Article

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Sovereignty between Effectiveness and Legitimacy

Dimensions and Actual Relevance of Sovereignty in Bodin, Hobbes and Rousseau*

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To Michael Th. Greven
and the beginning of his sixties

1 From sovereignty to (global) governance?

Over the past few years, a view has gained hegemony in the political and social sciences as well as in the political public according to which the idea and reality of the sovereign state have entered a crisis, or even the "End of Sovereignty"[1] might be announced. Even though the advocates of this position differ considerably in evaluating and judging the reasons and consequences of this process, and also partly contradict each other, they largely agree on the diagnosis: the constantly growing complexity and importance of political, economic, ecological and socio-cultural problems, institutions and actors on the intra-societal as well as the transnational level have significantly changed the role played by the state as an institution and actor in society and the international system. Thus, a *qualitative* change in the theory and praxis of the state has taken place, caused by two mutually reinforcing processes. On the one hand, the reach and enforcing power of state actions in intra-societal as well as inter- and transnational affairs has markedly decreased. On the other, a multitude of political, social and economic actors has evolved below and beyond the state level, which not only are beyond the control of the state but whose influence the state is subject to, or at least has to include as independent powers in its calculations. These developments undermine or even destroy the very entitlement by which the modern state is essentially defined and distinguished from all other social organizations: its sovereignty. If, however, the state is characterized by its sovereignty, yet this sovereignty is dissolved by social developments and thus becomes an 'anachronism'[2], a façade

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* In the following article, citations from German sources are our own translations. For the English translation of the text, I am deeply indebted to Andreas Busen (Augsburg).

1 Cf. Joseph A Camilleri/Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*, Aldershot: Hants 1994.

2 As termed almost four decades ago by Ernst-Otto Czempiel (ed.), *Anachronistische Souveränität. Zum Verhältnis von Innen- und Außenpolitik*, Köln/Opladen 1969.

without substantial form, we cannot but acknowledge that the state, as it has been constructed theoretically and historically in the 16th and 17th century, has come to an end.

This structural change is subject to efforts to define it by differentiating within the conventional concept of sovereignty, undertaken by authors trying to draw the theoretical conclusions from the aforementioned diagnoses of the times. According to those authors, sovereignty on the one hand implies the formal and legal dimension, *i.e.* that the state exclusively holds the right and competence of regulating and settling conflicts within the state. This is mirrored on the outside by the idea of impermeability in the sense of 'negative' sovereignty, which guarantees the state (being subject of international law) freedom of action by means of the ban on intervention. On the other hand, so they argue, the concept of sovereignty refers to the *material dimension*, or *positive* sovereignty, meaning the actual capability of effectively realizing the formally legal freedom of action, *i.e.* possessing "the means which enable states to take advantage of their independence."[3]

Both dimensions of sovereignty interpreted this way are put into question by the developments of the past decades. If the ability of the state to effectively influence political and socioeconomic processes is reduced to a point where a lack of actual options for action forbids speaking meaningfully of 'material' or 'positive' sovereignty any longer, then, as a legal term, sovereignty becomes an empty phrase. If in addition the authority to establish norms and make binding decisions is increasingly transferred from state institutions to supranational institutions – such as the European Union – or to other transnational, but also sub-national organizations and arenas for decision making, this implies the immediate "loss of the formally legal sovereignty of the nation state"[4]. In this way, not only the coupling of these two dimensions of sovereignty, but also the dimensions themselves and thus sovereignty as such are being dissolved. Hence, the king is not only

[3] Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge 1990, p. 29 – The dimensions mentioned here are established in different terminologies and accordingly specific definitions and evaluations; thus, particularly in view of international relations, Jackson speaks of the tension between positive and negative sovereignty; Kjell Goldmann (*Transforming the European Nation State: Dynamics of Internationalism*, London 2001, pp. 62 f.) confronts legal sovereignty with "autonomy" as the quintessence of "action possibilities"; finally, Ulrich Beck and Edgar Grande (*Das kosmopolitische Europa. Gesellschaft und Politik in der Zweiten Moderne*, Frankfurt/M. 2004, p. 123) differentiate between "legal" and "material" sovereignty in terms of the performance of state actions; cf. Stephen D. Krasner, *Sovereignty. Organized Hypocrisy*, Princeton 1999.

[4] Bob Jessop, „Die Zukunft des Nationalstaats: Erosion oder Reorganisation? Grundsätzliche Überlegungen zu Westeuropa", in: Steffen Becker (ed.), *Jenseits der Nationalökonomie? Weltwirtschaft und Nationalstaat zwischen Globalisierung und Regionalisierung*, Berlin 1997, p. 52.

naked[5], but does not exist any more at all, as the concept no longer corresponds to any actual or imagined reality. Therefore, the lesson to be learned from these diagnoses of the political, social and economic dynamics of the past and future of the nation state – which cannot be discussed here with regard to their correctness or alleged originality[6] – seems to be the following: the conventional concept of sovereignty needs to be completely redefined, or – what seems even more consistent – to be put aside entirely as it has proven itself functionally inappropriate in view of the novelty of the existing structures of political and socioeconomic regulation.

Thus, the narratives about the greatness and misery of state sovereignty dominant today follow an altogether dualistic scheme which is crucially based on a notion of sovereignty defined first and foremost by the form, degree and effectiveness of its organizational and regulating power. Accordingly, we are at the intersection of two historic ages. *Firstly*, it is assumed that the end of a model of political rule is foreseeable or has already taken place, which is characterized by the sovereignty of a state's effectiveness as an autonomous actor. According to this account, the sovereign state, holding the monopoly of establishing and enforcing positive law as well as legitimate use of force, is highly differentiated toward and opposed to society. As such, it takes care of internal and external security and provides the services necessary for the functioning of society. The logic of this model of sovereign statehood is thus one of the "regulatory centrism of state politics", in so far as it assumes "that through politics proper problem solving and shaping of society, coming from the center, would be possible"[7]. The state proceeds by means of 'hierarchy' as the main regulative mechanism, *i.e.* by collectively deciding on political objectives and purposes, and enforcing those decisions through law and order, and (legitimate) coercion, if necessary. Even though the varying tasks attributed to the state have been stretched ever further over the centuries, the modern 'interventionist state', as it be-

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5 Beck/Grande, *Das kosmopolitische Europa*, p. 123.

6 Doubt is cast on the novelty not only by the fact that, as is well known, there has been talk about the crisis and end of the state since the beginning of the 20th century (cf. for instance, the discussion by Hermann Heller, "Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts" [1927], in: *ibid*., *Gesammelte Schriften*, vol. II, Leiden 1971, pp. 46 ff. or Carl Schmitt, *Der Begriff des Politischen*, Berlin 1963, p. 10). Raymond Vernon, too, stated as early as 1971 – *i.e*. in the heyday of political regulatory optimism – almost verbatim to the mentioned authors that "the sovereign states are feeling naked", since terms as national sovereignty "appear curiously drained of meaning" (*Sovereignty at Bay. The Multinational Spread of U.S. Enterprises*, New York/London 1971, p. 3).

7 Michael Th. Greven, *Die politische Gesellschaft. Kontingenz und Dezision als Probleme des Regierens und der Demokratie*, Opladen 1999, pp. 148 and 149 f.

came established in the democratic constitutional and welfare state of the 20th century and the according optimism for regulating and planning, is on principle already included in the concept of sovereignty. Sovereignty is here understood as the ability "to regulate the development of society as a whole, and to rationalize the history of the world in co-operation with those of its own kind."[8]

As today it is becoming historically and empirically unmistakable that the possibility of such central regulation of societal processes is a myth and an illusion[9], this conception is *secondly* opposed to a new model independent of the structure of sovereign statehood. According to this model, the state definitely looses its outstanding position, which it was formerly entitled to by means of its claim to sovereignty. This means that the structural difference between state and society is being eliminated, and of the sovereign state, at best the 'co-operative' or 'negotiating' state remains. As such, it is no longer able to impose its will 'from above' upon societal actors but conceives of itself as but one societal actor among others who no longer holds an exceptional position.[10] This change in the conception of the state in the political and social sciences is expressed in the recent upturn of the shifting concept of "governance". The important thing is that this is not so much a theoretical concept as it is rather an umbrella term under which the empirical changes in political and legal decision making are summarized. Governing is no longer a function that state institutions are exclusively entitled to, but takes place in varying, more or less institutionalized ways, with the participation of state and non-state actors on sub- and supranational levels: at times still as 'governance *by* government', yet more often just as 'governance *with*' or even '*without* government'.[11]

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[8] Klaus Roth, „Der Staat als Zentrum des neuzeitlichen politischen Denkens", in: Gotthart Breit/Peter Massing (eds.), *Der Staat. Ideengeschichtliche Grundlagen, Wandel der Aufgaben, Stellung des Bürgers*, Schwalbach/Ts. 2003, pp. 31 f. A historical and typological account of the characteristic dimensions of the modern state, as it had its 'Golden Age' in the democratic constitutional and interventionist state in the second third of the 20th century, is drawn by Stephan Leibfried/Michael Zürn, "Reconfiguring the national constellation", in: *ibid*. (eds.), *Transformation of the State?*, Cambridge 2005, esp. pp. 4-11.

