famous article in *Pravda* on 'Sovereignty and International Duties of Socialist Countries' did not contain an expression such as 'limited sovereignty'. The thrust of the article by S. Kovalev is that the 'sovereignty of each socialist country cannot be opposed to the interests of the world of socialism'. This stems from the recognition that 'the counterrevolutionary elements in Czechoslovakia undermined the very foundations of the country's independence and sovereignty.' Thus, 'the help to the working people of Czechoslovakia by other socialist countries, which prevented the export of counterrevolution from abroad, constitutes the actual sovereignty of the Czechoslovak socialist republic against those who would like to deprive it from its sovereignty and give up the country to imperialism.'[28]

At least, according to this official explanation, the USSR did not intend to 'limit' sovereignty. Brezhnev himself declared immediately after the invasion, 'the socialist states stand for strict respect for the sovereignty of all countries. We absolutely oppose interference in the affairs of any states and violations of their sovereignty.' This socialist conception of sovereignty, according to G. I. Tunkin, includes 'the duty to render assistance in the enjoyment of these rights [of respective states], as well as jointly defending them from the infringements of imperialists, in conformity with the principle of socialist internationalism.'[29] In the end, as Robert A. Jones observes, the Soviet conception of sovereignty may be likened to a distorting mirror which inverts surface appearances: what may look like a *prima facie* case of aggression is said to be a defensive, altruistic action undertaken out of respect for the sovereignty principle.[30] The real sovereignty of communist states is always superior to the false sovereignty of capitalist states. This can be called the left wing attack upon the formality of constitutionalism.

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[27] Korovin, 'Sovereignty and National Security' (1966), pp. 17, 20.

[28] Kovalev, 'Sovereignty and International Duties of Socialist Countries' (1968), pp. 137-138, 141. See also Jones, *op. cit.*, pp. 153-156.

[29] Tunkin, *Theory of International Law* (1974), p. 440.

[30] Jones, *op. cit.*, p. 90.

Communist China

While the USSR gradually receded from its position of absolute national sovereignty with the emphasis upon socialist internationalism in the post-Stalin era, communist China took on the role of reinforcing the doctrine. Nationalist China before the communists took power in 1949 favoured liberal and limitable sovereignty.[31] But the government of the People's Republic of China insisted on the strict observance of sovereignty. From the time of the birth of the People's Republic of China, Mao Tse-tung discussed the principle of sovereignty. Premier Chou En-lai also repeatedly emphasised the inviolability of sovereignty.[32] The communist government was determined to oppose Anglo-American international political behaviour, the 'transnational' tendency among Anglo-American publicists, and even the International Court of Justice which was exploited by the 'imperial' Anglo-American bloc.[33]

Ying T'ao argues that 'bourgeois international law . . . openly attempts to bury the principles of inviolability of sovereignty in order to meet the practices of imperialist aggression.' T'ao asserts that the theory of absolute and indivisible sovereignty was developed in order to facilitate bourgeois interests. But in the international fields, sovereignty was divided in order to justify the existence of vassal and protected states. The search for a 'higher legal order' symbolises the stage of imperialism that more and more exploits small countries. International legal jurists are 'imperialism's perfect slaves and servants'. The principle of equality was never applied to oppressed nations like China that suffered unequal treaties and colonisation.[34]

Yang Hsin and Ch'en Chien stress that the Chinese conception of sovereignty is different from the imperialistic theories of absolute sovereignty; it is also different from restrictive sovereignty and denial of sovereignty in that it is based on mutual respect.

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[31] For instance, the Chinese Foreign Minister in 1942 stated: 'China will gladly cede such of its sovereign power as may be required.' The Chairman of the Chinese delegation to the United Nations Conference declared in his speech on 26 April 1945: 'we must not hesitate to delegate a part of our sovereignty to the new international organization in the interests of collective security.' Quoted in China Institute of International Affairs, *China and the United Nations* (1959), pp. 23, and see also pp. 64, 139.

[32] See Yang Hsin and Ch'en Chien, 'Expose and Criticize the Imperialists' Fallacy Concerning the Question of State Sovereignty' (1964), pp. 110-111.

[33] See James Chieh Hsiung, *Law and Policy in China's Foreign Relations* (1972), pp. 72-79.

[34] Tao, 'A Criticism of Bourgeois International Law Concerning the Question of State Sovereignty' (1960), pp. 106-110.

They argue that the attack upon sovereignty has become the main current and fashion in American legal circles, because the United States has become the chief representative of neocolonialism. The US approval of national independence is a legal camouflage to conceal 'neocolonial rule'. Secretary of State Dulles's insistence on the acceptance of interdependence and President Kennedy's 'Declaration of Interdependence' are nothing but neocolonial pretence. The interest among American jurists in 'transnational law' in connection with the issues like how to promote safer international transactions is 'an extremely tricky way for imperialism to destroy the principle of sovereignty.'[35] Later, the list of imperialists who attacked sovereignty included the USSR.[36] In place of the USSR, China claimed to be a defender of small states. It is for this reason that a Chinese legal scholar emphasises that 'any nation, regardless of its economic, political and cultural level of development, should in no way be deprived of its right to the claim of international entity.'[37] The support for decolonisation was an important means to justify the ideological standpoints in the Cold War.

Discourses on Sovereignty of the Third World

Decolonisation

The issue of sovereignty in the post-1945 world was intrinsically tied with the appearance of the 'Third World'. Through the rise of national independence movements, the principle of sovereignty became linked to revolutionary agendas and was given a new meaning. In the process of decolonisation the provision of Article 1 (2) and 55 of the UN Charter, 'self-determination of peoples', was interpreted as a guarantee of the right of nations to independence. The judges of the International Court of Justice in the

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[35] Hsin and Chien, *op. cit.*, pp. 110-117. See also Suzanne Ogden, 'Sovereignty and International Law: The Perspective of the People's Republic of China' (1974), pp. 10-16, 22-30.

[36] An example of a harsh Chinese criticism of the 'renegade' USSR invasion of Czechoslovakia is Chi Hsiang-yang, 'Smash the New Tsars' Theory of Limited Sovereignty' (1969), pp. 153-155.

[37] Quoted from K'ung Meng, 'A Criticism of the Theories of Capitalist International Law on International Entities and the Recognition of States' (1960) in Ogden, *op. cit.*, p. 17. As regards the argument that Tibet is not a state and China wields sovereignty over Tibet, Yü Fan, 'Speaking about the Relationship between China and the Tibetan Region from the Viewpoint of Sovereignty and Suzerainty' (1959), pp. 395-404.

case of *International Status of South West Africa* in 1950 suggested that Namibia 'constituted a subject of law . . . , possessing national sovereignty but lacking the exercise thereof. . . . Sovereignty . . . did not cease to belong to the people subject to mandate' and it 'had simply for a time, been rendered inarticulate and deprived of freedom of expression.'[38] More importantly, the Declaration of the Granting of Independence to Colonial Countries and Peoples adopted by the UN General Assembly in 1960 provided 'all peoples' with 'an inalienable right' to 'the exercise of their sovereignty'.

Here is a clear example of the conflict of ideas that evolved around the notion of sovereignty. The ICJ and the UN General Assembly cultivated the revolutionary agenda of the doctrine of national sovereignty. Under the formula of the revolutionary doctrine of national sovereignty the 'nation' was conceived to be a natural entity. Whether independent or colonised, a nation was a natural entity that had the natural right to sovereignty. The rule that classic international law had stipulated - international law knows no nation, only the state - fluctuated in the process of the collapse of European colonial systems. Just as popular sovereignty had been advocated by revolutionaries against royal sovereignty, national sovereignty of colonised 'peoples' was now justified *against* colonial state sovereignty.[39] It is no wonder that Third World states that had thrown off the yoke of the sovereignty of Western powers repeatedly invoked the importance of the principle of sovereignty.[40] Thus after the movement of

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[38] Quoted in Rebecca M. M. Wallace, *International Law* (1992), p. 66. See also 'Separate Opinion of Vice-President Ammoun' on the continued presence of South Africa in Namibia in 1970. Judge Ammoun argues that the law which denied a legal personality to Namibia under colonial and mandatory systems is obsolete. Namibia always constituted a subject of law, possessing national sovereignty but lacking the exercise thereof. It is because 'sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate.' *I.C.J. Reports 1971*, p. 68.

[39] For instance, in advocating 'the principle of racial sovereignty', Ali A. Mazrui insists: 'For many nationalists in Africa and Asia the right to sovereignty was not merely for nation-states recognizable as such in a Western sense but for "peoples" recognizable as such in a racial sense, particularly where differences of colour were manifest.' By defining colonialism as 'permanent aggression', namely, 'a violation of racial sovereignty', Mazrui proposes to extend the notion of 'illegitimate sovereignty' to a paradoxical notion of 'illegal sovereignty'. He continues that 'if it was illegal to usurp the sovereignty of a people of different colour, it could not be illegal to attempt the restoration of that sovereignty.' Mazrui, *Towards a Pax Africana* (1967), pp. 33-35, 39. The two conflicting notions of sovereignty were discussed in Alfred Cobban's classic book. According to Cobban, 'the true function of sovereignty' is the preservation of law and order, and the maintenance of the social fabric. 'National sovereignty, on the other hand, is irreconcilable with any solution of the fundamental political problems of the modern world.' Cobban, *op. cit.*, pp. 141-142.

[40] For instance, see the Pact of the Arab League (1945), Inter-American Treaty of Reciprocal Assistance (1947), the Charter of the Organization of American States (1948), the South-East Asia Treaty (1954), the 1954 Declaration by India and China (Five Principles of Peaceful Coexistence), the 1955 Resolutions of the 29-nation

decolonisation, national sovereignty of 'peoples' converged on the formula of state sovereignty. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970 stipulates: 'The establishment of a sovereign and independent State . . . constitute modes of implementing the right of self-determination by that people.'[41] However, this was not the end of the conflict between national and constitutional notions of sovereignty caused by decolonisation.

From the time of decolonisation the issue of sovereignty inevitably reflected a divided world: sovereignty of the 'haves' and the 'have-nots'. This is a vision of a divided world that E. H. Carr formulated by contrasting the victors and the losers of the First World War. But the division of the two camps after decolonisation reasserted the conflict of the two notions of sovereignty on a globalised scale. While the majority of Western publicists were to be silent on different meanings of sovereignty and regarded it as a formal common denominator of states, those in Third World and socialist states saw international relations from the perspective of a divided world. One of the examples of the perspective was the doctrine of 'permanent sovereignty over natural resources', to which we shall now turn.

Permanent Sovereignty over Natural Resources

It is of importance for our study that the rule of 'permanent sovereignty over natural resources'[42] developed hand in hand with decolonisation. The General Assembly of the United Nations in which the number of newly independent states surpassed that of

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Bandung Conference . . (Ten Principles of Bandung), Charter of the Organization of African Unity (1963). The principle of sovereignty was also used within the US and USSR blocs to smooth the concern of the aligned small states. See the North Atlantic Treaty (1949) and the Security Pact of Warsaw (1955). See Marek Stanislaw Korowicz, 'Some Present Aspects of Sovereignty in International Law' (1961) pp. 33, 54-56; Louis B. Sohn (ed.), *Basic Documents of the United Nations* (1968), pp. 119, 125-128.

[41] Brownlie, *op. cit.*, p. 43. Aureliu Cristescu writes: 'The self-determination of peoples is thus the basis of the sovereignty of the State . . . Relations in the international community cannot be imagined without respect for the sovereign rights of nations and peoples.' Cristescu, *The Right to Self-Determination* (1981), p. 47.

[42] According to the definition of Aureliu Cristescu, 'Permanent sovereignty over natural resources means that natural resources belong to the peoples of the territory in which they are situated; that, whether or not those peoples constitute independent States, the resources in question must be exploited for their benefit; and that the legal regime governing such exploitation must be established or modified in accordance with the will of those peoples by their independent State or, in the case of peoples still dependent, by the authorities administering them.' See *ibid*, p. 71.

industrialised states adopted a series of resolutions to enhance their development. In 1952 the Commission on Human Rights adopted a provision: 'The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources'. The words were deleted in the Third Committee of the General Assembly in order to meet objections that it could be invoked to justify expropriation without equitable compensation.[43] Yet, the UN General Assembly Resolution 626 (VII) in the same year stated its awareness that 'the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations'.[44] In 1954 the phrase, permanent sovereignty over natural resources, was coined in deliberations to prepare the Covenants on Human Rights, although the suggestion to include the phrase was finally abandoned.[45] However, Resolution 1314 (XIII) of 1958 acknowledged that 'the right of peoples and nations to self-determination . . . includes permanent sovereignty over natural resources'.[46] The establishment of the Commission on Permanent Sovereignty over Natural Resources in the same year led to Resolution 1803 (XVII), adopted by the General Assembly in 1962.[47] It declared: 'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'. The most important 'nationalisation' provision in the Resolution dictated: 'Nationalization, expropriation or requisitioning shall be based on grounds of reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests', while 'the owner shall

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[43] See *ibid.*, p. 72.

[44] Adopted with a vote of 36-4-20. The United Kingdom and the United States were among the four countries which voted against the resolution. See *ibid.*, p. 73, A. Akinsanya, 'Permanent Sovereignty over Natural Resources and the Future of Foreign Investment' (1979), pp. 73. See also Mannaraswamighala Sreeranga Rajan, *Sovereignty over Natural Resources* (1978), p. 16.

[45] See Rudolf Dolzer, 'Permanent Sovereignty over Natural Resources and Economic Decolonization' (1986), pp. 218. The United States and Great Britain voted against the 1955 Covenant on Human Rights as regards the right of states over natural resources, while the Afro-Asian-Arab group supported it. See Akinsanya, *op. cit.*, pp. 73-74.

[46] With a vote of 52-15-8. The US was among the countries voting against. See Cristescu, *op. cit.*, Akinsanya, *op. cit.*, p. 74.

[47] The resolution was adopted with a vote of 87-2-12. The UK and the US voted in favor of it, after having their joint amendments adopted. See Rajan, *op. cit.*, p. 20; Somendu Kumar Banerjee, 'The Concept of Permanent Sovereignty over Natural Resources - An Analysis' (1968), pp. 528-535.

be paid appropriate compensation'.[48] This is a resolution of a compromise between developing and developed states, in other words, from the perspective of our study, between an ideal of national sovereignty and the protection of the private sphere, a premise of constitutionalism. The conflict continued for the next decade, but within international organisations it gradually evolved in favour of the demand of national sovereignty.[49]

The notion of permanent sovereignty over natural resources reached its high point in the 1970s. Resolution 3016 (XXVII) of 1972 reaffirmed the rights of states to permanent sovereignty over natural resources and declared that any coercion against a state seeking to exercise its sovereign rights over natural resources was a violation of the UN Charter.[50] The UNCTAD Resolution 88 (XII) in 1972 declared that any disputes resulting from permanent sovereignty fell within national courts.[51] The General Assembly Resolution A/3171, passed in 1973, treated domestic law as being the only source of law relevant to expropriations of alien property.[52] In 1974 the General Assembly adopted Resolution A/3201 (S-VI) and 3202 (S-VI), the Declaration on the Establishment of a New International Economic Order and the Program of Action on the Establishment of a New International Economic Order.[53] They went beyond previous pronouncements by calling for a right of restitution and full compensation on the part of developing countries in order to compensate for previous measures of exploitation. The Charter of Economic Rights and Duties of States, passed as Resolution A/3281 (XXIX) in 1974, stipulated the rights derived from 'full permanent sovereignty of every state over its natural resources and all economic activities' 'to regulate and exercise

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[48] See Brownlie, *op. cit.*, pp. 237-238.

[49] For instance, the General Assembly Resolution 2158 (XXI) of 1966 reiterated the principle of permanent sovereignty. It was adopted by a vote of 104-0-6, with the United States among the countries abstaining. Other examples are Resolution 2173 (1966), 2542 (1968) and 2692 (1970). See Cristescu, *op. cit.*, p. 75; Akinsanya, *op. cit.*, pp. 79, 90.

[50] Adopted by a vote of 102-0-22, with the US among the countries abstaining. See Akinsanya, *op. cit.*, p. 90. Security Council Resolution 330 (1973), adopted by 12 votes to none with 3 abstention, noted 'with deep concern the existence and use of coercive measures which affect the free exercise of permanent sovereignty over the natural resources of Latin American countries.' See Cristescu, *op. cit.*, p. 75.

[51] See Akinsanya, *op. cit.*, p. 78.

[52] Adopted with a vote of 108-1-16, with the United Kingdom voting against, and the United States, France, Japan and West Germany abstaining. See *ibid*; Elian, *op. cit.*, p. 105.

[53] Adopted without a formal vote. The United States, Japan, France, West Germany and the United Kingdom entered reservations to both resolutions. See Akinsanya, *op. cit.*, p. 78.

authority over foreign investment', 'to regulate and supervise the activities of transnational corporations' and 'to nationalize, expropriate or transfer ownership of foreign property'.[54] The Charter carried the exclusive emphasis of the domestic legal order over natural resources to its logical extreme.

By 1974 the concept of permanent sovereignty over natural resources had become the political demand for a new international economic order and went beyond the limited aim of terminating colonial arrangements.[55] It is noteworthy that there were 875 cases of nationalisation or take-over by 62 countries during the period 1960 to mid-1974.[56] That indicates the 'dramatic shift toward absolute sovereignty and towards an extreme version of economic self-determination beyond the process of decolonization'.[57]

It was no accident that the oil crisis caused by the OPEC actions in 1973 occurred at the high point of the principle of permanent sovereignty over natural resources. The Declaratory Statement of Petroleum Policy in the Member Countries of OPEC, issued in 1968, had already emphasised 'the inalienable right of all countries to exercise permanent sovereignty over their natural resources'. Rilwanu Lukman maintains that the collective actions of the OPEC members derived from this principle. They adopted 'collective sovereignty' over individual sovereignty. It was based on 'the determination of OPEC's Member Countries to establish their right to exercise sovereignty over their

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[54] Adopted with a vote of 120-6-10. The US and the UK among the countries voting against. See Brownlie, *op. cit.*, pp. 240, 244-45.

[55] For instance, the Economic Declaration of the Fourth Conference of Heads of State and Government of Non-Aligned Countries of 1973 states: 'The Heads of State or Government denounce before world public opinion the unacceptable practices of transnational companies which infringe the sovereignty of developing countries and violate the principles of non-interference and the right of peoples to self-determination'. See Cristescu, *op. cit.*, p. 78. By contrast, the sole arbitrator Depuy in *Texaco v. Libya* case decided that in terms of the voting patters and other reasons, Resolution 1803 of 1962 seemed to reflect customary law but the Charter of Economic Rights and Duties of States was a 'political rather than legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States.' See Robert B. von Mehren and P. Nicholas Kourides, 'International Arbitrations Between States and Foreign Private Parties' (1981), p. 526.

[56] See Wang Xuan, 'Permanent Sovereignty of States over Natural Resources' (1983), pp. 144.

[57] Dolzer, *op. cit.*, p. 222. It may be added that to a certain extent the development of the law of the sea was based on the same presupposition of national sovereignty over natural resources. For instance, the Convention of the Territorial Sea and the Contiguous Zone (1958) stipulates in Articles 1 and 2: 'The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.' 'The Sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.' The Continental Shelf Convention also points out: 'The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.' See Brownlie, *op. cit.*, p. 89, 119. The UN General Assembly in 1970 and 1972 adopted Resolutions 2692 (XXV) and 3016 (XXVII) expanding the permanent sovereignty of the States over natural resources to the contiguous water zones and superjacent waters over the continental shelves. See Xuan, *op. cit.*, p. 131. See also George Elian, *The Principle of Sovereignty over Natural Resources* (1979), pp. 88-89.

own hydrocarbon resources.' OPEC's Secretary General thus explains that in the system of OPEC 'each Member agrees not to exercise one aspect of its sovereign rights - the right to determine its own level of oil production - in the knowledge that the effects of the collective sovereignty that the Organization exercises on behalf of its Member will - or at least should be - beneficial.'[58] It may be added that 'collective sovereignty' was exercised in the early 1970s with a clear intention to challenge the post-war political and economic system established by the West.

While the theory of permanent sovereignty over natural resources was generally regarded as a nuisance in the West especially in terms of the problem of compensation to investors in the event of nationalisation, it was strongly defended by most practitioners and publicists in Third World and socialist countries. The delegates of the developed countries spearheaded by the UK and the US maintained that an agreement with investors, far from limiting sovereignty, was an exercise in sovereignty. They emphasised the complementarity and validity of contractual and international law obligations of states. By contrast, the developing countries in the United Nations insisted that sovereignty was indivisible, that the political and economic aspects of sovereignty could hardly be separated from each other and that the right of sovereignty over natural resources was a corollary to the right of self-determination.[59]

A brief look at the debate in the United Nations General Assembly indicates the depth of the commitment of Third World, as well as socialist states, to the issue of permanent sovereignty. For instance, a representative of Algeria asserted that the principle of the right of sovereignty over natural resources is to economics what the universally-recognised principle of the right of peoples to self-determination is to politics. The representative of UAR said that 'absolute sovereignty' was essential to effective planning and projection. The Iranian representative proclaimed that under the principle of sovereignty, every state had an unlimited right to dispose of its natural resources as it saw fit. According to a Yugoslav delegate, economic sovereignty was

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[58] Rilwanu Lukman, 'OPEC: Collective or Individual Sovereignty?' (1996), pp. 4-6.

[59] See Rajan, *op. cit.*, pp. 39-100. It is also interesting to see that Geoffrey Chandler of Shell International Petroleum Company wrote: 'We should therefore not start lamenting prematurely a hypothetical world dominated by mythical beasts (a few hundred companies), but consider coolly whether there is not a danger that international enterprise . . . may be circumscribed before its costs and benefits have been weighed in the balance, or even understood.' Chandler, 'The Myth of Oil Power: International Groups and National Sovereignty' (1970), p. 718.

the essential complement of political sovereignty and inconceivable without full sovereignty over natural resources. The Soviet Union took advantage of the debate by accusing the Western powers of sidetracking the question of sovereignty for the sake of private capital. A Chilean delegate pointed out that the term 'economic sovereignty' was incomprehensible to industrial countries because of the extent to which it was a reality for them. For a representative of Guinea, permanent sovereignty over natural resources was linked to a state's very existence. The Indonesian representative also stated that a nation did not really achieve full sovereignty until it became economically independent. A representative of Iraq argues that the United Nations was obliged to assist developing countries in acquiring sovereignty over natural resources and a delegate of Byelorussia said that the UN should strive to have the principle of sovereignty over natural resources made universal practice in international relations. The representative of Ecuador explained their position thus: 'It was a matter of recognizing that the twentieth century was the century of nationalism, which was nothing but the total expression of national sovereignty'.[60]

In a document prepared for the United Nations, Aureliu Cristescu declares that permanent sovereignty over natural wealth and resources is vested in peoples themselves, by virtue of their right of self-determination, whether or not they constitute independent states. Accordingly, nationalisation is a sovereign act of the state. For newly independent states nationalisation is a means of achieving economic independence; nationalisation measures are a part of the struggle of peoples for national liberation. The state has the sole right, by virtue of its sovereignty, to regulate questions relating to ownership, acquisition, transfer and deprivation of property. Since the nationalisation of the property of foreigners is an act of sovereignty, it cannot be reviewed or challenged at law by other states or by any international organisation.[61]

Among the publicists who enthusiastically support the doctrine of permanent sovereignty, George Elian of Rumania proclaims that sovereignty over natural resources is the 'fundamental, permanent right of States and people . . . to manage its own natural resources in its own way' and that it is 'the supreme prerogative of the State.' He

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[60] See Rajan, *op. cit.*, pp. 40-61.

[61] See Cristescu, *op. cit.*, p. 78-79.

continues that 'However diverse the forms of internal ownership of natural resources, it is the State that has a determining say in the internal utilization of its resources and riches, in guiding international trade and business exchanges as well as in their carrying out.' It is because 'Sovereignty includes the right of the State to freely exploit its resources and wealth on the basis of its economic independence.' In other words, 'there can be no complete sovereignty unless economic liberation is achieved alongside political emancipation.' Elian adds that the universality of Western sources of law is no longer accepted. Thus he justifies the objectives of OPEC as the establishment of their permanent sovereignty.[62]

Wang Xuan at the Beijing Institute of Political Science and Law also explains that political and economic sovereignty are interdependent. Thus he is sympathetic to the application of permanent sovereignty over natural resources. He justifies the rule that the amount and the mode of compensation should be decided by national laws. It rules out 'the unreasonable demand which developed countries may raise because the so-called "rapid, full and effective" compensation is in fact impossible in view of the economic situation in the developing countries.' When the question of compensation gives rise to a controversy, it should be settled under the domestic law of the nationalising state and its tribunals. He concludes: 'This stipulation in the Charter is a strong measure to safeguard the permanent sovereignty of the developing countries over their natural resources and ensure thier (sic) effective exercise of this sovereignty.'[63]

The advocates of permanent sovereignty over natural resources did not always justify 'absolute' sovereignty that may override any other authorities and private investors in any circumstances. But still they resorted to the theoretical conclusion derived from the vision of 'complete' national sovereignty. As a result, despite the doubt cast by Western jurists upon the binding effect of resolutions of the UN General Assembly, it was more or less accepted by the majority of states that nationalisation or expropriation became lawful in international law and disputes concerning compensation were deemed to fall within the national jurisdiction. As Georges Abi-Saab of Egypt argued, 'permanent' sovereignty 'cannot be severed from territorial sovereignty'. This means in the first place

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[62] Elian, *op. cit.*, p. 11-12, 15, 27, 29, 71-72.

[63] Xuan, *op. cit.*, pp. 125, 146.

that natural wealth and resources by their very nature 'always fall in the public domain of the State.'[64] The new paradigm is justified because it calls upon the concept of sovereignty to reinforce sovereign equality and to invest it with a more substantive rendering. The legal regime of permanent sovereignty is constructed upon the premise that 'the principle of permanent sovereignty lays the ground for a more balanced, hence more meaningful and stable co-operation.'[65] In other words, the advocates of permanent sovereignty are the people who believe that international co-operation is to be achieved only when the principle of sovereign equality realises its 'full' substance in the actual world.

It is no wonder that UN Secretary-General Kurt Waldheim remarked in 1977: 'National sovereignty and national feeling are a vital element of our society.[66] There was a revitalisation of the theory of national sovereignty in the post-1945 world. Paradoxically, communism, which was originally hostile to the idea of sovereignty, was a major factor in solidifying the principle of national sovereignty during the Cold War. More importantly, decolonisation and nationalism in Third World states globalised the principle of national sovereignty by the 1970s.[67] All these were the achievements of the theory of national sovereignty.

But in the 1980s the conditions in those blocs changed rapidly and significantly. As it became more and more evident that the political and economic power of the Soviet Union was declining, communism lost its ideological power. The justification of national sovereignty that was founded upon the hostility towards capitalism lost

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[64] Georges Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities' (1991), p. 602.

[65] *Ibid.*, p. 615.

[66] Quoted in Elian, *op. cit.*, p. 85. Waldheim also remarked in the 1975-6 Annual Report: 'We live in a transitional period when the undoubted fact of increasing interdependence has by no means decreased the power or the prevalence of the concept of national sovereignty.' Quoted in Rajan, *op. cit.*, p. 151.