[9] Greven (*Die politische Gesellschaft*, pp. 157 f.) speaks of an "illusion widespread in abstract political theory as well as in the political myths of everyday life (...), claiming that the whole of society is ruled and rationally controlled by a government as its head", the "myth of a decision making power monopolized somewhere within society".

[10] Seemingly conflicting positions such as actor-centered approaches and system theory agree on this overall diagnosis; for an overview, *cf.* Dietmar Braun, *Die politische Steuerung der Wissenschaft. Ein Beitrag zum 'korporativen Staat'*, Frankfurt/M.-New York 1997, pp. 31-42.

[11] For an overview, *cf.* Michael Zürn, *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance*, Frankfurt/M. 1999, pp. 166-171; James N. Rosenau/Ernst-Otto Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge 1992; Arthur Benz (ed.), *Governance – Regieren in komplexen Regelsystemen. Eine Einführung*, Wiesbaden 2004.

In many analyses, this transition from the 'sovereign' to the 'co-operative state' is more than a purely *descriptive* model: often, it implicitly or explicitly adopts the character of a *prescriptive* agenda for actual political and social actors and practice.[12] Against the background of an ever more complex society divided into a variety of actors, problems and interests, the melting down of sovereignty into structures of sub-national, regional, functional or global governance is not only necessary but desirable. This is true, on the one hand, in terms of effectiveness as they compensate for the practical impossibility of directly and hierarchically controlling and regulating complex functional systems within society. At the same time the transition to a co-operative or negotiating state has a beneficial effect for the de-potentized sovereign as well. By redefining itself as a provider of specific organizational services within the bounds of the functional logic of societal subsystems, the state preserves its status as an actor and gains new effective power.[13] Even the renouncement of the monopoly of legislation in favor of transnational institutions may be seen as an attempt to regain decision and enforcement power lost on the national level.[14] On the other hand, the leave-taking of sovereignty also appears welcome from a normative point of view. For indeed, if one reads that in the historical dimension sovereignty has cemented "the governmental conception of state and politics" against the workers' and other emancipatory movements just as much as the "Foreign-'Power'-Politics in line with the nation state, as has found expression, for instance, in colonialism, the intra-European rivalry conflicts and fascist models of hegemony",[15] then one cannot but welcome its end. Who would not prefer a political order that respects the internal

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[12] It is in no way uncommon that the respective concepts come directly from the offices and think tanks of such actors; this is true as well for the term "governance", which "– being derived from a normative-pragmatic term of the World Bank, the IMF and other political actors, culminating in the 'White Paper' of the European Commission – is ubiquitously and uncritically replacing the conventional scientific terminology of government, while at the same time neglecting the traditional demands upon authority and legitimacy associated with it" (Michael Th. Greven, „Zur Situation der Politikwissenschaft in Deutschland", in: *Politikwissenschaft. Rundbrief der Deutschen Vereinigung für Politische Wissenschaft* 131 (2004), fall iss., p. 143); *cf.* Marianne Beisheim/Achim Brunnengräber, "Zaubertrank ‚Global Governance'? Eine diskursanalytische Annäherung", in: Thomas Fues/Jochen Hippler (eds.), *Globale Politik. Entwicklung und Frieden in der Weltgesellschaft*, Ulm 2003, pp. 112-136.

[13] One only has to think of corresponding attempts out of positions of system theory, to secure the survival of the state as a 'local hero' by means of indirect context-regulation; *cf.* Helmut Willke, „Die Steuerungsfunktion des Staates aus systemtheoretischer Sicht. Schritte zur Legitimation einer wissensbasierten Infrastruktur", in: Dieter Grimm (ed.), *Staatsaufgaben*, Frankfurt/M. 1994, pp. 705-709.

[14] *Cf.* Beck/Grande, *Das kosmopolitische Europa*, pp. 123 f., who make a positive-sum game of post-national sovereignty, since "a loss of legal sovereignty does not necessarily result in a loss of the state's ability to act and solve problems – under certain circumstances, the latter may even be extended. In short: the state renounces a part of its legal sovereignty in order to thus regain its material sovereignty. Even shorter, and put paradoxically: losing sovereignty results in winning sovereignty."

logic of societal actors and subsystems and brings about the "retreat of the state to the tasks of moderating, organizing, communicating and mediating", to a sovereign state based on hierarchy, legal command and compulsion?[16] And only malicious persons would not happily welcome the end of the nation state and sovereignty if this would entail that social actions would not longer be based on law fortified by coercion, but would rather rely on voluntary will, individual conviction and consensus.[17]

However the danger of appearing in such unfavorable light should not keep one from critically assessing these current diagnoses of an actual as well as normative decline of the concept of sovereignty. Is this an appropriate conceptualization of the current developments on the societal and on the international level? To what extent are the dimensions historically and systematically linked to the concept of state sovereignty adequately grasped this way? For this reason I refer in what is to come to the foundations of the concept of sovereignty as they have been developped by Jean Bodin, Thomas Hobbes and Jean-Jacques Rousseau in their systematic and normative peculiarities in the early modern age. This is not meant to be a philologically and systematically comprehensive discussion of the respective theories, their relations to each other, or of the political and societal circumstances and developments. Rather, by discussing the fundamental concepts and definitions an attempt is made to resolve the substantial problems and dimensions associated with the modern notion of sovereignty (2). For this is actually the precondition for then being able to indicate if and how the historic, analytical and normative demands associated with this term can adequately be reflected upon and showed to advantage in the current debates. Since these discourses are vital for the perception and further developing of existing political as well as social institutions and relations, this is in no way an issue of purely academic interest. As a conclusion, I will therefore point to aspects and criteria which to a large extent remain obscured – or are intentionally obscured – in current debates, which, however, one should not carelessly fall back behind (3).

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15 Reimund Seidelmann, „Souveränität", in: Dieter Nohlen/Rainer-Olaf Schultze (eds.), *Lexikon der Politikwissenschaft. Theorien, Methoden, Begriffe*, 2nd, revised edition, vol. 2, Munich 2004, p. 865.

16 Braun, *Die politische Steuerung*, p. 30.

17 *Cf.* e.g. Martin Albrow, *The Global Age. State and Society Beyond Modernity*, Cambridge 1996, p. 173 f.

2 Dimensions of sovereignty in Bodin, Hobbes and Rousseau

Sovereignty, understood as the main characteristic of the modern state, has been developed in its most concise and most influential form in the political theories of Bodin, Hobbes and Rousseau. They represent important historical stages in the development of the modern state between the 16th and 18th century and the theoretical as well as normative ways of pondering about and legitimizing it. All differences in details aside, their theories establish definitions of structures and problems as well as responsibilities of the state, politics and the law which at present are far from being outdated. In the following I shall examine to what extent this is true for the problem of sovereignty as well. After a brief reconstruction of the conception of sovereign power developed by the theorists in discussion (which seems to confirm the critical aspects mentioned above) and its relation to society (2.1), I discuss the issue of the analytically and normatively significant ways in which this is a reaction to the structures and capacities of modern society (2. 2). On this basis, it becomes clear that linked to this concept of sovereignty are conditions of individual and collective liberty (2.3) which are in danger of being jettisoned in the current cheerful waving goodbye to the concept of sovereignty.

2. 1 The absolutism of modern sovereignty

By means of the concept of sovereignty, as coined by Bodin and adopted and further developed by Hobbes and Rousseau, a change of paradigm takes place in justifying political authority and the relationship between state and society, which as such only come into existence by virtue of this change. Bodin's famous definition – "La souveraineté est la puissance absolue & perpetuelle d'une Republique"[18] – is more than simply a technical redefinition of state authority. It stands for its specific modern justification. The modern state differs from medieval forms of governing not only by a quantitative surplus of centralized authoritarian rights, powers and means of effective government. The crucial fact is rather that a whole new structure comes into existence with regard to justificatory grounds and point of reference for any legitimate government. In the medieval order, authoritarian rights and the legal exercise of power are considered as being of specific bene-

fit for a multitude of actors as well as being legitimized by the order of things as derived from God, nature or tradition. It is from this view that the various bearers of rights derived their conviction to independently have them at their disposal and be able to defend them, as particular rights, against each other. Here, *rights* and *liberties* are privileges one owns by way of birth, being a member of a particular class or corporation, or on other bases, yet always as opposed to others. *Right* and *liberty* do not exist as *universal*, but only in the plural as *particular* rights and liberties of particular societal actors and institutions.