[67] It was not until the end of the sixties that the universal system of international law became almost complete; the whole earth came to be covered with numerous 'sovereign and equal' nation-states. For instance, in contrast with the nineteenth century orthodoxy of international law, nothing in the late sixties obstructed the statement that 'neutralized states are also sovereign states.' Furthermore, 'the class of semi-sovereign states has become obsolete.' To the lawyers' relief, in addition, 'The former League of Nations mandates and those later transferred to the United Nations system as trust territories have all become independent nations', with a few exceptions. See William L. Tung, *International Law in an Organizing World* (1968), pp. 43-47. As regards the difficulty of the problem of sovereignty in trust territories in the early fifties, Hans Kelsen, *The Law of the United Nations* (1950), pp. 688-694; L. Larry Leonard, *International Organization* (1951), pp. 509-514.

validity.[68] Furthermore, the trend that had produced permanent sovereignty over natural resources was reversed in some areas. Instead of nationalisation, host countries offered legal arrangements to attract foreign investment. The new trend was that the 'radical emphasis on an absolute concept of economic sovereignty and the corresponding negative attitude toward foreign private investment has disappeared in the light of sobering economic realities'.[69]

In parallel and in compliance with these changes, Western countries no longer felt the necessity to disingenuously support the newly emergent Third World. In the course of the 1980s they would become more self-assertive as regards traditional liberal principles. We shall see in the next chapter how discourses regarding constitutional sovereignty in Britain and the United States struggles with and gradually displaces the discourses regarding the national sovereignty of non-Western countries.

[68] See Jones, *op. cit.*, pp. 230-256.

[69] Dolzer, *op. cit.*, p. 230.

Chapter 9 Towards New Constitutional Sovereignty

In this chapter we shall examine the discourses on sovereignty in the 1970s and 1980s. We shall see that this period marks a new tendency in the understanding of sovereignty. For a long time international politics took the anthropomorphism of nations for granted. A great conceptual change in the period was the decline of international anthropomorphism. In 1966 Foucault asserted in *The Order of Things* that the 'death of man' was becoming a contemporary conceptual problem. In our study this means a relative decline of the importance of the nation as the subject of sovereignty. Indeed, the interwar projects to implement an international constitution disappeared in the field of international studies and were replaced with the highly formal doctrine of sovereignty. To write a constitution for international society relied on a simple domestic analogy, i.e. the anthropomorphism of nations. By contrast, a new mode of international constitutionalism delineates sovereignty in a conceptually different sphere; it does not limit sovereignty, but formalises it within the framework of international society.

From the time of the Soviet invasion of Czechoslovakia, the doctrine of 'limited sovereignty' became primarily associated with the USSR. The Western camp that had blamed the USSR for its vigorous adherence to sovereignty now labelled the USSR as the usurper of the principle of sovereignty. In addition, sovereignty in the decolonised world did not simply represent a problem of anarchy, but also a principle of the protection of formerly colonised peoples. Does this not mean that sovereignty ought to be observed rather than attacked? The task to be accomplished by Anglo-American theorists was no longer to limit sovereignty, but to conceptualise international society, which was founded upon sovereignty as its constitutive principle and still contained a kind of constitutional rules. International society is primarily a society of states. But it is not a chaotic meeting place of absolute sovereigns egoistically pursuing power. There is no international constitutional law, nor is there a world government. But many feel that it ought to have, and has continued to have to some extent, the values of

constitutionalism like the protection of individual rights and free economic activities. International society has its own rules in which sovereign states are embedded. I shall call this phenomenon 'new international constitutionalism'. Few dared use the word, constitutionalism, to describe international rules. But the lack of a constitutional world government did not change the fact that international society had its own constitutional rules and principles.

This chapter identifies the gradual emergence of the new kind of international constitutionalism. I shall explore in the first two sections leading theories in Britain and in America in the 1970s and 1980s. Furthermore, in the historical context I shall focus on the theoretical connotation of the emergence of the restrictive theory of sovereign immunity together with discourses on human rights.

Sovereignty in International Society

British politics in the 1970s evolved around the issue of the European Community. But despite the significance of the entry into the EC in terms of the doctrine of sovereignty, the majority of people behaved in a practical way.[1] Although the opponents of the British entry into the EC repeatedly mentioned sovereignty, mainstream intellectuals rationalised 'constraints on economic sovereignty' for real gains.[2] The pro-Community side emphasised that entry was a practical exercise of British sovereignty and there would be no loss of it. It should be emphasised that the implementation of a referendum after the decision by parliament was also innovative from the perspective of traditional parliamentary sovereignty. The validity of parliamentary sovereignty was left in the air, for both sides needed the confidence of popular votes. The application of a referendum meant that Dicey's 'political sovereign' was put in the position to give sanction to the 'legal sovereign'. But such a theoretical argument was beside the point

[1] For instance, see two pro-EC Conservative Members of Parliament, Tufton Beamish and Norman St John-Stevas, *Sovereignty: Substance and Shadow* (1971). Edward Heath, British prime minister at the time of the entry into the EC, attributes the change in the meaning of sovereignty to interdependent international society. Heath, *The Place of Sovereignty in an Interdependent world* (1984).

[2] See John Williamson, 'Constraints on Economic Sovereignty' (1972). See also William Wallace, *The Illusion of Sovereignty* (1979).

in the face of so practical a problem as the entry into the EC. Britain continued to remain sovereign, although publicists admitted that the European Communities Act 1972 gave primacy to Community Law over the parliament of Great Britain.[3] Sovereignty survived within the intensive web of international rules and institutions; it proved its tenacious nature. Moreover, British politicians repeatedly resorted to the idea of sovereignty when they negotiated with the other members of the Community for British national interests. Sovereignty, which was no longer absolute, was persistent. It never died; rather, it showed its value in a strong international institution.

Interestingly, during this period there arose the major statements of the 'English School' in the discipline of international relations. The English School was a rare example in maintaining the concept of sovereignty as a basis of political theory. In the period of the 'apparent paradox', namely, 'the near-universal denial of the fundamental importance of sovereignty at the moment of its universal triumph',[4] the English School approach aimed to examine the historical paradox.

One of the characteristics of the English School was to identify international society in the conceptual framework of international rules and principles. For instance, F. S. Northedge together with M. J. Grieve emphasises that the confusion about sovereignty derives from the misunderstanding that sovereignty means supremacy above the law. This may be true for internal sovereignty. But in speaking of the external aspects of sovereignty, in terms of the state as a whole in relation to other states, to be a sovereign state is not to be above the law; it is to be subject to 'all the existing rules and obligations of international law, and only sovereign states and, to some extent, international institutions can be so bound since other entities have no *locus standi* in the sight of international law.'[5] Northedge's argument is characterised by a strong belief in the existence of international society. Sovereignty does not exist prior to international

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[3] See J. D. B. Mitchell, 'The Sovereignty of Parliament and Community Law' (1979), pp. 33-46; M. A. Fazal, 'Entrenched Rights and Parliamentary Sovereignty' (1974), pp. 295-315; Chijioke Dike, 'The Case against Parliamentary Sovereignty' (1976), pp. 283-297. But John Taylor argues that 'losses of sovereignty' are more apparent than real. Taylor, 'British Membership of the European Communities' (1975). The orthodox interpretation is, as Roy Pryce says, that the British entry into the EC is not a surrender of sovereignty, but 'the voluntary acceptance of self-imposed rules of conduct governing the exercise of sovereignty by a group of states.' Pryce, *The Politics of the European Community* (1973), pp. 52-55.

[4] Christopher Brewin, 'Sovereignty' (1982), p. 35.

[5] Northedge and Grieve, *A Hundred Years of International Relations* (1971), pp. 342-343.

society.[6] It is embedded in international society. The sovereign state 'could not exist outside the international political system.'[7] Even if Northedge's ideas are not completely shared by all other scholars in the English School, the importance of the notions of international society and sovereignty within it is a core interest that characterises the School.

Constitutional Insularity

C. A. W. Manning, one of the leading scholars in the English School, starts with the traditional approach of the analogy between natural and artificial persons. He emphasises that constitutional law as well as international law is binding '*in idea*'; it is 'a matter of dogma'.[8] Ascertaining this claim, Manning finds that the world of ideas, constitutional law, can work on the consent of individuals in a society. Similarly, international law is a product of the consent of states as constitutive entities. The idea that constitutional law is binding is 'logically *pre*-legal dogmatic premise number one'; international law exists because sovereign states as the members of international society accept as self-evident the value of a modicum of voluntary collective self-discipline. They do so through diplomacy from a natural necessity for coexistence. Thus Manning defines sovereignty as 'an aspect of their [states'] nature as organizations *constitutionally insular*.' The individual members of domestic society have the competence to exist and to function as human beings primordially independent of municipal law. Accordingly, 'the nature of the sovereign states as constitutionally insular is analogous to that of the individual as a developed personality, dependent indeed upon society, yet at the same time inner-directed and self-contained.'[9]

Manning's logic of constitutional rules relies on the existence of constitutional

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[6] For instance, compare Northedge with a contemporary publicist, D. J. Latham Brown, who identifies two sovereigns that differ from Northedge's notions of sovereignty. 'Natural sovereignty' is the degree of independence and concerns a relationship of power. Potentially each man and woman has natural sovereignty, but they abandon it by accepting the notional social contract. Positive sovereignty is the limited internal authority. Namely, according to Brown, while internal sovereignty is limited and social, external sovereignty is natural and concerns power relationship. Brown, *Public International Law* (1970), p. 11.

[7] Northedge, *The International Political System* (1976), pp. 143-144.

[8] Manning. 'The Legal Framework in a World of Change' (1972), p. 306.

[9] *Ibid.*, p. 306-307.

principles in international society, while he does not intend to apply a domestic constitution to international society. Although constitutional law and international law are two different legal systems, and the perception of constitutional aspects in international society no longer relies on a simple domestic analogy, *a fortiori*, the relationship between international law and sovereignty are no more contradictory than the relationship between constitutional law and the individual. For Manning external sovereignty no longer entails supremacy. External sovereignty that constitutes international society is 'constitutional insularity or self-containedness' that belongs to 'the state as such, as an international person, a performer upon the international stage.'[10]

Manning does not say that this definition is the only meaning of sovereignty. But he insists that international society is based on the notion of sovereignty defined as 'constitutional insularity'. The effort to impose a written constitution upon international society misses this point. International society is not simply a primitive figure of domestic society. It is a society of corporate persons that has its own rules and principles. As even constitutional law in domestic society rests on the acceptance of its 'pre-legal dogmatic premise' by individuals,[11] international law stems from the acceptance of 'pre-legal' rules and norms by sovereign states.

Alan James follows Manning, taking his argument in a more formalistic direction. In the early 1970s James argued that sovereignty had two sides. The first is supremacy, the location of which in a state is almost impossible to find. But James emphasises that this does not deny the theory of sovereignty as the state as a whole possesses sovereignty. The sovereign state is still supreme as a distinct constitutional system; it is the sole guardian of its constitution. As long as there is no constitutional superior, the sovereign state is supreme in constitutional terms. The second aspect of sovereignty is separateness. No matter how much the state seems permeable, interdependent and restrained, it is sovereign as long as it is constitutionally separate. This constitutional self-containment is a necessary consequence of the state's supremacy. This does not mean that sovereignty has internal and external aspects. The supremacy and

[10] *Ibid.*, p. 308.

[11] This point applies to English constitutional law in particular.

separateness of the state is the same thing in terms of its constitutional status.[12] The importance of sovereignty lies in the fact that it is the requirement for membership of international society. Only the entities which are able to demonstrate their sovereign status can enter international society to enjoy their pre-existing status and acquire new rights and duties.[13]

Sovereignty is the qualification which states must have before they can join international society.[14] James's peculiarity lies in this belief. To say that sovereignty exists before states join international society is different from saying that the members of international society are sovereign states. James's position implies that sovereignty is an independent factor of social conditions. He argues that sovereign states existed in the beginning of the sixteenth century or before it.[15]

In the middle of the 1980s James refined his argument by defining sovereignty as 'constitutional independence'. James explains that the state is composed of the three elements of the Montevideo conditions: a government, territory and population. Thus he speaks of a territory which itself becomes sovereign, as territory is part of the sovereign entity.[16] Sovereignty resides in the constitutional structure of the state that is conceived to be independent. 'Constitutional independence' exemplifies formal conditions of state sovereignty, and nothing more.[17] It is furthermore evident that James's notion of sovereignty is highly formal and ahistorical. For instance, James admits that sovereignty is sometimes used as a synonym of ownership,[18] implying there

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[12] James, 'The Contemporary Relevance of National Sovereignty' (1972), pp. 17-19.

[13] *Ibid.*, p. 29.

[14] James, 'International Society' (1976), pp. 103-104.

[15] *Ibid.*, p. 105. It is theoretically possible that sovereignty as constitutional insularity might exist even in Jupiter or Pluto. See the implication of this point in James, *Sovereign Statehood* (1986), p. 34.

[16] See *Ibid.*, pp. 13, 23-25.

[17] With almost the same intention as James's, David T. Llewellyn, in discussing monetary integration, distinguishes 'constitutional and effective sovereignty'. The former defines a national government's ability to use instruments of policy at its own discretion and independently of other countries. The latter relates to the power of government to independently determine the value of significant target variables in the economy. A government may have little effective sovereignty even though its constitutional sovereignty is unquestioned. See Llewellyn, *International Financial Integration* (1980), p. 198. See also Robert H. Jackson's distinction between 'the constitutive rules of the sovereignty game' which include 'civil international relations' like legal equality of states, and 'the instrumental part of the sovereignty game' employed by statesmen in pursuing their interests. Jackson, 'Quasi-States, Dual Regimes, and Neoclassical Theory' (1987), p. 522. See also Robert Keohane's distinction between 'formal sovereignty' and 'operational sovereignty', in Keohane, 'Sovereignty, Interdependence, and International Institutions' (1993), p. 91.