The principle of sovereignty breaks up this utterly intertwined jumble of particular rights interlinked with one's position in social, corporative or ecclesiastical hierarchies. It does not simply gather up these rights, add them up and lay claim on them – even though this might historically and empirically have been the way in which princes obtained support for their claimed right to power –, but puts them on a new basis: the single, universal will of the sovereign. Sovereignty is not a cumulative but a constitutive concept. Any legitimate government, any right and any legal exercise of power in societal relations have as their origin and their validating foundation the will of the sovereign being, the sole bearer of sovereignty.[19] The rules of the community are hereby given a whole new foundation and form; just like iron filings in a magnetic field, the particular is given a new orientation and meaning in a different totality, a structure which is indeed – as established at the beginning – characterized by a clear hierarchy. The "puissance souveraine" of the state is represented by the unified, centralized, universal power which stands opposed to all other actors in the social system and is on principle superordinate to them. In spite of all the differences in the argumentative structure, the peculiarities and the consequences found in the qualification of sovereignty in Bodin, Hobbes and Rousseau, they fully agree in justifying the necessity of this 'absolute' position and the central requirements linked to it. There may be not a single equal power, either beside or even above the sovereign power. By having written "Non est potestas super terram quae comparetur ei"[20] above the

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18 Jean Bodin, *Les Six livres de la République*, Paris 1583, I. 8, p. 122.

19 Max Weber speaks of the "fusion of all those organizations which had respectively engendered their own bodies of law into the *one* compulsory association of the state, now claiming to be the sole source of all 'legitimate' law" (*Economy and Society. An Outline of Interpretative Sociology*, ed. by Guenther Roth and Claus Wittich, vol. 2, Berkeley/Los Angeles/London 1978, p. 666).

20 This statement, which derives from the Bible, is found in Job (41, 24-25); here, too, we find the symbol of the Leviathan itself (Job 40, 25 ff.); *cf.* Thomas Hobbes, *Leviathan, or The Matter, Form, and Power*

head of the Leviathan on the cover copperplate of his most famous work, Hobbes only confirmed Bodin's statement that "celuy est absolument souuerain, qui ne recongnoist rien plus grande que soy apres Dieu".[21] Sovereign power means absolute and unlimited power – "tout absolu, tout sacré, tout inviolable", as Rousseau emphasizes[22] –, power of a kind which is defined and identifiable precisely by being able to enforce its will without limitation or legal appeals of a third party.

The distinguishing marks of sovereignty are analytically tied to the existence and conditions of the realization of state government.[23] Here, the fact that "le poinct principal de la maiesté souueraine, & puissance absolue, gist principalement à donner loy aux subiects en general sans leur consentement"[24] plays a central part. The ability and authority to legislate and enforce the law contains, as had already been made precise by Bodin, "tous les autres droits & marques de souueraineté: de sorte qu'à parler proprement on peut dire qu'il n'y a que ceste seule marque de souueraineté, attendu que tous les autres droits sont compris en cestuy là".[25] For, in the end, sovereignty is nothing else than the ability to enforce the *one* (sovereign) will, *i.e.* to indicate and establish what the rules in a society are to be, what is to be in order and what forbidden, what is to be right and wrong. It is this legislating will which makes for the difference between the being and non-being of the state. The difference found in Hobbes between *libertas* and *imperium*, between the mutually exclusive conditions of natural freedom and state power, is precisely the fact that by means of the *status civilis* there is an institution which supersedes the central contradiction of the state of nature – that it is only "by the judgment of him that doth it, the

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of a Commonwealth Ecclesiastical and Civil. English Works, ed. Molesworth, vol. III, London 1839, chap. XXVIII, p. 307.

[21] Bodin, *République*, I. 8, p. 124.

[22] Jean-Jacques Rousseau, *Du contrat social ou principes du droit politique*, in: ibid., *Œuvres complètes* (Bibliothèque de la Pléiade), vol. III: *Écrits politiques*, Paris 1964, p. 375; cf. Rousseau's definition of the sovereignty of a political corporation as "pouvoir absolu sur tout les siens" (*ibid*., p. 372).

[23] For the "marques de la souveraineté", *cf*. Bodin, *République*, I.10; for the "marks" of sovereignty in Hobbes, *cf*. *Leviathan*, chap. XVIII; *ibid*., *Philosophical Rudiments Concerning Government and Society. English Works*, ed. Molesworth, vol. II, London 1841, chap. VI.

[24] Bodin, *République*, I.8, p. 142; cf. also *ibid*., I.10, p. 221: "la premiere marque du Prince souuerain, c'est la puissance de donner loy à tous en general, & à chacun en particulier: mais ce n'est pas assez, car il faut adiouster, sans le consentement de plus grand, ny de pareil, ny de moindre que soy."

[25] *Op. cit.*, I.10, p. 223; Bodin continues his summarizing enumeration of sovereign rights: "decerner la guerre, ou faire la paix: congnoistre en dernier ressort des iugements de tous magistrats, instituer & destituer les plus grands officiers: imposer ou exempter les subiects de charges & subsides: octroyer graces & dispenses contre la rigueur des loix: hausser ou baisser le titre, valeur & pied des monnoyes: faire iurer les subiects & hommes liges de garder fidelité sans exception à celuy auquel est deu le serment".

thing done is either right or wrong"[26], so that conflicts on rights are not only empirically likely but logically necessary – by replacing the *many*, conflicting wishes by the *one* will. The final decision is up to the ruling of the sovereign.[27] Therefore, Rousseau has called the laws "registres" of the sovereign will.[28] They indicate and list which rules the members of society are subject to and what they have to gear their actions to. From this, one can see the structure of sovereign statehood and its minimum conditions as a political corporation which gets its unity and structure out of being subject to the forming will of the sovereign power. This will provides it with its law, against which there is no other law, since the author of all positive law cannot in turn be bound by the law itself. Above all, however, the sovereign represents the will of the individuals subordinate to him. Hobbes's theory of authorization, according to which the subordinates – as a result of the social contract – are "reputed author of all, that he that already is their sovereign, shall do, and judge fit to be done"[29], is mirrored in Rousseau by the "aliénation totale de chaque associé avec tous ses droits" in favor of the sovereign will.[30] This means nothing else but that the individuals are faced with the legislating will as their own abstract will, against which resistance is not only factually, but also – in legal terms – logically impossible and thus absurd. According to Bodin, Hobbes and Rousseau, this legal justification and position of the sovereign power is the basis for having at its disposition all means, institutions and proceedings it deems necessary for the organization and regulation of all societal relations, *i.e.* monopolizing the right to legitimate use of force, defining the executive, juridical and administrative institutions and authorities, deciding about the social, economic and normative fundamental order of society and so forth. For the existence of sovereignty as "puissance absolue" requires having at its disposal the means necessary for implementing and enforcing its will in the way considered necessary and desirable.[31]

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[26] Hobbes, *Rudiments*, I.10, note, p. 10.

[27] According to Bodin, in the same way the law is the result of the decision of will of the sovereign: "la loy (…) prend sa vigueur de celuy qui a puissance de commander à tous (…): la loy est commandée & publiée par puissance" (Bodin, *République*, I.10, p. 222). Cf. Hobbes's corresponding formulation in chapter XXVI of the Latin version of the 'Leviathan', which is extremely precisely put and has often been misunderstood as positivistic: "authoritas, non veritas, facit legem".

[28] Rousseau, *Du contrat social*, II.6, p. 379.

[29] Hobbes, *Leviathan*, chap. XVIII, p. 160; for the theory of authorization cf. *ibid*., chap. XVI, esp. pp. 147-152.

[30] Rousseau, *Du contrat social*, I.6, p. 360.

[31] For, as Hobbes says, "because it is in vain for a man to have a right to the end, if the right to the necessary means be denied him", like the individual will in the state of nature, in the *status civilis* the sover-

These brief remarks seem to confirm what in the current debates is described as the historic strength and today's weakness of the concept of sovereign statehood: that sovereignty has to be regarded as a power principally opposed and superordinate to society, whose existence depends on its ability to effectively organize and control society as a whole by means of its political-administrative and military system. If, however, the state loses the correspondingly understood "puissance souveraine" as a result of social powers and actors gaining influence on the societal and international level, its right to exist itself is lost. Yet, as I want to show in what is to come, it would be a historically, systematically and normatively at least foreshortened and problematic account of things to accept this grounding and definition of sovereignty in early modern times.

2. 2 The social and normative meaning of the modern concept of sovereignty

Much as has been indicated about central elements and functions in the identifications sketched so far, less has been said in order to achieve an adequate understanding of this structure of political power. For the latter, one needs to reflect upon the historic societal as well as the systematic function of this concept of sovereignty; only by this it becomes clear to which societal constellations, systematic and normative problems and demands these conceptions respond, which are at the same time 'inscribed' in them. It is, of course, crucial to adequately register the systematic meaning of this historic societal classification of the mentioned concepts. The early modern theorists make no secret of the fact that their respective determinations of the necessity of a sovereign power have arisen out of the historically concrete problems. Bodin develops his conception in the midst of the religious civil wars, and explicitly recommends it as a remedy for bringing back under control the state ship which is about to shatter.[32] Just as much, for Hobbes, the construction of the 'Leviathan' in terms of public law is the only way of putting an end to the civil war

eign needs to dispose of the right "*to use all the means, and do all the actions, without which he cannot preserve himself*" (Hobbes, *Rudiments*, I.8, p. 9).

[32] *Cf.* Bodin, *République*, Préface: "depuis que l'orage impétueux a tourmenté le vaisseau de nostre Republique avec telle violence, que le Patron mesme & les Pilotes sont comme las & recreus d'un travail continuel, il faut bien que les passagers y prestent la main".

going on between the Crown and parliament since 1640.[33] And even though Rousseau, differently than both his predecessors, did not hope that his "principes du droit politique" would ever be realized[34], this does not lessen the poignancy of how he contrasted the 'corrupt' political and social conditions of his time with his principles of the single legitimate form of government. Yet situating these constructional forms of sovereign rule within their historic and social context is far more than establishing these temporal references, as their meaning is neither limited to historically factual experience and purposes nor to their relations in the context of contemporary discourse.[35] Rather, their both historical and systematic relevance results from two facts. Firstly, they reflect the systematic social problems, structures and developments, which have been quarreled and fought about in the conflicts of their time in theory and praxis, sometimes literally by words and weapons. Secondly, by doing the former, they gave them a theoretical form which could be used for the analysis, understanding and practical-normative orientation within this newly evolving social order. Hence, it is not only about finding a pragmatic solution for political and socio-cultural conflict in its respective context, but trying, as it were, to inform about its underlying structure, in order to achieve "a true and certain rule of our actions" and to derive great benefit by its scientific knowledge for the construction of the political and social institutions in the future.[36] And only as far as this has been successful, these concepts are of analytical and/or normative importance, by which they are entitled to more than an archivist's interest for the history of ideas.

The classifications of the evolving modern state as a sovereign power, made in political theory since the end of the 16th century, are based on the new experience of funda-

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[33] As is well known, Hobbes wrote the first draft of his philosophy of the state, which already contained nearly all the essential arguments – "Elements of Law Naturall and Politic" – in 1640 as a straightforward 'combat organ' against the approaching civil war.

[34] Of course, Hobbes, too, in the *Leviathan* (chap. XXXI, p. 357 f.) seemed quite skeptical of whether his political writings would find an audience; yet this is in no way comparable to Rousseau's pessimistic account, as also given in the *Contrat social*, being not only systematically supported, but also in terms of philosophy of history and critique of contemporary culture (*cf.* e.g. II.8, p. 385, or II.10, pp. 390 f.).

[35] These are the limits of a discourse approach as advanced by the so-called 'Cambridge School' around John G. A. Perkins and Quentin Skinner; *cf.* Olaf Asbach, "Von der Geschichte politischer Ideen zur 'History of Political Discourse'? Skinner, Pocock und die 'Cambridge School'", in: *Zeitschrift für Politikwissenschaft* 12 (2002), iss. 2, pp. 637-667.

[36] Hobbes, *Elements of philosophy. The First Section, Concerning Body. English Works*, ed. Molesworth, vol. I, London 1839, I.7, p. 9. Similarly, even though still on a metaphysical and theological basis, Bodin develops a universal, rational theory of the state, its elements, responsibilities and effectiveness. Finally, Rousseau explicitly differentiates his study of the "principes du droit politique" from Montesquieu's empirical-sociological method by indicating that he is concerned with legal and not empirical questions

mentally conflictive social relations and in need for its regulation. The religious civil wars, the political and social conflicts between princes, feudal, local or corporative actors give expression to the order of the medieval world having lost its cohesive power. The pre-political normative and institutional systems of a world legitimated by feudal rights, tradition and Christian values are no longer able to provide a common system of reference for thought and action, or to meet newly evolving social demands and interests. The institutions as well as ideas of the modern state are the result of a redefinition of the political in a new form of society which may be characterized by *pluralization* and *secularization*.[37] It is no accident that the phenomenon of *pluralization* as a fundamental fact of modern society becomes visible for the first time in form of the denominational religious parties. As the medieval social order was essentially based on Christianity, communicated by the institutions of the one Church claiming universal validity, it is broken open in the course of the Reformation by the growing pluralism of religiously founded parties which each advocate their own absolute, transcendent claims of truth and faith. For associated with them are different ideas about the organization of individual and common life, ideas in which – seen from a sociological perspective – new social interests and powers make themselves heard and claim acceptance.

These developments result in a *secularization* of the political, which, however, is not necessarily accompanied by a turning away from religion as such – as is shown by the fact that, at least for a long time, religious content and justification of political and social institutions remain of prime importance. To the extent, however, in which the inconsistency of religious claims to truth and the general impossibility of agreeing on truth and liability become sufficiently tangible, the political arises as an independent sphere and activity.[38] Religious values, organizations and practices are gradually driven out of their former central position within the social order and become a part of it. As far as they become a part of the social parties and conflicts of interest, their respective social validity, position and significance have themselves to be decided politically. Yet, these decisions

(Rousseau, *Émile ou de l'éducation, Œuvres complètes* (Bibliothèque de la Pléiade), vol. IV, Paris 1969, p. 836 f.).

37 For this aspect, see also Greven, *Die politische Gesellschaft*, pp. 20 ff.

38 For the birth of the 'secular state' out of the pernicious ideology of the religious wars, as it had been promoted during the French civil war since the 1560s, for instance, by the circle of the 'Politiques' which Bodin may be ascribed to, see Ernst-Wolfgang Böckenförde, „Die Entstehung des Staates als Vorgang

about the foundations and orientation of society thus become transparent in a novel way: they are visible in their contingency for the first time, so to speak. Under these circumstances, the institutions, norms and purposes constituting society necessarily lose the character of being predetermined by tradition and transcendent eternity. They now are something that needs to be *decided* about – one way or another, and ever anew –, something that needs to be decided about by specific individuals or groups and hence becomes clearly attributable.[39] As a result, these decisions are in an extreme and radically new need of justification.

Historically, the modern state and its sovereign power are established by their advocates, and justified in political discourse by precisely this function of founding social order. From a systemic perspective, political decisions in a society becoming ever more complex are gradually externalized and centralized since early modern times, which are themselves characterized by a growing number of social, religious, cultural, economic and other actors, interests, practices and functional systems. The state acts, as it were, as a service provider for a variety of heterogeneous interests – even though, in effect, for a long time mostly according to its own pretence rather than actual fact it guarantees social peace by means of its power monopoly, generates and secures the conditions for as well as the limits of the individual and collective pursuit of interests by means of a common legal system, and establishes the prerequisites for social progress and prosperity by means of taking the respective measures. Yet, the relation between state and society is not to be mistaken for a purely superficial and one-dimensional one. However little the state is opposed here to society from the outside and above, and however little it exists independently of society and may arbitrarily govern it, no more may the relation between state and society be seen as purely instrumental and functionalistic. Rather, modern state and modern society originate and function by way of a mutually constitutive relationship: the state is the prerequisite and functional condition for the existence of society, yet at the same time also the product of this society which is characterized by plurality and heterogeneity.

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der Säkularisation", in: *ibid., Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Frankfurt/M. 1991, pp. 100 ff.

39 "The contingency of the modern age is characterized by the fact that any action has to be considered against the 'horizon' of knowledge of those acting, who themselves know that it could, or could have been, different. (…) Hence, all action inevitably entails a decision which might as well have been different" (Michael Th. Greven, „Hannah Arendts Handlungsbegriff zwischen Max Webers Idealtypus und Martin Heideggers Existentialontologie", in: Winfried Thaa/Lothar Probst (eds.), D*ie Entwicklung der Freiheit. Amerika im Denken Hannah Arendts*, Wien 2003, p. 120).