[18] James, *op. cit.*, pp. 33-34.

are political struggles for sovereignty. However, he is not interested in this notion of sovereignty, as it cannot provide the 'basis of international society'. Interestingly, he argues that the member states in the European Community are still sovereign in his sense; otherwise, although it is unlikely, the Community itself becomes a sovereign state, reducing the number of sovereign states in one area of the world.[19]

Why is the basis of international society so important? The answer may be found in the argument of Geoffrey L. Goodwin. He reinforces the Manning-James definition of sovereignty as constitutional separateness. But he also distinguishes between external and internal sovereignty as equality and supremacy: the status of and the capacity to exercise sovereignty. This implies that the debate on the 'erosion' of sovereignty may be to some extent applicable in the sphere of internal sovereignty and the capacity to exercise it. But as far as the external aspect and the status of sovereignty are concerned, there is no evidence of its imminent demise. Rather, peace through the reconciliation of sovereignty with international order is achieved in line with the 'rationalist' and 'realist' schools. According to Goodwin, the rationalist holds that:

> a system of international order analogous to that to be found in domestic society can be achieved without setting up some kind of common authority with power to enforce edicts on the rest of mankind . . . . There is here the Lockean assumption that, as in domestic society, the majority can be counted upon to act together to maintain a peaceful and relatively just order because of the majority's sense of obligation to the community of nations as a whole.[20]

The rationalist's perception of international society is 'a quasi *Gemeinschaft*'. To the realist, international society is a *Gesellschaft*.[21]

If international society is founded upon the 'Lockean assumption', there must be something corresponding to natural rights of the individual: something existing prior to the establishment of political power. Sovereignty is the vital right in a society of states. The Lockean premise is that individuals protect their rights according to reason without conflicts. English School theorists think that were it not the case that sovereignty was

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[19] See *ibid.*, pp. 30-31.

[20] Goodwin, 'The Erosion of External Sovereignty' (1974), pp. 101-102, 116.

[21] *Ibid*, p. 102.

as important as natural rights, international society would lack its constitutive principle and become theoretically groundless.

Among English School scholars a certain domestic analogy was still valid. However, they no longer aspired after an international constitutional law or deplored its absence. Their strong belief in international society paved the way for the recognition of international rules that were not simply reduced to positive international law. Sovereignty for them was not a natural attribute of living nations. It was a constitutive principle of international society, which has its own constitutional structure distinct from domestic.

Sovereignty and the Antithesis between Order and Justice

Hedley Bull stands in a slightly different position from that of other scholars of the English School. While he shares the basic ideas of international society with others, his notion of sovereignty is not as formalistic as James's. Bull also refers to multiple perspectives on sovereignty within international society that reflect the conflict of ideas in international society.

According to Bull, the state is an independent political community, which 'possesses a government and asserts sovereignty in relation to a particular portion of the earth's surface and a particular segment of the human population'. Bull then defines 'internal sovereignty' as 'supremacy over all other authorities within that territory and population.' 'External sovereignty' is 'not supremacy but independence of outside authorities.' He adds that sovereignty of states may be said to exist at a normative as well as a factual level.[22] This *inter-authority* definition of the sovereign state as a *political* community makes a contrast with the more legalistic description of sovereignty by Manning and James. This leads Bull to contain political dynamism within the notion of sovereignty.

On the one hand, Bull respects the principle of sovereignty as the very foundation of international society. Bull stipulates that international society exists 'when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their

[22] Bull, *The Anarchical Society* (1977), p. 8.

relations with one another, and share in the working of common institutions.' Then Bull searches for international order defined as a pattern of activity that sustains the elementary or primary goals of international society.[23] There exists 'a common set of rules' that sustains international order. The study of order thus seeks to identify 'the fundamental or constitutional normative principles', 'the rules of coexistence' and other complex rules. Indeed, because the domestic analogy derived from Hobbes does not apply perfectly to international society, Bull chooses 'Locke's conception of the state of nature as a society without government'.[24] State sovereignty is, of course, one of the most 'fundamental or constitutional' principles in Lockean international society.

On the other hand, Bull conceives of sovereignty in a way that reflects the dynamic or conflicting nature of international politics; Bull differentiates the ideas of sovereignty according to his famous antithesis of order and justice. Bull notes that the antithesis of the two values is 'the clash between the preoccupation of the rich industrial states with order (or rather with a form of order that embodies their preferred values) and the preoccupation of poor and non-industrial states with just change.'[25]

Given Bull's emphasis on the conflict between order and justice, it is hardly surprising that he identifies sovereignty as a major conceptual battlefield between these two norms. On the one hand, one of the elementary, primary or universal goals of international order is to sustain sovereignty. The goal of stability in international society is reflected by the compact of mutual recognition of sovereignty. This is the value of sovereignty for 'the rich industrial states'.[26] On the other hand, the right of states to sovereign independence exemplifies 'arithmetical justice'. Bull means by 'international or interstate justice' moral rules like the idea that all states are equally entitled to the rights of sovereignty. A moral right to sovereignty constitutes 'substantive justice'. 'Poor and non-industrial states' would cherish this aspect of sovereignty.[27] It may be claimed that this antithesis reflected decolonised international politics in the late 1970s.

Bull eventually takes sides with order by saying that justice 'is realisable only in a

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[23] *Ibid.*, p. 13.

[24] *Ibid.*, pp. 67-71, 48.

[25] *Ibid.*, p. xii.

[26] *Ibid.*, pp. 17-19.

[27] *Ibid.*, pp. 80-82.

context of order.'[28] This implies that Third World demands for justice should be satisfied only after 'the rich industrial states' have secured the maintenance of international order. It should be recalled that according to Locke the supreme power of the people was permitted to be exerted only when a revolution was justifiable as a result of tyranny. Dicey designated political sovereignty, *de facto* popular sovereignty, but excluded it from the sphere of the rule of law. Nineteenth century British international lawyers used to distinguish between sovereign and semi- or non-sovereign states in order to construct international order, as Schwarzenberger still drew on the ranks of sovereign states in the twentieth century.

However, the tradition of English constitutionalism is also characterised by an instinct of the rationalist principle of 'the golden mean'. In fact, Bull notes that order should not be taken to be a commanding value.[29] It is noteworthy, therefore, that in a series of lectures delivered in 1984 Bull is more inclined to the 'golden mean' position. This optimistic prospect for the possibility of 'the golden mean' represents a revival of the unequivocal reaffirmation of Western values in the 1980s. He observes that the understanding of 'limits of growth', the oil price rise and growing recession in the early 1970s made the idea of cooperation between developed and developing countries go into retreat. As a result, 'the assertion by Third World states of their rights of sovereignty, and their tendency to define the rights in absolute and uncompromising terms, stand in conflict with the view prevailing in Western countries that the rights of sovereign states today are qualified by their obligations to the international community.'[30] In spite of the demands of Third World states, Bull emphasises, as a concept of justice 'we' should embrace, that 'The rights of sovereign states, and of sovereign peoples or nations, derive from the rules of the international community or society and are limited by them.' The doctrine of the natural or inherent rights of absolute sovereignty over natural resources cannot be acceptable 'now', whatever case might have been made out at earlier periods. The idea of sovereign rights existing apart from the rules of international society has to be rejected.[31]

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[28] *Ibid.*, p. 86.

[29] *Ibid.*, p. 98.

[30] Bull, *Justice in International Relations* (1984), pp. 4, 6.

[31] *Ibid.*, p. 11-12.

It is striking that Bull became willing to invoke the agenda of Western values in the decade in which self-confident neo-conservative statesmen seized power in Great Britain and the United States. Bull also modifies the contrast between the North and the South in relation to order and justice, which he himself accepted several years ago. On the one hand, Third World states have a stake not only in just change but also in international order. On the other hand, the Western states should pursue not only order but also justice in their own values. Bull proclaims that 'The world society of individual human beings entitled to human rights as we understand them exists only as an ideal, not as a reality; but if it is our ideal, this must help to shape our policy.'[32]

According to Bull, the conservative argues that order should be given priority and that demands for just change may place international order in jeopardy. The revolutionary considers that justice should be preferred even at the price of order. But 'The inclination of the liberal in this situation is to seek a third course' and seek for ways of reconciling the one with the other. Although the liberal position cannot always be achieved, 'There is political wisdom as well as generosity in the liberal impulse to reconcile these two goals, and the attempt is sometimes successful.'[33] This may seem to signal Bull's conversion from a theorist of order to a theorist of liberal justice. But it should be recalled that from the beginning Bull searched for a set of rules of international society. Thus his liberal position in the 1980s is no more than an extension of his earlier position.[34]

Bull as well as other English School theorists illustrated the end of an era in which intellectuals deplored the lack of a constitution in international society. They all strove to prove that constitutional rules, different from those in domestic society, were in existence in international society. They were not exceedingly illuminating from the view of traditional constitutionalism. They were not exempt from realist 'statism'. However, they still pursued and identified the constitutional elements in international

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[32] *Ibid.*, p. 13.

[33] *Ibid.*, p. 18.

[34] A similar method of analysing international society by means of the two concepts of sovereignty is developed by James Mayall in his argument of 'prescriptive sovereignty' and 'popular sovereignty'. The 'development of the first truly global international society that the world has known' is the result of an accommodation between 'the prescriptive principle of sovereignty and the popular principle of national self-determination.' See Mayall, *Nationalism and International Society* (1990), p. 35.

society.

Sovereignty in Structures and Regimes

The 1970s was the age of a relative decline in the US power and its moral authority; but it was also the age of the relative success of Kissinger's realpolitik. The topic of 'sovereignty at bay' was still discussed after the enthusiastic observance of the expansion of multinational enterprises in the 1960s.[35] But 'sovereignty at bay' was not tantamount to the advocation of the limitation of sovereignty in the past. The 'limitation' was regarded as unrealistic and idealistic in the context of the Cold War. But the authors of the discourses of 'sovereignty at bay' or 'complex interdependence' claimed to be observers of reality.

For the neorealist, who appeared in the late 1970s and early 1980s, reality was no longer founded on the dogma of Morgenthau. Instead, the glory of neoclassical economics that reflected doubts on Keynesian remedies for recession, unemployment, and inflation became an attractive source of intellectual imagination. Post-Morgenthau realists still believed that state sovereignty would not disappear; but they no longer engaged in the philosophy of national sovereignty. They seldom focus on the problem of sovereignty. It is a given fact, or an abstract nuisance. Even if sovereignty was not at bay, it was insignificant in the world of neorealists.

Werner Levi explains the situation in which the discrepancy between formal and informal political systems is disclosed. On the one hand, the inextricable entanglements of modern international relations make 'a narrowly conceived sovereignty' illusory. The informal system dispels the outmoded system of sovereign states. On the other hand, 'sovereignty remains formally the foundation for all international activity', although it tends to be interpreted restrictively in favor of broadening the bailiwick of international discussion. Sovereignty is now only 'a socially organizing principle.' The growing

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[35] Raymond Vernon's argument is devoted to the analysis of multinational enterprises, rather than the concept of sovereignty. He only mentions that the concept of 'national sovereignty' appears 'curiously drained of meaning.' But he does not explain what he means by 'national sovereignty' and the sense in which it appears to have lost meaning. See Vernon, *Sovereignty at Bay* (1971), p. 3. See also Vernon, '*Sovereignty at Bay* ten years later' (1981).

informal political system 'has little to do with sovereignty and dominates rather than serves the formal system.' Sovereignty has survived; but its substance has eroded.[36]

The synthesis of the discrepancy between the formal and informal systems in international relations appeared in the form of 'structural realism'. When Kenneth Waltz enunciated his 'neorealism' at the end of the 1970s, he never seriously explored the meaning of sovereignty. It is 'a bothersome concept'.[37] The structure of international politics is defined only in terms of the major states, especially, the two superpowers. However, as long as the structure comprises numerous small units as minor actors, the structural importance of the superpowers does not exclude the roles of minor states. It is certain that the sovereignty of states does not mean their ability to do as they wish. But sovereign units certainly exist and construct a structure of international politics. Therefore, according to Waltz, 'To say that a state is sovereign means that it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them.' States are by no means supreme or independent; but develop their own strategies and by so doing contribute to the making of a structure of international politics. He remarks that 'It is no more contradictory to say that sovereign states are always constrained and often tightly so than it is to say that free individuals often make decisions under the heavy pressure of events.' In the end, 'The only interesting question is whether the category that classifies objects according to their common qualities is useful.'[38]

It is striking that 'structural realism' is no longer committed to Morgenthau's conception of struggle for power among sovereign states. It is more to do with cultural anthropology and neoclassical economics. It is the doctrine of order, not of anarchy, based on the logic of social structures or free market economy. Just as 'free individuals' make decisions according to the distribution of power or resources to them, states make decision according to their power. Just as 'free individuals' determine a structure of political society, states determine a structure of international society. What neorealism

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[36] Levi, *International Politics* (1974), pp. 72-75.

[37] Waltz, *Theory of International Politics* (1979), p. 95.

[38] *Ibid.*, pp. 95-96.

needs is just a unit, which Waltz calls the sovereign state.

The rise of the discourses on international 'regimes' in the 1970s and 1980s can be understood in this historical context.[39] There are degrees of 'statism' among regime theorists. Those who can be called 'modified realists' like Robert Keohane represent the realist end of the theory of international regimes.[40] The theories of Donald J. Puchala, Raymond F. Hopkins and Oran R. Young are characterised by Stephen D. Krasner as 'Grotian perspectives'.[41] Like Hedley Bull, who oscillated between the necessity of realism and his preference for rationalism, the theory of regimes has two faces: neo-realism and neo-liberalism. But the realist and the liberal ends of the theory of regimes do not make significant differences in our historical study. The emphasis upon 'sets of implicit or explicit principles, norms, rules, and decision-making procedures'[42] in the definition of regimes indicates the perception of invisible bonds of international society.

Unlike their counterparts in the English School, regime theorists were strongly influenced by the achievements of neoclassical economics that became a status quo ideology after the relative decline of American power. Lacking the multiple perspectives of Bull's formula, regime theorists were predominantly concerned about the maintenance of the 'order' that the US had established since 1945. Nevertheless, regime theorists, like English School scholars, identify sovereignty as 'the most diffuse principle' or 'the constitutive principle of the present international system'.[43] The 'constitutive principle' is the authoritative characterisation of sovereignty followed by many international relations scholars.[44]

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[39] The differences and similarities between regime theory and the English School are fully discussed in Tony Evans and Peter Wilson, 'Regime Theory and the English School of International Relations: a Comparison' (1992).

[40] Robert O. Keohane writes that 'Sovereignty and self-help mean that the principles and rules of international regimes will necessarily be weaker than in domestic society. . . . Yet even if the principles of sovereignty and self-help limit the degree of confidence to be placed in international agreements, they do not render cooperation impossible.' Keohane, *After Hegemony* (1984), p. 62.

[41] See Stephen D. Krasner, 'Structural Causes and Regime Consequences' (1983), p. 20.

[42] See *ibid.*, p. 2.

[43] See *ibid.*, p.. 17-18. Jock A. Finlayson and Mark W. Zacher contrast 'sovereignty norms' with 'interdependence norms' and identify the coexistence of the two sets of norms in the GATT regime. See Finlayson and Zacher, 'The GATT and the Regulation of Trade Barriers' (1983), pp. 276, 306-309.

[44] For instance, international regimes should be comprehended chiefly 'as components of systems in which sovereignty remains a constitutive principle.' Keohane, *op. cit.*, p. 63; sovereign statehood is 'the constitutive principle of international society', Robert H. Jackson, *op. cit.*, p. 519; 'in our view sovereignty is a "constitutive principle" rather than an "institution"', Alexander Wendt and Raymond Duvall, 'Institutions and International Order' (1989), p. 69; 'state sovereignty is the primary constitutive principle of modern political life.' R. B. J.

Krasner argues that the incapability of sovereign political units to cope with global issues has had no impact on 'the constitutive principle of the present international system', for the cost of abandoning 'the regime of sovereignty' without a substitute for it will be high. In addition, especially for many weak, poor and small states, abandoning the principle of sovereignty would undermine their independence and push them into subservient relationships with more powerful actors.[45] It might be said in this sense that even Waltz shares the formal notion of sovereignty which is a 'constitutive' principle of the international structure.[46]

Sovereignty is an indispensable principle of international relations. To conceive of a world constitution or a super-state is a 'utopian' and 'idealistic' dream in the later periods of the Cold War. However, international society has more or less been stable for some decades, in spite of frequent regional conflicts. There must be 'rules' or 'regimes' or 'institutions' or at least 'structures' that constitute the society of sovereign states. Without an international constitution or a super-state, sovereignty constitutes and is embedded in international society.

The Demarcation of the Sovereign Sphere

One may argue that the scholars I have examined so far in this chapter are in the end 'statists'. Their image of international society is mainly composed of territorial sovereign states, if not only of them. To a certain extent this assertion is true. Nevertheless, we should not conclude that international society is illusory, or the complex development of international law since 1945 is deceitful, because sovereign states remain. International rules, which I characterise as 'constitutional', may exist,

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Walker, 'Sovereignty. Identity, Community' (1990), p. 157.

[45] See Krasner, *op. cit.*, pp. 366-367. In 1989 Krasner together with Janice E. Thomson insists that 'the commonplace notion that there is an inherent conflict between sovereignty and economic transaction is fundamentally misplaced. The consolidation of sovereignty - that is, the establishment of a set of institutions exercising final authority over a defined territory - was a necessary condition for more international economic transactions.' Krasner and Thomson, 'Global Transactions and the Consolidation of Sovereignty' (1989), p. 198.

[46] It is a matter taken for granted by international relations scholars that as Norman Cousins writes, 'there are two kinds of sovereignty. One is absolute. The other is relative. . . . In a world without absolute national sovereignty, the world organization can underwrite national independence and relative sovereignty.' Cousins, *The Pathology of Power* (1987), p. 196.

whether states survive or wither away.

Constitutional notions of sovereignty we have focused on in this chapter may not be 'constitutional' enough. More 'constitutional' or liberal international society lies in the tenacity of rules regarding the sphere of *non*-sovereignty. What marks 'constitutional' elements is not the existence of a central government; nor is it the demise of states. What is more important is the distinction between the public and the private spheres, i.e. the premise that sovereignty exists only within the public sphere defined by certain rules.

When looked at from this perspective, other discourses on sovereignty in the 1970s and the 1980s that seem irrelevant to the English School or regime theory nevertheless appear to reinforce 'constitutional' elements of the notion of sovereignty. One such example is the process of redefining the principle of 'sovereign immunity', which took place in the late 1970s. The restrictive theory of sovereign immunity implemented by the UK and the US attacked the doctrine of absolute national sovereignty. I select this example because the redefinition of sovereign immunity was intended to impose the rule of the protection of private interests upon governments. It illustrates the Anglo-American understanding of sovereignty in the 1970s which marks a clear contrast to the doctrine of permanent sovereignty over natural resources. In order to highlight the process of the demarcation of the sphere of sovereignty, I shall deal with the discourses on human rights as well.

The Restrictive Theory of Sovereign Immunity

In practice the sovereign immunity of representatives of foreign states in the national courts of Great Britain and the United States were not simple. In the nineteenth century they were among the leading observers of the doctrine of sovereign immunity. The first relevant case appeared in 1812 in the US Supreme Court.[47] However, it is usually emphasised by commentators that the case involved only military ships; the Court was

[47] In the case of *The Schooner Exchange v. McFaddon* the Court stipulated: 'This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects.' See Burns H. Weston, Richard Falk and Anthony A. D'Amato, *International Law and World Order* (1980), p. 809. See also Sompong Sucharitkul, 'Immunities of Foreign States before National Authorities' (1976), pp. 117-119.

not concerned with the commercial activities of the state. It did not ignore the distinction between commercial and public acts of the state. It was not until 1926 that the US Supreme Court regarded 'the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.' Britain was also a strict observer of the doctrine.[48] But this does not mean that British jurists were unanimously in favour of the absolute theory of sovereign immunity. It can also be claimed that the common law tradition until the eighteenth century embraced the restrictive theory of sovereign immunity and the tradition never died away even throughout the nineteenth and twentieth centuries. It is said that the move towards an absolutist approach to sovereignty began as late as 1879.[49]

In what way did the two countries oscillate between the absolute and the restrictive theories of sovereign immunity? H. Lauterpacht wrote in 1951 that there were five arguments in support of the doctrine of sovereign immunity. Two major arguments among them were the principles of independence, equality and dignity, and the impossibility of the definition and application of the distinction between acts *jure gestionis* and *jure imperii*, namely, private and public acts. Both arguments are connected with traditional Anglo-American policies and constitutional principles. Respect for the independence of other states was an indispensable element of the principle of non-interference. It should be added that the spread of the laissez-faire economic doctrine resulted in a low-ebb of trading of governments in the middle of the nineteenth century. Furthermore, in the traditional British constitutional system the state (government) *is* the public realm, while individuals are in the private domain. It is difficult upon this premise to distinguish between the public and private activities of the state.[50]

The doctrine of sovereign immunity was rooted far deeper in classical constitutionalism in the United States. In the domestic context, the spirit of the Eleventh

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[48] See Sucharitkul, *op. cit.*, pp. 126-182.

[49] See Lakshman Marasinghe, 'The Modern Law of Sovereign Immunity' (1991), pp. 664-684.

[50] The issue in the late seventies was how to deal with the state having engaged in activities in the private sphere, i.e. 'a sovereign, having gone into the marketplace'. Rosalyn Higgins, 'Recent Development in the Law of Sovereign Immunity in the United Kingdom' (1977), pp. 433-434. The point is not whether the state has private and public faces or not, but whether priority should be given to the public nature of the state or the logic of the marketplace.

Amendment of the US Constitution that prohibited a suit against a State of the United States by citizens of another State was conducive to mutual respect for non-interference with other States. That is interpreted by the US Supreme Court as the constitutional basis of State sovereign immunity barring suits against the State even by its own citizens without the State's consent.[51] In the international context as well, the rigid American interpretation of the separation of powers prohibited judicial power from interfering with the matters of the president and Congress which possessed the power to decide how to deal with foreign states.[52] In addition, of course, the negative principle of the Monroe doctrine which was aimed at mutual respect for sovereignty perfectly accorded with the rigid adoption of sovereign immunity.

The difficulty of dealing with the issue of sovereign immunity lies in the janus-faced character of the doctrine. Absolute sovereign immunity may derive from the notion of absolute sovereignty. But absolute territorial sovereignty demands the abnegation of sovereign immunity. In order to identify the conceptual conflicts, therefore, we must look into the political contexts of the discourses on sovereign immunity. It is probably safe to say that in the nineteenth century the principle of non-intervention and constitutionalism prevented the Anglo-American countries from restricting the doctrine of sovereign immunity. However, this trend was gradually reversed in the twentieth century as the economic activities of states increased.

In the domestic sphere, the constitutional relationship of 'non-interference' between the government and citizens was modified after the Second World War. Sovereign immunity over certain claims in tort against the United States was renounced by the Federal Tort Claims Act of 1946, even though it was not a total abandonment. It was soon followed by the Crown Proceedings Act of 1947 in Britain that made the crown directly suable. The restriction of sovereign immunity of the national government was a necessary consequence of the expansion of governmental activities. Indeed, it was not until the twentieth century, especially after Franklin D. Roosevelt's New Deal, that the view of sovereign immunity began to change. After the Second World War 'the

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[51] See Phillip J. Cooper, 'The Supreme Court on Governmental Liability' (1984), p. 272.

[52] See Sucharitkul, *op. cit.*, p. 120. See also J. Gillis Wetter's explanation of the 'act of state' doctrine in contrast with the prohibition of sovereign immunity in international arbitration. Wetter, 'Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals' (1985), p. 16.

dramatic mid-twentieth century surge of cases against officials and government units' began.[53]

But the sovereign immunity of foreign states developed in a different historical context. In 1976 the US Supreme Court in the case of *Alfred Dunhill of London v. Republic of Cuba* proclaimed that it adopted a 'restrictive' (as distinct from 'absolutist') theory of sovereign immunity. Justice White acknowledged that since 1952 the US Department of State had 'adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity' and as a result of the lower courts' practices for twenty years the 'restrictive theory' of sovereign immunity appeared to be generally accepted. What he actually did was to distinguish between the 'commercial' activities of Cuba and an act of state by Cuba. However, there was a practical difficulty in discerning the 'precise scope' of a 'commercial act', as Justice Marshall pointed out criticising the opinion of Justice White.[54]

The doctrine of the distinction between acts *jure gestionis* and *jure imperii* was somehow acknowledged in the 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State Owned Vessels and the 1972 European Convention on State Immunity. But the United States became the first country to unequivocally declare that it was no longer prepared to accord immunity to foreign government agencies which were engaged in commercial activities. The US Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976 to legislate the doctrine. Following it, the British Parliament passed the State Immunity Act 1978 to the same effect.[55] It should be noted that unlike treaties which are binding only upon signatories who have ratified them, these Acts have global effects as they apply to any state in the world.

Not surprisingly, international lawyers in socialist countries criticised this doctrine and asserted that 'it was employed by bourgeois courts against the Soviet state and

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[53] See Leon Hurwitz, *The State as Defendant* (1981), pp. 20-22; Cooper, *op. cit.*, p. 269.

[54] See Weston, Falk and D'Amato, *op. cit.*, p. 810-812.

[55] The effect of the FSIA and the State Immunity Act 1978 upon 'the financial community' is discussed in Georges R. Delaume, 'Public Debt and Sovereign Immunity' (1977), and F. A. Mann, 'The State Immunity Act 1978' (1979). Delaume also analyses the State Immunity Act in comparison with the FSIA in 'The State Immunity Act of the United Kingdom' (1979). See also Charles N. Brower, F. Walter Bistline, Jr. and George W. Loomis, Jr., 'The Foreign Sovereign Immunities Act of 1976 in Practice' (1979).

against other socialist states.'[56] The change in the policy of the US State Department certainly accorded with the difficulty it had with the broad range of state organs of socialist states or even its ideological hostility to them.[57] Moreover, the culmination of the 'restrictive' theory in the 1970s had as much to do with the confrontation between North and South in its implications. It can be argued that the FSIA of 1976 was a *de facto* counterattack upon the principle of permanent sovereignty over natural resources. The Act stipulates that a foreign state is not immune from jurisdiction when its action is based upon 'commercial activities' or upon an act in connection with commercial activities in the United States or outside the territory of the US where that act causes a direct effect in the US. The gist of the British Act is also non-immunity of the state relating to a 'commercial transaction'.

In 1979, not surprisingly, it had to be decided in a court of California whether the activities of OPEC in controlling the production of oil and joining to set oil prices were 'commercial activities' or not. Judge Hauk decided 'to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries' and held that the 'control over a nation's natural resources stems from the nature of sovereignty'.[58] Although this statement was based on common sense, it missed the point of the FSIA. Richard Fine of the California Bar said that the testimony elicited at the trial had been uniform and against the findings of the court in that the evidence adduced at trial did show a direct effect between OPEC activities and the price of gasoline in the Central District of California, and that moreover the activities of the OPEC nations were commercial. Fine speculated that if the case involved a commodity that had not been as politically significant as oil, the court would have not had any difficulty in finding that the same activities were commercial in nature.[59] From the perspective of our study, it is worth noting that this was nothing but an example of a conflict of the Third World

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[56] M. Boguslavskij, Staatliche Immunitat 40-44 (Rathfelder trans. 1965), quoted in Weston, Falk, and D'Amato, *op. cit.*, p. 814.

[57] 'For the Soviets there is no jurisdictional immunity, except by treaty. The Soviet Union, in claiming immunity for itself, its property, and its agents, appeals neither to Soviet law nor to international law, but to foreign law. . . . This series of unembellished and pre-emptory doctrines has certain obvious realistic advantages over the more historically and jurisprudentially limited doctrine of such countries as the United States and Great Britain.' Bernard Fenserwald, 'Sovereign Immunity and Soviet State Trading' (1950), p. 633-634.

[58] See Weston, Falk and D'Amato, *op. cit.*, pp. 814-815.