It is both, a condition and something conditioned. Indeed, this may be observed ever since the developing central powers have been described, conceptualized, and finally organized in terms of the state. The raison d'être of this state also is – in terms of theoretical justification, and thus also practically – always its Other, namely securing and preserving the functioning of society against the disintegrating tendencies and forces it has within.[40] As a system of relations based on market-induced competition, private production and acquisition as well as on growing religious and cultural pluralism and individualism, modern society displays – to speak in the words of Hegel – the principle of "difference" or of "particularity"[41], which may exist "purely and simply by means of the form of universality, the second principle here", namely by means of the state.[42]

Accordingly, this sovereign power of the state, seeming – and actually being – threatening and absolutist, is necessarily and in an ambiguous manner related to society, and determined by it. On the one hand, it is centralized governing. Society with its plurality of actors and acting structures is imposed by the state with particular rules and demands, which are equally valid and binding for everybody, and are enforced if necessary. To the extent that each of these decisions is a decision for and against particular norms, values, interests and purposes, state government as such is always particular. For in a society characterized by the irreconcilable opposition of interests as well as norms, which is just not vested by default with convictions and institutions establishing and securing unity, any universality is at the same time also inevitably a particularity forced upon it. Yet, the crucial aspect here is the way these structures and contents of state government – being both universal and particular – are being generated. As the *political* exercise of power is outsourced and centralized in the institutions of *state* government, it is *made visible*. On the one hand, government is made *visible* – and thus attributable – to the ex-

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[40] This is true since Machiavelli, at the latest, according to whom the *virtú* of the prince is proven by his ability to secure government – *lo stato* – against internal as well as external threats and disintegrating tendencies – the internal and external *necessità*: "In Machiavelli, the self-preservation of the state becomes the highest norm of political action. Only an ordered and stable state is able to counter the constant threat of a civil war. Unlike hardly any political theorists before or after him, Machiavelli has based his theory on the actual facts of the modern state." (Herfried Münkler, *Machiavelli. Die Begründung des politischen Denkens der Neuzeit aus der Krise der Republik Florenz*, Frankfurt/M. 1982, p. 395).

[41] Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, ed. T. M. Knox, Oxford 1952, §§ 181 and 186, pp. 122 and 124.

[42] *Op. cit.*, § 182, p. 123; *cf.* the Addition to § 182: "Civil society is the difference which intervenes between the family and the state, even if its formation follows later in time than that of the state, because as difference it presupposes the state; to subsist itself, it must have the state before its eyes as something self-subsistent" (*ibid.*, p. 266).

tent that it is no longer valid without challenge, dispersed and existing by linkage to social and personal ties, but is built on and by particular institutions and actors; on the other hand, government is visibly *made*, for particular decisions are made – either in the *arcane sphere* of absolutist Cabinet politics[43] or in an open democratic process – and imposed on society as general will. This dual 'making visible' of political government in the institutions and proceedings of the modern state are of course accompanied by the necessity of justifying and generalizing them, government and the enforcement of *particular* decisions necessarily associated with it, derive their legitimacy not from sources transcendent to society, but from the constitutive reference to the fact of social pluralism and the claims and requirements of particular interests resulting from it.

On the other hand, the sovereign power of the state is thus also the sphere of universality, both despite and *as* being the sphere of exercising the societal government. The gaining of independence as well as the being made absolute of the state are a result and a function of the fact that dominion is no longer set into social relations. The mutual recognition of the plural social actors and structures, their intrinsic values and particular inner logic, require that they must not be negated by the outward effects of domination of the respective other social actors. The constitution of a sphere of legitimate public and legal domination, separate from society and centered in the state, represents a novel form of organizing, generating and legitimating governance – namely by government –, and sovereignty is the precondition of this structure. Only an authority *legally independent* of all particular social interests is capable of being recognized as providing the *general* conditions of the constitution, maintenance and realization of social actors, their advancing of interests and the according struggle for social, economic and other means. As a sphere of mediation, the institutions of the modern state serve a twofold purpose for social ac-

[43] Admittedly, it has correctly been observed that absolutist Cabinet politics were 'pre-modern' in so far as the political was taken away from public competition and monopolized as a jealously looked after sphere of monarchic power of disposal, which in turn would mean that the era of modern political society would have to be classified as beginning with the Enlightenment only. On the other hand, the absolutist attempt to centralize political power and decisions in the hands of 'the state' is already a result of the growing pluralism in society and the contingency of the modern age, and has been identified and recognized as such, particularly in the process of absolutist preclusion. If Louis XIV identifies – as expressed in the admittedly inauthentic but splendidly invented phrase "L'État c'est moi" – the state with his own person, and if politics is made an arcane sphere, everyone able to interpret it knows: it is here – in this person or in this 'black box' of absolutist decision making – where politically binding *decisions are made* and *politics has its place*; the fact that this 'modern' claim was met by a general lack of ability of the absolutist state should attract the attention of advocates of the thesis of a – other than today – once almighty state.

tors. On the one hand, they serve as the arena and channels by which social actors generate their own conditions of existence and action – by means of a legal and structured social and constitutional order. On the other, they provide a way of influencing the latter in terms of particular interests, as decisions and measures are taken by the legislative and executive powers which respond to the respective needs and wants. It is precisely by its being a sovereign, independent sphere of mediation that it prevents particular social interests and actor groups – religious parties, interests of capital, powerful warlords, etc. – from immediately using their position of power in society for political and legal authority. On the contrary, even if they are *in effect* the greatest social powers imaginable they remain *legally* dependent on political decisions representing the general will.[44]

So in the claim to sovereignty, the effectiveness and legitimacy of structures of political government join forces in a particular way. The effectiveness of state sovereignty is not measured on the basis of being capable of actually enforcing any material purposes of internally and externally controlling society, or even of acting completely without limits.[45] Rather, it indicates the existence and functioning of a socially differentiated sphere of institutions and procedures in which the processes of political formation of will and attributable political decision making take place. The latter, in turn, make it possible to indicate and define the structural and enabling conditions for the various social actors and their advancing of interest, according to the respective circumstances and given problems. Therefore, it is not so much a matter of abstract freedom of action but of being able to make decision, *i.e.*, of the capability of political will formation under however variable restricting conditions. Thus, the effectiveness of sovereign power internally refers to its

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[44] This is not to be mistaken for voluntaristic control. Rather, the state as a sphere of mediation may be regarded as a structural mechanism for settling and dealing with social struggle of interests, as the *field* or *arena* of such disputes about hegemony and specific *policies* regarding the perception, interpretation and organization of the political, social and economic circumstances and institutions. To that extent, the state may be a "power being variously effected, but unitary effective", but "the state power as a unitary force can only be accounted for causally by the collaboration of all involved, and can thus only be attributed (…) to this collaboration". One needs "to acknowledge the objective unitary force of the state power as the resultant of all powers being effective, both from the inside and the outside, even the conflictive ones" (Hermann Heller, *Staatslehre*, ed. Gerhard Niemeyer, 6th edition, Tübingen 1983, pp. 270 and 272).

[45] Under these conditions, it would be impossible to speak of sovereignty at all concerning empirical states of the past and present, since every state imaginable is necessarily subject to a multitude of restricting conditions and limits to its freedom of action. In this respect, the difference between sovereignty and freedom of action has rightly been indicated; for instance, *cf.* Michael Kreile, „Globalisierung und europäische Integration", in: Wolfgang Merkel/Andreas Busch (eds.), *Demokratie in Ost und West*, Frankfurt/M. 1999, p. 613; Wolf-Dieter Narr/Alexander Schubert, *Weltökonomie. Die Misere der Politik*, Frankfurt/M. 1994, pp. 155 f.

legitimacy in society. Those subordinate to sovereign government have to find themselves in, and feel represented by it: they have to be able to consider the state – also and especially as a sovereign state – as the 'state of society'. This entails first and foremost a consensus about the 'universality' of the institutionally outsourced sovereign formation of will being indeed an expression and function of the respective particular will, *i.e.* nothing extrinsic, strange or heteronomously opposed to it. The sovereignty of the modern state stands or falls not so much with this or that form of efficiency, or with a particular level of doing justice to specific needs and wants. Rather, it depends on the will and ability to generate and guarantee – as the sphere of mediating the plural, heterogeneous and partly antagonistic social forces – the general conditions for their existence and relations.

2. 3 Sovereignty and the constitution of political freedom

It is this structure of unity *and* difference of state and society in the modern age, that the political theories of Bodin, Hobbes and Rousseau and their conception of 'absolute sovereignty' are trying to express and enforce theoretically and practically. They draw the obvious conclusion from the historically detectable process of the development of a society characterized by the fact of pluralism, *i.e.* being marked by contradictory religious, economic, social and other interests and thus generating conflict for structural reasons. This growing pluralism of the normative orientation and ordering of preferences of actors is an expression as well as a cause of the fact that social relations are no longer integrated by traditional or transcendent, pre-politically set common values and the institutions and procedures representing them.[46] The normative as well as institutional foundations of social integration and cooperation have to be justified on the basis of these structural conditions and problems themselves. Hence, it is, to use a paradox formulation, a justification of the necessity of sovereign power as the quintessence of 'unifying etatism', which is

[46] This dissociation irrevocably arises when religious truths are no longer valid without scrutinization, as the logical consequence of 'corroding' critical reason, which rules out 'blind faith' in a transcendent truth guaranteeing the existence of community, and generates the opposite. Hobbes has put this succinctly: "For it is with the mysteries of our religion, as with wholesome pills for the sick; which swallowed whole, have the virtue to cure; but chewed, are for the most part cast up again without effect" (Hobbes, *Leviathan*, chap. XXXII, p. 360). Once "chewed", the integrating power of universal systems of belief may only be restored at the price of the – in consequence: physical – extermination of the disbelievers.

principally secular, centered on society and oriented towards pluralism. The crucial point here is that sovereign state power conceptualized this way does *not* exhibit a structure which *negates* the fact of social pluralism and particularism – and thus the modern principle of freedom – but on the contrary *makes possible* and *establishes* the latter. Only as such it is able to claim acceptance in so far as – put succinctly by Rousseau – "l'opposition des intérêts particuliers a rendu nécessaire l'établissement des sociétés [politiques]", yet this connection is made possible by "l'accord de ces mêmes intérêts".[47] Therefore, the task and legitimacy of the sovereign power do not consist in abolishing, but in establishing and securing the *general* conditions of subjective freedom and the pursuit of interests. Taking a look at the central definitions of sovereign power made by the 16th to 18th century theorists of sovereignty quickly demonstrates that – all other differences aside – objectively this is nothing other than an attempt to secure these definitions for the constitution and functioning of civil society itself, and as such to organize and guarantee it as an autonomous sphere – in particular by means of state sovereignty.

Even though Bodin may be regarded, as already indicated, as the father of the modern conception of sovereignty, his justification of the necessity of sovereign state government remains part of universalistic theological metaphysics, according to which it is that particular organizational form of the political by which individuals and society adapt themselves to the divine order of creation and their living together is organized according to its rules and the respective requirements; the sovereignty of the ruler here corresponds to his role as "image de Dieu" on earth, and to his function of making justice real.[48] Even so, in Bodin the structure and function of state sovereignty result entirely from their reference to society being based on the fundamental distinction between the public and the private. This distinction is analytically connected to the definition of the state as "gouuer-

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47 Rousseau, *Du contrat social*, II.1, p. 368.

48 Bodin, *République*, I.8, p. 161. How much Bodin – in contrast to Hobbes, for instance – still relies on Christian medieval tradition, is shown by this definition „que ce peuple là jouist du souuerain bien, quand il a ce but devant les yeux, de s'exercer en la contemplation des choses naturelles, humaines, & diuines, en rapportant la louange du tout au grand Prince de nature. Si donc nous confessons que cela est le but principal de la vie bien-heureuse d'un chacun en particulier, nous concluons aussi que c'est la fin & félicité d'une Republique" (*ibid*., I.1, p. 5). In contrast, cf. Hobbes's notes on "happiness" or "felicity" (*cf*. Hobbes, *Leviathan*, chap. XII, p. 105 and chap. XI, p. 85, cit. below, note 72). For Bodin's ambivalent position between tradition and the modern age "[qui] pense la République – la *Res publica* – déjà en moderne, mais encore en ancien", cf. Simone Goyard-Fabre, *Jean Bodin et le droit de la république*, Paris 1989, pp. 9-16.

nement de plusieurs mesnages & de ce qui leur est commun".[49] Even though Bodin, taking as his starting point the traditional concept of the family as a socio-economic fundamental unit with the *pater familias* at its head, is not yet using the individualistic concept of civil society, his definition still indicates most clearly that privately owned property represents the cause, purpose and internal limit of sovereign state power. The state is thus entitled to the government *of* the plurality of households, while *within* them the *pater familias* holds the supreme power, so that the sovereign power has to stay out of this sphere of the private. And it is this difference which, according to Bodin, the state needs to pay attention to for the sake of its own existence, in so far as it can be imagined as a sphere of the public only with reference to the private.[50] Accordingly, the state meets its ultimate limit in freely disposing of that belonging to the private, *i.e.* in private property. For Bodin, securing this sphere and this property is the highest and sole criterion of legitimate statehood, "la seule marque de Republique": "en ostant ces deux mots *Tien* & *Mien*, on ruïne les fondements de toutes Republiques, qui sont principalement establies pour rendre à chacun ce qui luy appartient."[51] According to Bodin, the sovereignty of the state constitutively relates to its function of ensuring its Other, the protection and maintenance of the private, the property of families, which has to be guarded against the self-destructive forces occurring between these particular actors.[52] Being the sphere of the public, the state acts as precisely this authority of mediating the particular: "la seule union, & liaison des familles, corps, & colleges, & de tous les particuliers".[53] Hence, the legitimacy of sovereign power is based on the regulation and securing of this generality of the public and common, in so far as they are the conditions for a peaceful and productive development of society in general and its parts; this constitutive relation of the general to the particular is the reason for its entitlement to acceptance and obedience.

In Hobbes and, in his succession, Rousseau, the sovereignty of the modern state is founded completely on a structure of society which is characterized by secularism and

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[49] Bodin, *République*, I.1, p. 1.

[50] *Cf.* Bodin, *République*, I.2, p. 15: "il n'y a point de chose publique, s'il n'y a quelque chose de propre: & ne se peut imaginer qu'il y ayt rien [de] commun, s'il n'y a rien [de] particulier".

[51] Bodin, *République*, I.2, p. 15, and *ibid*., VI.4, p. 948.

[52] *Cf.* Bodin's remarks on the pre-state state of nature (*République*, I.6, pp. 68 ff.), which of course do not – other than in modern natural law since Hobbes – serve a theoretical justificatory function, but are meant to indicate the historic origin, and postulate – other than Hobbes and Rousseau – "que la force & violence a donné source & origine aux Republiques" (*ibid*., p. 69).

[53] Bodin, *République*, I.2, p. 14.

plurality. In a wholly provocative way Hobbes detaches the sovereign state from any transcendent justification, comparing the creation of the Leviathan with one of "an artificial man", in which any "*fiat*, or the *let us make man*, pronounced by God in the creation", is attributed exclusively to man: "the *matter* thereof, and the *artificer*; both which is *man*".[54] Modern contract theory founded by Hobbes, which is based on purely individualistic foundations, may be seen as the attempt to justify state government under the conditions of the Modern Age in a completely new way, namely by showing that freedom and government, subjective rights and sovereign power, the safeguarding of the rights of the particular and the absoluteness of state power are not mutually exclusive, but really presuppose each other.

Herein, the theory of the state of nature as non-historic, legal fiction serves to prove that a social system based on the naturally unlimited freedom and equality of actors is on principle unstable and self-destructive. It is a state which, particularly by virtue of unlimited subjective legal rights, is one of structural lawlessness, and thus identical to the rule of force and the law of the strongest. Hence, this structure of the state of nature, termed by Hobbes "a war of all men against all men"[55], is not based on the frequently invoked myth of his supposedly 'negative anthropology'[56], but precisely describes the legal contradictory structure of modern society. The latter is characterized as based on the natural freedom of subjective rights that cannot be restricted by any natural domination, and – being a plural one – is therefore a sphere of difference, antagonism and conflict. Thus in the social contract theory, the creation of the 'Leviathan' and its absolute power happens as a result of the free will of the actors themselves. The social contract generates the sphere of the public and the general, *i.e.* of those institutions and procedures for establishing and implementing the common rules, structures and conditions, which are required for the existence and realization of individuals as free legal subjects and proprietors. These are, as it were, emanations of those rules being called natural law, as they have already existed in the state of nature, to the extent that they arise from the actors' own reason, yet which may only be provided with legally consistent and empirical force in a form

54 Hobbes, *Leviathan*, Introduction, pp. ix – x.

55 Hobbes, *Rudiments*, I.12, p. 11.

56 According to this myth, Hobbes „pensa que la nature de la nature humaine était mauvoise, & de là toute sa fable ou son histoire de l'état de nature"; as put by Denis Diderot in the article "Hobbisme", in: *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers*, vol. 8, Neuchâtel 1765, p. 233.

made positive by state power.[57] In order for these rules to be general and binding, state power has to be sovereign, *i.e.* it has to be able to decide about them in the last instance; if social actors were still able to judge their being legitimate and binding, there would be no objective law *obliging* them all. However, this sovereign position is far from representing the dissociation of state power from the interests and the consensus of society, which have given it this absolute power. It is a widespread yet no less grotesque misunderstanding to interpret Hobbes's Leviathan in this way and to assume that in the end it would reduce sovereignty to the task of preserving nothing but life, the establishment of security for the purpose of self-preservation. In contrast, Hobbes has clearly expressed that 'security' is supposed to mean the guarantee of all those *general* conditions which combine with the will of social actors themselves, realizing their particular purposes and interests[58], *i.e.* internal and external security, the enforcement of a general legal order guaranteeing individual freedom as well as its implementation by an independent and impartial judiciary[59], politics promoting and enabling individual and social productivity, and finally a multitude of measurements which in political science today would be subsumed under categories such as responsiveness or 'good governance'.