[59] See Richard I. Fine's remarks in *American Society of International Law*, 'Sovereignty Immunity, Act of State, OPEC' (1980), p. 77.

doctrine of national sovereignty over natural resources and the Western doctrine of the restrictive theory of sovereign immunity (the restriction of sovereignty in favour of private activities). It may be argued in this sense that the FSIA was a proclamation of a liberal and constitutional principle and an ideological challenge to the notion of national sovereignty in the Second and Third Worlds.[60]

What the FSIA implies is that sovereignty must not override the private sphere. The fact that the supremacy of national sovereignty in the Second and Third worlds was not reconciled with the restrictive theory of sovereign immunity in the West indicates a new conceptual map of the notion of sovereignty. What changed in the new theory of sovereign immunity is the way the private and the public spheres are demarcated. The traditional approach presupposes that the existence of the state proves public nature; the absence of the state means private acts. However, the premise of new international constitutionalism demarcated the two spheres differently. Regardless of the engagement of the state, the private sphere is defined according to certain conceptual rules. The distinction between the private and the public spheres is no longer a matter of the engagement of the state; it is a matter of the rules of international society (cultivated by the US and the UK). The process of redefinition of sovereign immunity by Anglo-American states is an example of sovereignty strictly demarcated by constitutional rules and principles.

Human Rights

Behind the scene of international realpolitik in the 1970s, several important declarations on human rights were enacted. Two Covenants on Human Rights, namely, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, adopted by the UN General Assembly in 1966, entered into force in 1976 with one hundred and twenty-seven, and one hundred and twenty-five parties respectively. The latter Covenant established the Human Rights Committee. The two Covenants are most important in the safeguarding

[60] The ideological assertion of the distinction between the private and the public spheres sometimes appeared to contradict the policies of the US government. In the case of the 1979 Iran Hostages Crisis and the US freezing of assets, the US government did not hesitate to trespass upon its own liberal restraint.

of human rights and constitute what international lawyers call 'an international Bill of Rights'.[61] Numerous other global human rights conventions have also appeared including the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention for the Elimination of All Forms of Discrimination Against Women of 1979, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. In addition, there are a number of regional agreements including the European Convention of Human Rights of 1950, the Final Act of the CSCE conference in 1975 known as the Helsinki Accord, the American Convention of Human Rights of 1969, and the African Charter on Human and People's Rights of 1981.[62]

All these conventions inevitably have great impact upon traditional anthropomorphism, because the very notion of individual human rights goes beyond the simple analogy of natural and state persons. As far as basic civil and political rights are concerned, the rules of human rights demand the protection of the private sphere from sovereign power abuse. Furthermore, from our genealogical perspective it can be argued that the interest in human rights derives from traditional Western constitutionalism. The issue of human rights entails the conceptual struggles of international politics. For instance, as Richard Falk explains, while the sceptic of human rights 'overdoes statism', those who are innocent implicitly assume that 'humanitarian intervention is something that only happens to "others". The targets are always *foreign* societies.'[63] Perceiving the power of the nonaligned movement as 'a creative reconciliation of the demands of sovereignty with a form of internationalism appropriate for Third World countries', Falk does not support the view that 'weakening the doctrine of sovereignty is tantamount to restricting the operative discretion of states.'[64] Indeed, it can be claimed that the interest in human rights arose mainly in the form of concern by Anglo-American publicists about the abuse of human rights by 'others'.

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[61] See Louis Henkin, *The International Bill of Rights* (1981).

[62] The last African example is different from Western counterparts in that it stipulates duties of individuals to the state.

[63] Richard Falk, *Human Rights and State Sovereignty* (1981), pp. 3-4. As regards the different interpretations of human rights by American and Soviet lawyers, see Jennifer Noe Pahre, 'The Fine Line between the Enforcement of Human Rights Agreements and the Violation of National Sovereignty' (1984).

[64] Falk, *Reviving the World Court* (1986), pp. 3-4.

In 1987 when it had already become safe, or not necessarily politically incorrect, to attack the Third World, one of the leading American international lawyers, Anthony D'Amato, developed the argument which would explain the political connotation of the 'restrictive' theory and of human rights in relation to the doctrine of sovereignty over natural resources. He warned that the industrialised nations should not feel any guilt over the charge that they had exploited the natural resources of Third World nations. He illustrates a psychological change in the issue of sovereignty after the resurgence of Western values by asking:

> why should we assign to any person or group of persons the vast wealth that by an accident of nature happens to be located within the physical territory that they claim is a nation? From a human rights standpoint, it would be far more defensible to allocate all underground mineral wealth to every human being regardless of the location of that wealth. . . . Yet we await in vain any statement by a mineral-rich third-world nation that its underground wealth should be distributed to poor persons in foreign countries. Instead, we receive rhetoric that subtly blends human rights with national sovereignty claims of right. . . . I would contend that a universal system of human rights would tend toward the dissolution of all national claims to special rights or privileges of the citizenry. For a nation, upon analysis, is a collectivity. Its boundaries are artificial, for the purposes of universal human rights. To the extent that human rights makes any inroad at all into national sovereignty claims, the effect will be to protect international business against expropriation or confiscation. In this respect, there is a fundamental affinity between the goals of multinational business enterprise and the goals of human rights.[65]

This statement succinctly illustrates what happened in the 1970s and the 1980s. In the face of national sovereignty as claimed by the Third World, the West led by Anglo-American states became more assertive in its efforts to implement international constitutionalism. Neither strong international organisations nor written world constitutions were needed. Power still resided in states; Western states still retained relative superiority in terms of power distribution. Power is the source of international rules, which are derived from Western values and conducive to Western interests. The implementation of Western rules does not mean that Western states dominate the world.

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[65] Anthony D'Amato, *International Law: Process and Prospect* (1987), pp. 159-160. D'Amato also argues that sovereign immunity was only a rule for nineteenth century positivists. The Alien Tort Claims Act of 1789 proved that there was no general concept of sovereign immunity in the law of nations at that time. In addition, sovereign immunity does not mean that sovereignty is not subject to international law. See *ibid*, pp. 199-204.

However, they will lead 'others' in creating the rules and principles of international society. Sovereignty is observed *and* strictly demarcated in the process.

In the early 1970s international society experienced a decline of American political and economic power. The Nixon administration constructed a Kissingerian balance of power with the USSR and China. Accordingly, the Soviet Union and even China changed their ideological positions.[66] International power politics reached a relatively stable stage. The end of the Breton-Woods system early in the 1970s did not lead to a complete collapse of the liberal market economy, despite the defiance of Third World states. The efforts to maintain liberal economic rules continued among the industrialised countries. Under these political and economic conditions, it was natural to suppose that while sovereignty was persistent, it was not meant to be absolute. In fact, the development of international law in the field of the law of the sea, human rights and state responsibility in the 1970s and 1980s provided a complex set of international rules that went beyond the simple domestic analogy. What became crucial in this new era was to identify and develop international rules that in reality constituted international society. Sovereignty did not destroy, but constituted international rules and principles. It was in this context that there emerged a new international constitutionalism that focussed on a set of rules and principles in international society. We have also seen that the international implementation of a constitutional premise of the protection of the private from the public domain developed in various forms. This was the gist of Western international constitutionalism which was aimed at establishing a standard set of rules in international society.

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[66] In the post-Stalin era there appeared numerous textbooks and statements by practitioners that emphasised the compatibility of sovereignty and international law. See Grzybowski, *op. cit.*, p. 34. See also Bernard A. Ramundo, *Peaceful Coexistence* (1967), pp. 91-92; Richard J. Erickson, *International Law and the Revolutionary State* (1972), pp. 50-52; Allan Gotlieb, *Disarmament and International Law* (1965), pp. 33-38. As regards the constitutional provision of popular sovereignty and the gradual change in its unitary character from the end of the sixties, see Ottó Bihari, *The Constitutional Models of Socialist State Organization* (1979), pp. 111-128. An example of praise of the 1977 Constitution of the USSR is V. T. Kabyshev, 'Social-Psychological Aspects of Popular Sovereignty in the USSR' (1981). As an example of the reformulation of sovereignty in the eighties, see B. Kurashvili, 'Toward Sovereignty of the Soviets' (1988). Kurashvili makes some proposals to restore sovereignty of the Soviets referring to the principle of the 'separation of powers'. The attitude of Chinese international lawyers also changed in accordance with political changes. See Ogden, *op. cit.*, p. 30-31.

Conclusions

Our study of the notion of sovereignty has reached the present decade. I shall now summarise what we have examined and found in a history of notions of sovereignty.

We started with identifying concepts of sovereignty in reference to the *episteme* of modern knowledge. The modern mode of *episteme* formulated by Foucault was characterised by the emergence of man. Interestingly, we found that it corresponded with the emergence of the nation in political discourses in almost the same age. The modern quest for something natural, original and real turned the attention of intellectuals to the problem of man and the nation that were conceived to exist beyond artificial reasoning. The characteristic of the modern theory of sovereignty after the French Revolution rested upon the nation as a living entity. This was called our diachronic perspective.

The other starting point of our research was the recognition of two conflicting traditions of the notion of sovereignty. Drawing on Nietzsche's ideas of two morals, we formulated two major tendencies of thought in the concept of sovereignty: constitutional and national. The two traditions highlighted the impact of the two significant political schools of thought - constitutionalism and nationalism - upon the notion of sovereignty. This was called our synchronic perspective.

As we found from our diachronic perspective, national sovereignty characterised the modern age. The nation as an organic person obtained the supreme status of the sovereign. The theory of sovereignty above law passed from royal to national sovereignty. We have claimed at the same time that constitutional sovereignty has never disappeared despite the culmination of the theory of national sovereignty in the modern age. With the spread of constitutionalism, the idea of sovereignty within constitutional rules was also put into practice in many countries. Theories of national and constitutional sovereignty have been engaged in a history of conceptual struggles of sovereignty.

Our two perspectives were exemplified by traditional Anglo-American models of constitutional sovereignty in Chapter 1. The constitutional foundation of Great Britain

in the seventeenth and eighteenth centuries was a classic example of the notion of constitutional sovereignty. Constitutional monarchy, mixed government and more importantly, individual rights composed a harmony with the idea of sovereignty. In the United States, federalism as well as the protection of individual liberties and a moderate application of popular sovereignty highlighted historical evidence of concepts of constitutional sovereignty. The innovative theory of divided sovereignty illustrated the nature of the idea of sovereignty within constitutional rules.

In Chapter 2 we traced the development of the theory of national sovereignty in Continental countries. In the fervour of the French Revolution, the sovereignty of the nation was loftily proclaimed. Despite reactionary movements in the post-Revolution time, the ideal of national sovereignty led to the supremacy of the state as the sole possessor of national sovereignty. Among German philosophers and jurists in the nineteenth century we found the most unequivocal development of the theory of national sovereignty.

In Chapters 3 and 4, we traced the development of notions of sovereignty in nineteenth century Britain and America. The Austinian theory marked a transition period in the direction of national sovereignty in Britain. As laissez faire liberalism declined and international politics entered the age of imperialism, the notion of sovereignty came to be highly absolute. In spite of the Lockean system of political and legal sovereignty, Dicey perfected the doctrine of parliamentary sovereignty. In the United States the experience of the Civil War resulted in even more serious modifications to the notion of sovereignty. The strong tendency at the end of the nineteenth century pointed in the direction of the supremacy of national sovereignty that would justify the emergence of the US as one of the imperial powers in international politics.

The victory of Britain and the United States over Germany in the First World War generated a new atmosphere among practitioners and publicists. As we saw in Chapter 5, the then popular comparison of the Anglo-American with the German idea of sovereignty corresponded with constitutional and national sovereignty. Although the movement of what I call international constitutionalism was based on international anthropomorphism - a product of modern nationalism - the attempt to apply

constitutional rules in the international field symbolised the dominance of conceptions of constitutional sovereignty in the decade after the First World War. But the documents we examined in Chapter 6 showed a dramatic decline in this tendency in the 1930s.

Despite a short revival of international constitutionalism after the Second World War, the memory of the failure of international constitutionalism combined with the new reality of the Cold War provided fertile ground for Morgenthau's importation of Carl Schmitt's theory of sovereignty to Anglo-American soil. In Chapter 7 we also identified the formalisation of the concept of sovereignty. Although realism dominated international studies in the post-1945 era, it was soon contradicted by the decolonised world composed of a handful of powerful, and a great number of small, poor, weak states. Politicians and publicists in socialist and Third World countries were, as we observed in Chapter 8, the vigorous advocates of national sovereignty. Formal sovereignty was a necessity in order to satisfy two conditions: the acceptance of the universal principle of sovereign equality; and power politics in the age of the Cold War. In Chapter 9 we noticed that mainstream Anglo-American theorists in the 1970s tied the concept of formal sovereignty to international rules and principles. We also explored the constitutional premises which emerged after the decline of anthropomorphic constitutionalism.

In this history of concepts of sovereignty, our diachronic perspective has identified the modern development of concepts of national sovereignty. The modern age was characterised by the rise of nationalism. Nations were conceived to be natural, original and real creatures, and sovereignty was understood as an expression of the will of the omnipotent nation. Sovereignty as the theory of supremacy of the king could not survive after his sovereign head was cut off by the French revolutionaries. Supremacy, implied in the word, sovereignty, then found its highest expression in the theory of the nation-state. Nineteenth century nationalism functioned to reinforce the supremacy of imperial powers that enjoyed their privileged global status. It was in the period of high imperialism that the *reification* of sovereignty occurred. Vigorous imperialism associated with the sense of European supremacy was followed by the challenge of Nazi Germany to the norms of international society in the 1930s.

Even in the interwar period in which we have found a rise of Anglo-American international constitutionalism, the impact of national sovereignty was considerable. The projects of international constitutionalism in the interwar period was more or less based on the anthropomorphism of nations. In other words, the separate sovereignty of nation-states was a given fact, even though it was conceived to be susceptible to limitations. The direct application of Anglo-American domestic constitutional systems founded upon the anthropomorphism of nations was the typical method of international constitutionalism in this age.

Nationalism manifested in the process of decolonisation had a normative dimension. Formerly, the power of states determined the degree of sovereignty; full sovereign states were only the European imperial powers. In the post-1945 era the recognition of status as a nation necessarily involved the demand for sovereignty; nations ought to be sovereign. In the latter half of the twentieth century the principle of sovereign equality worked to sacrifice supremacy for national independence. Modern nationalism eventually subdued the sovereignty of imperial powers. It is no wonder that many of the newly independent states are now called 'quasi-states'.[1] To put it differently, 'for the Third World, sovereignty is neither irrelevant nor a malevolent force, but an unrealized goal.'[2]

We may also draw some hypothetical conclusions from our synchronic perspective. We have traced the relationship between the constitutional and national conceptions of sovereignty reflecting political, economic and social circumstances. Great Britain and the United States established their own domestic constitutional systems before the French Revolution. Their international attitudes were politically negative and economically positive embodied in their respect for non-intervention and free trade. But the double standard was a product of the supremacy of British worldwide power and American regional power. The unification and growth of the national military and economic power of Germany forced democratised Britain to retreat from its classic foreign policy. In the United States the quest for national unity after the Civil War led

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[1] See Robert H. Jackson, *Quasi-States* (1990).

[2] Naeem Inayatullah and David L. Blaney, 'Realizing Sovereignty' (1995), p. 4. Michael Barnett argues that after the end of the Cold War a renewed belief of international society is empirical (internal) sovereignty which underpins juridical (external) sovereignty. Barnett, 'The New United Nations Politics of Peace' (1995), p. 83.

to the emergence of the US as one of the imperial powers at the end of the nineteenth century. The process of nationalisation of sovereignty was a concomitant of power politics in the age of imperialism on the sides of both the defending superpower and the rising new power. However, the disappearance of challenging powers in the international field after the First World War led the majority of Anglo-American intellectuals to pursue a constitutional structure of international society. What they wanted was not a counterattack against the other imperial nations or a demand for recognition of their power, but the preservation of the stability of international society in which they had obtained paramount status. By contrast, a defeated Germany resorted to the ideology of national sovereignty and in the process constituted the most vigorous challenge to mainstream international society.

The threat of the communist bloc in the Cold War era generated new necessities in Anglo-American countries. What should be protected was not merely the status quo, but the containment of potential threats. Moreover, it became morally and politically necessary in the post-1945 era to grant sovereignty to formerly colonised peoples. Interwar international constitutionalism became obsolete, although order was still desperately needed in the international system established under the leadership of the Anglo-American powers. This historical need resulted in the formalisation of sovereignty and a pursuit of new international constitutionalism.

In short, the strong advocation of national sovereignty generally emerged with incentives to challenge the status quo. It tends to be accompanied by a sense of dissatisfaction with, or that of crisis in, the international status of a nation. It is a revolutionary concept, whether associated with Right or Left. Constitutional sovereignty was an intellectually progressive, but politically conservative doctrine. The stabilisation of international society within a certain constitutional framework is a reasonable objective for people who are not seriously dissatisfied with the existing international order.

Finally, having drawn these conclusions, I would like to examine the implication of this observation for contemporary international relations. Sovereignty in the 1990s is a fashionable object of investigation in a lot of efforts to conceptualise *something new*

going on in the current world.[3] Looking into this trend in the light of the hypothetical conclusions we have just drawn, we may assume that the end of the Cold War, namely, the disappearance of the threat of the communist bloc, is a great incentive for Anglo-American intellectuals to develop further existing aspects of international constitutionalism. A brief look at the contemporary trend of the discourses on sovereignty would suggest the validity of the assumption of the decline of theories of national sovereignty and the advance of constitutional notions of sovereignty. I shall briefly examine the relevance of our historical studies to the post-Cold War world by assessing philosophical, economic, institutional, ethical and legal issues.

First of all, there has emerged a new kind of philosophical (often described as 'postmodern' or 'poststructural') interrogations of sovereignty.[4] It can be noted that contemporary philosophical critics of sovereignty are in general hostile to the conventional theory of international relations, 'realism', whose characteristic is the very formal acceptance of the principle of sovereignty.[5] The critique of 'statism' developed by 'postmodern' International Relations scholars provides insight into the artificiality of formal sovereignty in neorealist thinking.[6] It reveals that mainstream international relations theorists ignore the dynamism which the notion of sovereignty necessarily involves. Resonating with the perspective in this thesis, R. B. J. Walker, for instance, emphasises 'continuing tensions between power and authority and between sovereign state and sovereign people, tensions that have come to be resolved either through binary

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[3] Even journalists do not hesitate to say that 'National sovereignty is an anachronism' and 'National sovereignty be dammed.' Flora Lewis, 'Shifting Standards for Sovereignty', The New York Times, June 20, 1988, quoted in Louis L. Snyder, *Encyclopedia of Nationalism* (1990), p. 373; *Economist*, 'New Ways to Run the World', (1991), p. 11.

[4] For instance, see Richard K. Ashley and R. B. J. Walker, 'Conclusion: Reading Dissidence/ Writing the Discipline' (1990).

[5] David Campbell insists that 'we have to ask whether or not the realist's commitment to the principle of sovereignty is (ironically) an instance of idealism in our postmodern world, where the rigid defense of sovereign communities located in a radically interdependent economy of violence could exacerbate many of the perils from which we seek to be secure.' Campbell, *Politics without Principle* (1993), p. 82. Timothy W. Luke writes: 'Political realism, sovereign territoriality, Cold War: the meanings of all these terms are unstable, variable and unfixed. . . . Old in-stated forms of governmentality, sovereignty and monotoriality after the Cold War are reconstituted in the un-stated spaces of contragovernmentality, sovrantee and multitorialities in a New World Disorder.' Luke, 'Governmentality and Contragovernmentality' (1996), p. 506.

[6] 'One asks how we have so easily forgotten about the concrete struggles . . . This question is concerned with how the formalization of state sovereignty as the primary constitutive *principle* of modern political life reifies the *practices* of state sovereignty'. R. B. J. Walker, 'Sovereignty, Identity, Community' (1990), pp. 159-160.

distinction between state and civil society or through unitary claims to national identity.'[7]

But Walker and other philosophical critics of sovereignty do not fully analyse notions of sovereignty. Instead, they aim at 'thinking beyond state sovereignty'.[8] In consequence, although contemporary philosophical interrogations start with criticising the formalistic character of sovereignty, they end up fighting the most dreadful image of the Hegel-Treitschke tradition of state sovereignty.[9] To challenge the omnipotent sovereignty of the state in order to think 'beyond state sovereignty' is not new. As the critics of pluralism in the interwar period said, the criticism of absolute sovereignty many a time misses the divergent theories of sovereignty of past thinkers.[10]

Those who are inclined to view sovereignty in respect of 'modernity' criticise it in connection with the problem of the sovereign 'Man' or 'self'.[11] This meaning of the sovereign state is normally understood not as state institutions contrasted with civil society, but as the 'nation-state', i.e. the 'fatherland' of the modern people. This aspect of philosophical interrogations leads to scepticism of the Hegelian nation-state, which is a rather orthodox position in Anglo-American thinking. As a result, while disclosing the fiction of the nation-state, it is often the case that philosophical inquiries examine and refine (but do not abandon) the relationship between state and civil society; the gist of the premises of constitutional sovereignty. While they do not have their own theories of sovereignty, the dynamism hidden behind the idea of sovereignty that philosophical

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[7] Walker, *Inside/Outside* (1993), p. 170.

[8] Michael J. Shapiro, 'Moral Geographies and the Ethics of Post-Sovereignty' (1994), p. 480.

[9] 'The construction of sovereignty allows us to make more sense of the will-to-sacrifice'. 'But we can try to tame and limit the demands of sovereignty; we can, perhaps, move toward what I am tempted to call a postsovereign politics. I have in mind a politics that shifts the focus of political loyalty and identity from sacrifice (actual or *in situ*) to responsibility.' Jean Bethke Elshtain, 'Sovereignty, Identity, Sacrifice' (1991), pp. 402, 403.

[10] For instance, see some remarks on sovereignty by practitioners. Sir Geoffrey Howe states that 'the British have always adopted a pragmatic attitude towards constitutional changes and assumed the simple principle of sovereignty as a "good servant, but bad master". According to Howe, sovereignty is something like 'bundle of sticks, and the subject of a never-ending series of transactions between nation-states, handing over some things and taking back others.' In relation to the British relationship with the European Community in particular, Howe adopts the notion of sovereignty as 'a nation's practical capacity to maximize its influence in the world.' Howe, 'Sovereignty and Interdependence' (1990), pp. 678-680. Former US Secretary of State George Shultz states that 'The model of divided sovereignty - part of the fabric of our own country since its birth - has become applicable on the international scene at large.' Quoted in *ibid.*, p. 681.

[11] 'Viewed as products of modernity, the sovereign individual and the sovereign state can be seen as mutually reinforcing constructs, a relationship captured in the dual meaning of the word, "subject."' Tom Porter, 'Postmodern Political Realism and International Relations Theory's Third Debate' (1994), p. 113. See also Joseph Dunne, 'Beyond Sovereignty and Deconstruction: the Storied Self' (1995).

inquiries aim to reveal emerges in most cases to the detriment of national sovereignty.[12]

It is worth noting in this context that some scholars put 'poststructuralist theories' into the category of 'constructivism' together with 'neo-Gramscian theories, the world-society paradigm' and even 'the Grotian tradition' or 'the English School of Hedley Bull'.[13] This reveals that 'poststructuralist theories' in International Relations have emerged as an antithesis to the 'statism' of both realism and liberalism, and 'material' structuralism. Within 'social structure' which non-statist theories articulate, sovereignty appears as 'only one of many identities that a state actor can have'.[14] Sovereignty is not an unproblematically given fact, but cannot be ignored either. It is never lost, while the boundaries of 'inside and outside' of the sovereign state can be questioned. There are other norms, principles and beliefs that transcend 'sovereign' national boundaries. If this insight is developed in a more positive way, the notion of sovereignty in poststructuralist theories will furthermore resonate with the English-School type of international constitutionalism.

Second, it has been said that sovereignty has been *eroded* by a global economy. It should be emphasised, however, that the 'sovereign state' in this economic aspect usually means the state as the government. What private economic activities *erode* is the control of the central government. The state in international law remains untouched. Moreover, the autonomy and growth of private economic activities are, despite the development of high technology and the scale of economy, a premise of classical constitutionalism.[15] It is historically taken for granted that laissez faire doctrines declined only at the end of the nineteenth century. A national economy perfectly controlled by a national government is a myth of the twentieth century. In other words, what a global economy *erodes* is national sovereignty, but not constitutional

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[12] Cynthia Weber concludes her historical study by saying that 'Investigating state sovereignty, then, requires investigating how states are simulated.' Weber, *Simulating Sovereignty*, p. 129. This statement challenges the nationalist assumption of the autonomy of nation-states. However, once we assume that there might be a set of codes that determines simulations of states in a more or less coherent way, we are permitted to call it a system of constitutional rules.

[13] Alexander Wendt and Daniel Friedman, 'Hierarchy under Anarchy: Informal Empire and the East German State' (1996) in Biersteker and Weber, *op. cit.*, pp. 272, 246. See also Ronal L. Jepperson, Alexander Wendt, and Peter J. Katzenstein, 'Norms, Identity, and Culture in National Security' (1996).

[14] *Ibid.*

[15] This suggests the political nature of 'globalization'. Saskia Sassen argues that globalization that threatens sovereignty 'has become in the most recent period a form of Americanization'. See Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (1996), pp. 16-20.

sovereignty.[16] The very abstract word, *erosion*, only invokes the conceptual demarcation of the sovereign and non-sovereign spheres under constitutional premises.[17]

Third, many argue that international institutions have rapidly expanded their activities since 1945, and since the end of the Cold War in particular. However, the antithesis of 'sovereignty versus international institutions' risks over-abstraction. The authorities of international institutions derive from state sovereignty, whatever degree of power state governments retain. 'International institutions' that are said to be fighting sovereignty contain the principle of sovereignty within themselves. Indeed, fighting international institutions cannot be said to bring about the death of sovereignty. Sovereignty constitutes and is constituted by international institutions. Both are so interwoven with each other that neither of them can be a master or a slave of the other.

The European Union, defined as a 'transnational organisation', draws the greatest attention from publicists. A commentator celebrates European integration as the 'post-modern sea-change'.[18] But this 'post-modern' character does not change the fact that while many are perplexed by the development of the European Union, they still have little doubt about the sovereignty of its member states.[19] At the other extreme, another

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[16] It is striking that Joseph A. Camilleri and Jim Falk use the expression, 'popular sovereignty', as an antonym of state sovereignty in the context of the erosion of sovereignty. Consciously or unconsciously, their standpoints disregard the premise of 'national sovereignty' by distinguishing between 'state sovereignty' and 'popular sovereignty'. In spite of their analyses of the impact of advanced technology and a global economy, they see competition between the sovereignty of the state and the community. State sovereignty in this context means nothing other than 'government' sovereignty, which even nineteenth century scholars knew was far from omnipotent. In consequence, they seem to believe that the enumeration of non-state phenomena is tantamount to the analysis of the erosion of sovereignty. Camilleri and Falk, *The End of Sovereignty?* (1992), pp. 114, 120. Among the examples of the same antithesis of state and popular sovereignty is Gotlieb, *Nation against State* (1993), pp. 21-22.

[17] This point is illustrated even by the standpoint of 'historical materialism'. Justin Rosenberg argues that 'the sovereignty of the state does depend on both a kind of abstraction from production and the reconstitution of the state-political sphere as external to civil society. . . . if we define sovereignty as the social form of the state in a society where political power is divided between public and private spheres, it becomes apparent that at least some of the confusion over whether modern state power is strong or weak, autonomous or determined, sovereign or constrained has been unnecessary. For under capitalism, these are not necessarily dichotomies.' Rosenberg, *The Empire of Civil Society* (1994), pp. 128-129.

[18] See Thomas Christiansen, *European Integration between Political Science and International Relations Theory* (1994). Shirley Williams examines 'the loss of sovereign national power' to the European Community. Williams, 'Sovereignty and Accountability in the European Community' (1990), pp. 299-317. But Ian Harden argues that British sovereignty is compatible with European monetary union. Harden, 'Sovereignty and the Eurofed' (1990), pp. 402-414. Stephan Leibfried of University of Bremen Germany discusses the threats to 'the sovereignty of the classical welfare state', while observing that EU reality is still mirrored by the model of 'negative joint sovereignty'. Leibfried 'The Social Dimension of the European Union' (1994), pp. 240-252.