Hence, the entire justification of the 'Leviathan' in terms of contract theory proves that the normative legitimacy and empirical stability of structures of political rule in the context of a society based on plural, competing actors may only be established and secured by this: that the subjects of this rule are subject to the sovereign power not as an alien but as their own will being internally linked to their particular interests – and that

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[57] For natural law, *cf.* Hobbes, *Rudiments*, chap. II and III; *ibid*., *Leviathan*, chap. XIV and XV. Natural laws are the product of reason reflecting upon the conditions of the state of nature, and thus are not predetermined for the individuals' freedom, but conditions for its realization identified by them themselves. Hence, here, too, the law and 'natural' limits of freedom are the result of the "free will which wills the free will" (Hegel, *Philosophy of Right*, § 27, p. 32).

[58] At the beginning of chapter XXX of the *Leviathan*, in which he thoroughly deals with the objective tasks of the sovereign power, Hobbes explicitly states that by the identification of "the procuration of *the safety of the people*" as the purpose of the state, "is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself" (Hobbes, *Leviathan*, p. 322). For this, also *cf.* esp. *ibid*., chap. XXI as well as *Rudiments*, chap. XIII.

[59] The notorious lack of understanding of many interpreters regarding the difference between the division of sovereignty – ruled out by Hobbes and his successors like Rousseau or Kant for systematically deliberate reasons – and the separation of powers which was not only thought possible but necessary, can only be pointed to here. Recent attempts to stress the dimension of the liberal constitutional state in Hobbes's Leviathan may be found e.g. in Lothar R. Waas, "Der ‚gezähmte' Leviathan des Thomas Hobbes. Oder ist der Theoretiker des Absolutismus eigentlich als ein Vordenker der liberalen Demokratie zu verstehen?", in: *Archiv für Rechts- und Sozialphilosophie* 88 (2002), pp. 151-177; Norbert Campagna, „Leviathan und Rechtsstaat", in: *Archiv für Rechts- und Sozialphilosophie* 84 (1998), pp. 340-353.

they actually experience and accept it.[60] It is evident that Rousseau, despite his many polemic comments against Hobbes' concept of the state of nature and the state as such, systematically bases his 'Contrat social' on its foundations and, by means of the specific form he gives to the social contract and sovereignty, continues with the freedom-guaranteeing intentions of this justification of government in the Modern Age. For the attempt made by Rousseau is one of procedurally and institutionally substantiating the linking of freedom and government, of particular and general will, intended by Hobbes already. Just as for Hobbes, for Rousseau leaving the state of natural freedom and submitting oneself to the absolute power of the law-giving state do not constitute a negation of, but the context for realizing the freedom, rights and security of individuals.[61] Yet Rousseau tries to prevent the subjects who are subjected to the state from experiencing their own general will as an alien one, in so far as it might be represented, as in Hobbes, by a third party, *i.e.*, by the empirical "man or council" having "the *supreme power*, or *chief command*, or *dominion*", being promoted and authorized by the social contract.[62] Therefore, for Rousseau, the only construction of political rule compatible with the indispensable rights and liberties of individuals[63] is one in which they are subject exclusively to self-given laws, so that the lawgiving *general* will of sovereignty and the plurality of *particular* will being subordinate to it have to be identical. Only in this way "ils n'obéissent à personne mais seulement à leur propre volonté".[64] Consequently, in spite of all empirical and systematic problems which might result from it, Rousseau's republican construction of sovereignty, in which the individuals themselves form the sovereign whose will is expressed in the

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[60] This is where the great importance – already documented by the publication of the text itself – comes from, which Hobbes – as all advocates of a contractual justification of law and the state – attributes to the informing and spreading of the foundations of legitimate rule. Accordingly, the demonstration of the reasons for the necessity of submission to the all-mighty Leviathan is directed not only towards the "Subjects" but also to the bearers of state power who are enlightened about the whole purpose of their office; *cf.* Hobbes, *Leviathan*, p. 357, or the end of chap. XL of the Latin version of the text in which he explicitly emphasizes "that all citizens, for their own good, and not for that of their rulers, are obliged to protect and strengthen the commonwealth with their wealth as far as they can" (Thomas Hobbes, *Leviathan. With selected variants from the Latin edition of 1668*, ed. Edwin Curley, Indianapolis/Cambridge 1994, p. 486).

[61] The different forms of the conceptions of freedom and society in Hobbes and Rousseau cannot be discussed in more detail here; yet, of course, this is not relevant on the level of justificatory theory discussed here.

[62] Hobbes, *Rudiments*, V.11, p. 70.

[63] *Cf.* the famous passage in Rousseau, *Du contrat social*, I.4, p. 356: "Renoncer à sa liberté c'est renoncer à sa qualité d'homme, aux droits de l'humanité, même à ses devoirs. Il n'y a nul dédomagement possible pour quiconque renonce à tout. Une telle renonciation est incompatible avec la nature de l'homme, et c'est ôter toute moralité à ses actions que d'ôter toute liberté à sa volonté."

[64] Rousseau, *Du contrat social*, II.4, p. 375.

general laws[65], represents the most logical formulation of the modern principle of subjective freedom as the basis for law and the state. It is *no substantial content or purpose* by which the absolute power of the state might justify itself, but solely its being a construction that can be described as the political and legal transformation and way of existence of the free will of those subject to its rule. Only this structure of construction and justification is able to solve "le grand problème en politique"[66] of modern society which has developed in the early modern age. This is the very problem that, on the one hand, realizing the integration and coordination of an indisputable plurality of free and equal actors necessarily requires structures of political government for regulating individual action and conflict, but that, at the same time, actors are still subject to neither an alien nor a particular, but exclusively to their own and general will, which does not destroy the freedom and equality of all subjects, but founds and realizes it.[67]

3 A difficult heritage: sovereignty and political autonomy

The reconstruction of some of the fundamental claims associated with the modern concept of sovereignty in and since Bodin, Hobbes and Rousseau draws attention to the blind spot which may be recognized in the debate on the state and future of sovereignty mentioned at the beginning – a blind spot on which to shed light is not only of theoretical, but of eminently practical importance. Strikingly put: reasoning fixed on the effectiveness of systemically induced problem solving on the society or global level threatens – in accord with a seemingly overpowering practice – to now remove theoretically and also normatively from the agenda essential foundations and claims of the modern conception of rights and freedom, as has been developed since the transition to the Modern Age. The structure of the construction of sovereignty, as it has been developed in political theory of the Modern Age and taken up by the advocates and champions of the evolving state powers as a blueprint for self-description and justification, responds – it turned out – to the

[65] „Le Peuple soumis aux loix en doit être l'auteur; il n'appartient qu'à ceux qui s'associent de regler les conditions de la société" (Rousseau, *Du contrat social*, II.6, p. 380).

[66] Jean-Jacques Rousseau, "Lettre à Mirabeau », 26 juillet 1767, in: *Correspondance générale*, éd. par Théophile Dufour, vol. XVII, Paris 1932, p. 157.

[67] For the belief that freedom becomes possible and real only under self-given laws, cf. below, fn. 71.

ambivalences of the newly evolving social conditions in the transition to civil society. The other side of these tendencies of a growing secularization, pluralization and individualization is the necessity of the existence of conflicts as well as antagonisms of values and interests. Yet these abstract terms may not hide the fact that this structure of a necessary mutual lesion of the respective rights means in practice the permanent threat and relevance of the exercise of force and power to the point of the legal and factual negation of respective others. In so far as it is possible and desired to make permanent and secure social pluralism[68], a sphere of mediation is needed which is able to frame the action of the different individuals so that their respective tendencies to make absolute their being particular are restricted, directed into the right channels and reduced to an extent not threatening their existence and potentials. The sovereignty of the evolving state powers receives its justification from precisely this capability to generate general rules, solve conflicts and provide those services necessary for the maintenance and development of the antagonistic social system. The separation of the public and the private by means of the constitutive differentiation of the state out of society may thus not be mistaken for any kind of complete *empirical* detachment of the institutions and actors of the state, its formation of will and decision-making from social forces.[69] The institutional differentiation of state power is a function of the existence of heterogeneous social groups as well as the establishment of non-destructive forms of their disputes about recognition and enforcement of their contradictory interests and values. As such, state power is on principle open and permeable to society, even though its manifestations differ considerably in the different historic forms of state government.[70] The marking and differentiation of the state as a sphere of the general and the mediation of the particular therefore mean anything but the existence of an absolute sphere of freedom and informal communication, independent of

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68 "Possible and desired" here may also indicate different historic stages, even though they permanently penetrate each other. "Possible" especially in so far as – yet not only – during the first centuries of the modern times there have permanently been attempts by particular powers to destroy pluralism and make equal or wipe out all that is different, beginning with the religious wars of the 16th and 17th up to the fascist movements of the 20th century; since the Enlightenment in the 18th, and the establishment of the capitalist order in the 19th century, there is an overall growing willingness to accept pluralism, at least to the extent it is useful for the relations of production and exploitation. "Desired" applies to the normatively orientated positions supporting such plurality – admittedly for very heterogeneous reasons, and with extremely different positions and content.