[19] For instance, see Paul Taylor, 'British Sovereignty and the European Community' (1991). Gavin Smith, 'Why Sovereignty Matters' (1992). An example of the defence of national sovereignty is Kenneth Minogue, 'Is National Sovereignty a Bad Wolf?' (1990).

publicist accuses politicians of not using the word, sovereignty, as 'constitutional independence'.[20] The very orthodox answer to the problem of sovereignty in the European Union may be Eli Lauterpacht's: 'There was no fall-back to the general notion of national sovereignty. It was rightly deemed irrelevant.'[21]

It would be possible to say from the perspective of our study that by creating a new constitutional framework for sovereign states and a supernational institution, the European Union is paving the way for new concepts of constitutional sovereignty. Indeed, multiple constitutions can coexist in the same area; that has held true since 1788.[22] In addition, a constitution of a geographically larger range is not always superior to that of a smaller. The European people can create a European constitutional system as European citizens, whether they attribute the sovereign status to national constitutional systems or the supernational one or something like a combination of both.

There are many who emphasise the growth of the activities of 'non-governmental' international organisations that exist outside the sphere of sovereignty. However, they are said to challenge only the 'exclusivity' of sovereign states. The important point is that in most cases sovereignty-related organisations and others respect a common set of rules in international society. The decline of sovereignty is also mentioned as the reason that sovereign states are not appropriate units to solve certain types of problems. Global issues like environmental protection are obviously beyond the jurisdiction of a sovereign state. But another fact is that no one seriously proposes establishing a strong authority to impose the necessary measures upon states. Ken Conca explains that the current emphasis on 'global change' together with 'sustainable development' carries with it an

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[20] Noel Malcolm, strongly supporting the definition of sovereignty as 'constitutional independence', deplores the lack of clarity in the usage of the word, sovereignty, among politicians. See Malcolm, *Sense on Sovereignty* (1991).

[21] Lauterpacht, 'Sovereignty - Myth or Reality?' (1997), p. 147. He argues that 'So far as sovereignty within the British legal system is concerned it is a reality. . . . With regard to sovereignty on the international plane, that must be seen largely as myth - except when it is used as a word to describe a state's title to territory. . . . States have increasingly used their power to limit their power . . . . But such limitations do not affect the quality of the state as such. The state remains a sovereign state in international law and continues to be able to guide its future destiny within the limits that it has itself accepted.' *Ibid.*, p. 149. Michael Newman distinguishes between several meanings of sovereignty and concludes in the context of the European Union that 'the concept of sovereignty is so ambiguous and distorted that it is now a barrier to analysis.' Newman, *Democracy, Sovereignty and the European Union* (1996), pp. 14-15.

[22] For instance, Sanford Lakoff argues that 'sovereignty is unlikely to disappear, but it will have to coexist with new forms of government in which mechanisms of federalism will provide for more limited forms of self-determination by states and subordinate entities.' Lakoff, 'Between Either/Or and More or Less' (1994), p. 76.

implicit endorsement of sovereignty as part of the solution to global problems. He observes that 'in their most common form, emerging international environmental norms embrace the principle of sovereignty as the foundation for international policy responses, even as they complicate the exercise of specific sovereign rights.'[23]

Fourth, the ethical issues surrounding the principle of sovereignty need to be mentioned. There have been two conflicting standpoints on this topic. On the one hand, the proponents of moral justification of sovereignty value the maintenance of collective goods that the sovereign state is bound to guarantee. On the other hand, the advocates of human rights many a time mention the word, sovereignty, as a serious obstacle to implement their aims.[24] It is striking that while the Western world is understood to represent concern about human rights, it is widely believed that non-Western countries stress community values. But what is at stake is not so much the issue of culture as that of the accusation of Western hypocrisy and the balance of the two sets of values in underdeveloped countries.[25] 'Cosmopolitan' criticism is either a search for a good balance between the two sets of values or an attack upon the absolute theory of national sovereignty, to which few people are unequivocally committed nowadays.[26]

It should be noted, of course, that ethical issues are not merely problems of the antithesis of community and individual. One of the crucial questions in the post-

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[23] Ken Conca, 'Environmental Protection, International Norms, and State Sovereignty' (1995), p. 153.

[24] For instance, Ali Khan advocates the conception 'Free State' which 'is rooted in the global forces of economic interdependence and human rights' in opposition to the concept of the sovereign nation-state. Khan, 'The Extinction of Nation-States' (1992), p. 234,

[25] Deng Xiaoping told Richard Nixon in the fall of 1989 that 'after years of subservience to foreigners, China was now united and independent and that the Chinese people would never forgive their leaders for apologizing to another nation.' Quoted in Richard Nixon, *Beyond Peace* (1994), p. 132. The Bangkok Declaration that reflected Asia's official views affirmed the principle of 'respect for national sovereignty' together with 'the non-use of human rights as an instrument of political pressure.' The head of the Chinese delegation at the United Nations World Conference on Human Rights in Vienna stated: 'To wantonly accuse another country of abuse of human rights and impose the human rights criteria of one's own country or region on other countries or regions are tantamount to an infringement upon the sovereignty of other countries and interference in the latter's internal affairs, which could result in political instability and social unrest in other countries. . . . State sovereignty is the basis for the realization of citizens' human rights. If the sovereignty of a state is not safeguarded, the human rights of its citizens are out of the question, like a castle in the air.' Quoted in Michael C. Davis, 'Chinese Perspectives on Human Rights' (1995), p. 17.

[26] The Under Secretary-General for Humanitarian Affairs, Jan Eliasson, contends that 'sovereignty is no longer a principle we can recognise as absolute'. Quoted in James Ingram, 'The International Response to Humanitarian Emergencies' (1994), p. 185. James N. Rosenau finds that far from absolute, states are conceived to be 'sovereignty bound actors' due to 'responsibilities and obligations', while non-state actors are 'sovereignty-free'. Rosenau, *Turbulence in World Politics* (1990), pp. 36-40. In a similar vein, the writers for the Brookings Institution contend that 'sovereignty carries with it certain responsibilities for which governments must be held accountable.' Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman, *Sovereignty as Responsibility* (1996), p. 1.

colonial era is the complexity of the issue of the community. It has become apparent to contemporary publicists that nations are not identical with states. It is contended that the myth of national sovereignty is falling to the ground, for in many places sovereign 'nation-states' appear to be fictional.[27] In practice, constitutional settlements are almost the only measure the international community can implement for conflicting 'nations' or ethnic groups in disrupted states.[28]

Finally, the legal aspect of international society also seems to be gaining attention. Former UN Secretary General, Perez de Cuellar, represents the standpoint of 'the international rule of law'. He argues that 'sovereignty and international responsibility are different sides of the same coin.' Drawing on the Lockean distinction between 'Each sovereign government' and 'The sovereignty that resides in the people', he declares that 'The nexus between sovereignty and humanitarianism introduces us to the notions of the international rule of law. . . . Sovereignty and international responsibility thus lead us back to the international rule of law.'[29] Along the same line, many scholars work within the standpoint of 'the international rule of law'.[30] Even the phrase, 'global

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[27] It is noteworthy that the defect of the sovereign nation-state in the Third World is not claimed by people in the Third World, but the critics of 'statism' in Western societies. For instance, see Mark E. Denham and Mark Owen Lombardi (eds.), *Perspectives on Third-World Sovereignty* (1996).

[28] For instance, Jeff J. Corntassel and Tomos Hopkins Primeau insist that indigenous groups should 'refrain from using phrases such as "self-determination" and "sovereignty" and instead focus upon gaining state guarantees of the maintenance of cultural integrity', and 'pursue these collective rights through existing human rights declarations and treaties'. Corntassel and Primeau, 'Indigenous "Sovereignty" and International Law' (1995), p. 362. See almost the arguments along similar lines in Mortimer Sellers (ed.), *The New World Order* (1996).

[29] De Cuéllar, 'Pérez de Cuéllar Discusses Sovereignty and International Responsibility' (1991), pp. 24, 26, 27.

[30] Abram Chayes and Antonia Handler Chayes contend: 'Sovereignty, in the end, is status - the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.' Chayes and Chayes, *The New Sovereignty* (1995), p. 27. Alec Stone claims that 'the distinction between international regimes and domestic constitutional forms is relative not absolute.' Stone, 'What is a Supranational Constitution?' (1994), p. 474. Tom J. Farer observes that 'at least in Europe and the Western Hemisphere, the concept of sovereignty evolved from a jurisdictional authority perceived in early modern times as supreme, absolute, and boundless to an authority bounded by international law and based on the will of its subjects.' Farer, 'Collectively Defending Democracy in a World of Sovereign States' (1993), p. 721. Ruth Lapidoth also discusses the 'erosion' of sovereignty by certain rules of modern constitutional and international law. Lapidoth, 'Sovereignty in Transition' (1992), pp. 325-346. Michael Ross Fowler and Julie Marie Bunck's insistence that 'it is ultimately the international community that determines whether a particular political entity qualifies as a sovereign state' seems to point in the same direction. Fowler and Bunck, 'What constitutes the Sovereign State?'(1996). They also distinguish between 'sovereigntyism' which stresses the just and legal sanctity of the state and nationalism which ignores the current order. Fowler and Bunck, *Law, Power, and the Sovereign State*, pp. 156-157. The phrase, 'constitutional sovereignty', is used by some scholars. For instance, Philip Allot argues that in the process of 'the theoretical evolution of the idea of democracy' into the disappearance of sovereignty in 'self-willed order', the sovereign nation evolves into 'constitutional sovereignty (functional limits on sovereignty)' and then into 'limited sovereignty (constitutionalism - generic principles of the

constitutionalism', is gaining currency.[31] It is argued that nobody in international society can pretend to act without regard to complex webs of international rules. But neither a worldwide constitution nor a world state emerges.[32] Publicists know that the international constitutional system differs from any national constitutions. It has its own peculiar constitutional order.

This point reinforces the argument in this study. In both the domestic as well as international contexts state sovereignty as the most fundamental public authority is expected to observe and sustain a set of international rules. It should be emphasised that international society establishes its own constitutional system beyond domestic analogies, all the more because it adopts the same constitutional rules that have been implemented in many domestic societies. What is shared by national societies and international society is not the shape of their constitutional structures, but the core constitutional values. We have already seen that the current debates on economic and normative issues are developing along the premises of Western constitutionalism. The core value is the protection of the private sphere from the abuse of public power. The growth of the activities of international institutions also strengthens a standard set of international rules in line with constitutional premises: a free market economy regulated by common rules, the protection of rights of individuals as well as of minority groups, the implementation of democratic elections, and intervention i.e. 'Appeal to Heaven' in the case of serious abuse of public power.[33] It is widely understood that the end of the Cold War has more or less brought about the convergence of ideological conflicts on the same value system. International constitutionalism lacking a coercive central authority necessarily needs a consensus on core values in international society. In our 'globalised' world, international society need not adopt a new constitution based on anthropomorphism imitating domestic society. Instead, it needs to implement the same

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constitution)'. Allot, *Eunomia* (1990), pp. 207-218. Colin Warbrick uses the phrase, 'formal constitutional sovereignty', denoting the legal essence of sovereignty. Warbrick, 'The Principle of Sovereign Equality' (1994), p. 206.

[31] See Richard Falk, Robert C. Johansen, and Samuel S. Kim, 'Global Constitutionalism and World Order' (1993), Richard Falk, 'The Pathways of Global Constitutionalism' (1993). See also Luigi Ferrajoli of the University of Camerino, 'Beyond Sovereignty and Citizenship: A Global Constitutionalism' (1996).

[32] Almost the only exception is Stanley W. Johnson who argues that the United Nations appears to be a world state. See, Johnson, *Realising the Public World Order* (1993).

[33] Intervention interpreted as a means to implement 'appeal to heaven' accords with the Lockean classic constitutionalism.

core values of constitutionalism that are expected to be applied in both international and domestic society.

Certainly, all the contemporary issues I have examined indicate the circumscription of the sphere of sovereignty. But none of these extinguishes the notion of sovereignty as the most fundamental public authority. To be sure, sovereignty has lost its mythical supremacy and independence. Nevertheless, it still retains circumscribed supremacy and independence. Whether or not 'circumscribed supremacy and independence' is an appropriate expression is a question of logic.[34] But as long as our actual world needs the concept that involves the meanings associated with sovereignty, it can claim to remain the most fundamental public authority.

What we should bear in mind would be the nature of the tendency of constitutional sovereignty and its relation with the theory of national sovereignty. If the sphere of sovereignty continues to be circumscribed, we need to ask how it ought to be so. Probably, we are now experiencing a historical process of the constitutionalisation of the notion of sovereignty. Needless to say, this phenomenon is a reflection of current conditions in the post-Cold War world. We have yet to obtain a proof that the struggle between conflicting ideas of sovereignty has ended. What we need to do now is neither attack nor defend sovereignty; but to carefully contemplate a healthy development of the constitutional rules of international society.

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[34] Thomas G. Weiss and Jarat Chopra argue that political scientists and international relations theorists have formulated 'a corruption of sovereignty' by admitting degrees of sovereignty. According to them, sovereignty either exists or does not exist in international law; therefore, 'it is becoming a dead letter'. Weiss and Chopra, 'Sovereignty under Siege' (1995), pp. 99-100. But international lawyers know that without sovereignty there is no 'international' law. They know that sovereignty has not been always absolute, while international law has not been always absolute either. The most orthodox and widely acknowledged view of sovereignty in the 1990s is still the well-cited statement by an ex-international lawyer, Boutros Boutros-Ghali. According to the former UN General Secretary, 'Respect for fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed.' Ghali, *An Agenda for Peace* (1992), p. 44. Ghali also writes: 'While respect for the fundamental sovereignty and integrity of the state remains central, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory. A major intellectual requirement of our time is to rethink the question of sovereignty - not to weaken its essence, which is crucial to international security and cooperation, but to recognize that it may take more than one form and perform more than one function.' Ghali, 'Empowering the United Nations' (1992/93), pp. 98-99.

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