69 A variety of diagnoses in the political and social sciences about the supposedly entirely novel relation between state and society today rest on a failure to recognize the difference between empirical and normative perceptions of this distinction.

social influence and institutions. Rather, it is a sphere of the struggle for recognition, hegemony and the pushing through of interests by means of the institutions, instruments and mechanisms of state government, which always entails the actual possibility and reality of a more or less complete repression of specific social actors, values and interests.

Yet it is of prime importance here that the legitimacy of this sphere and the sovereign power acting within it is proven not solely – and in certain respects not even primarily – by providing society with specific material services. For the acceptance of the legitimacy of state power stands or falls with the conviction of its subjects that this state will – which they are not only factually subject to because of its means of compulsion, but which they should be *obliged* to – makes possible their own claims to self-preservation and self-determination, and does not negate them by making them subject to the will of others.[71] Hence, the legitimacy of state sovereignty relies on the fact that the subordination of social actors and interest groups takes place under conditions of strict reciprocity and the protection of the respective autonomy. The attempts of political theory in the early Modern Age to justify the sovereignty of the state, starting with Bodin, take precisely this as their starting point and develop, in their respective conciseness and setting of focus, that legitimate rule under the conditions of the novel social relations firstly has to be that of *one* will, that secondly this will has to be a *general* will, and finally that it has to be the *own* general will of the subjects of this rule. In this sense Bodin defines sovereignty as that unified and general will which makes possible the existence of the sphere of the private and the unrestricted use of the private property of social actors, and protects them against the claims of all other social groups and interests and their tendencies of making

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[70] This includes a variety of manifestations from the formal and informal setting up of corporative committees and councils in the monarchies of the early Modern Age to political parties or corporate associations and network structures of the present.

[71] For both – self-preservation and self-determination – fundamentally belong together, the simple reduction of self-preservation to the preservation of sheer existence negates the self to be preserved; thus, self-preservation necessarily implies the preservation of self-determination. This is the case not only in Rousseau or Kant, but already in Hobbes, who clarifies that dominion and "law was brought into the world for nothing else, but to limit the naturall liberty of particular men, in such manner, as they might not hurt, but assist one another" (Hobbes, *Leviathan*, chap. XXVI, pp. 254 f.), and that the civil freedom, the freedom under legal rights, is the only real form of freedom, as it is – other than the natural one – not self-destructive (*cf. ibid*., chap. XXI, p. 198; just as much Bodin, *République*, I.6, p. 68; Rousseau, *Du contrat social*, I.8 u. II.4, pp. 364 f. and 375; Immanuel Kant, *Metaphysik der Sitten. Rechtslehre*, in: *ibid*., *Gesammelte Schriften* (Akademie-Ausgabe), vol. VI, Berlin 1914, § 47, p. 316). Accordingly, legal rules may only limit individual freedom of action to the extent they "necessarily serve for good of the magistrate and his subjects": "the measure of this liberty is to be taken from the subject's and the city's good" (Hobbes, *Rudiments*, XIII.15, p. 179 and 178) – as a result of which they are the very first to *create* such a sphere of individual and social freedom as being secure.

absolute their particular will. Hobbes and Rousseau base this sovereign power on the natural freedom and equality of individuals. In a social order in which natural, pre-political inequality and rights to power do not exist or meet with general acceptance, the legitimacy of government and the commitment to obedience may only derive from the free will and the approval of the subjects themselves. Hobbes restricts this constitutive relation of dominion to the will of its subjects mainly to the legitimizing-theoretical fiction of the constitution of sovereign government by its authorization by the idea of reason of an original social contract.[72] In contrast, by irreconcilably linking legitimate sovereignty with the necessity of structures of republican self-government, Rousseau generalizes it as the procedural principle of legitimate government as such.

Under the conditions of modern plural society, in the opinion of its early modern theorists, particularly in and since Hobbes and Rousseau, the task, characteristic and justifying grounds of sovereignty consist not in serving specific material purposes and performances but in the successful political organization of individual and collective self-determination, from which the form and contents of the respective institutions result.[73] This claim to self-determination is not simply one state responsibility among others but is qualitatively placed before and above all particular contents and purposes. For only by this the principle of political autonomy wins recognition, according to which decisions about the political, social and economic structural conditions of existence may solely be justified by their constitutive relations to the will of those affected by them, because they bring about the imposition of inequality, power and compulsion running counter to natural freedom and equality. If, as in the current debates, in political theory and practice the main stress is laid on the fact of effective problem solving in different institutions and

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[72] However, Hobbes already clearly realized that this form of sovereign government could perfectly be realized in a democratic form as well; yet of course he does not make this a fundamental condition for legitimate government. Herein, Hobbes is closer to Kant, for whom – in contrast to Rousseau – the idea of an original *tractus originarius* becomes primarily a "touchstone" (*Probierstein*) for the legitimacy of sovereign government; *cf.* Immanuel Kant, "On the common saying: That may be correct in theory, but is of no use in practice", in: *ibid.*, *Practical Philosophy*, ed. M. G. Gregor (Cambridge Edition of the Works of Kant), Cambridge 1996, p. 297; *cf.* Wolfgang Kersting, *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatphilosophie*, Frankfurt/M. 1993, pp. 401-403.

[73] Just like for Rousseau, as already mentioned (note 63), freedom represents the supreme reason and purpose of legitimate government and cannot be substituted by any other purpose, this is factually true, as is often ignored, already for Hobbes. As far as according to him – since "there is no such *finis ultimus*, utmost aim, nor *summum bonum*, greatest good," for it – the "happiness" or "felicity" of individuals has to be understood as "a continual progress of the desire, from one object to another; the attaining of the former, being still but the way to the latter" (*Leviathan*, chap. XI, p. 85), the state may not be seen paternalistically as an effective supplier and guarantor of specific goods, but as a structure for making possible and securing free – *i.e.* self-determined – pursuit of interests.

arenas below and beyond the nation state, this fundamental impetus of indisputable political freedom and self-determination gets lost. Consequentially, the future prospects of effective political decision making and governing are then seen – in accordance with the tendencies prevailing in practice – in sub- and transnational networks for negotiation, supranational institutions, societal and international regimes, expert committees, round-table talks and all the other "various informal command and coordination centers of the political process"[74]. In so far as the "authoritative decisions about the validity of immaterial or the allocation of material values"[75] are made this way – *i.e.* being scattered and outsourced to manifold arenas and circles having become independent – they take on a form that diametrically runs counter to the demands on legitimate government developed in the early Modern Age. Universally binding decisions are increasingly made by particular actors and circles whose composition is not representative but dependent on the greatly varying factors of social position and power resources, and in which the processes of decision-making are unclear, intransparent and no longer attributable in terms of responsibility. The internal connection between freedom and dominion, between the will being subject to government and the general will exercising government, is dissolved here. Individuals are thus subject to regulations of will, which are not derived from their will, but which justify themselves by means of the – at least being successfully communicated as such – effectiveness of their problem solving competence.[76] Yet this effectiveness is paid with being subject to decisions and effects of governance which are in principle of heteronomous and particular origin, and thus break away from the principle of subjective freedom and equality as the *foundation of all* legitimate political governance.

The problematic nature of the fundamental change in the legitimating foundation of political government coalescing with the as harmless as rational seeming transition from input to output legitimacy, should not too easily be dismissed as expressions of old familiar academic traditionalism of the history of ideas or of traditional affection for the ideals of republican freedom allegedly outdated by the hard facts of reality. Rather, these developments threaten to undermine the aspired effectiveness of political governance itself. Signs for this may be seen in various phenomena which are often labeled "irrational"

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[74] Greven, *Die politische Gesellschaft*, p. 154.

[75] According to Greven (*Die politische Gesellschaft*, p. 153), this is the theoretically and analytically appropriate conception of governing in the political society.

from a purely "effectiveness" or system-orientated perspective and remain misunderstood, like the rejection of the draft EU constitution, the repulsion of neo-liberal models of politics, or the skepticism about the globalization of political, economic and socio-cultural structures up to occurrences such as disenchantment with politics, irrational and nationalist resistance and countermovements, religious, cultural or ethnic-racist sectionalisms and fundamentalisms. To no minor degree, such phenomena give expression to the fact that in today's *condition (post)moderne*, in which the principles of freedom and self-determination of a plurality of social actors and entities have become real with all their ambivalences on a global level, political governance may not be justified heteronomously in the long run. So even though today the complexity of the present and future circumstances and problems as well as the effects of globalization persistently undermine the effectiveness of national sovereignty: From a normative as well as from a practical political – "effectiveness orientated" – perspective it obviously seems indispensable to help make real the claims associated with the "fiction of sovereignty" under the changed social circumstances: being subject neither to a particular nor to an alien, but only to one's very own will.

[76] This is also expressed in the different variations of the current transfer from 'input' to 'output legitimation'.

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