Sovereignties

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by
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(*Summary*)

The term "sovereignty" is used in a number of contexts, ranging from religion to law. Even within the context of law, the notion of sovereignty plays an important role in different contexts, such as constitutional law and international public law. The concept of sovereignty in constitutional law differs from that used in international public law, but even within either context, there is no consensus on the meaning of "sovereignty". Is sovereignty about factual power, or only about legal equality? Do only democracies have sovereignty, because they have legitimacy, or is there no (necessary) connection between democracy, legitimacy and sovereignty? Has the European Union encroached upon the sovereignty of the Member States, or is transferring competences to the European Union rather an expression and exercise of the very sovereignty some claim states no longer have because of the European Union? Is it about states, or is it about peoples having a right to self-determination, and if the latter, is that popular sovereignty or something else? In order to answer these questions, we need a clear grasp on the meaning of "sovereignty".

This book is a rational reconstruction of "sovereignty". It does not seek to describe how the term is used in the different contexts and discourses in which it is employed, but rather distinguishes four possible meanings of sovereignty that allow the reader to employ the term "sovereignty" with specificity and clarity. In this way, this book hopes to offer the analytical tools to politicians, constitutional and international lawyers (both practitioners and academics) and legal theorists to be clear about what they mean when they use "sovereignty". This book does not answer any of the questions listed above, or at least not finally. Instead, the purpose of this book is to enable us to have the discussions surrounding these questions in a conceptually clear manner.

For this purpose, this book distinguishes between constitutive and constituted, as well as internal and external sovereignty. These can be combined in the following way:

Constitutive	Internal
	External
Constituted	Internal
	External

The four meanings of sovereignty this book identifies are, accordingly, internal constitutive sovereignty (ICVS), internal constituted sovereignty (ICDS), external constitutive sovereignty (ECVS) and external constituted sovereignty (ECDS). Internal constitutive sovereignty is related to the notion of popular sovereignty that exists in

political philosophy and constitutional law and legal theory, while internal constituted sovereignty concerns the state's sovereignty vis-à-vis other organizations (such as the church). Notions such as parliamentary sovereignty in the constitutional doctrine of the United Kingdom also fall under this concept, although ICDS shows how parliamentary sovereignty is a conceptual confusion. On the external level, constitutive sovereignty does not have a corresponding concept in current usage of the term "sovereignty", but its inclusion as a form of sovereignty offers insight into the foundation of international law and the justification of *ius cogens*. External constituted sovereignty, meanwhile captures the notion of state sovereignty in international law. Despite these connections to existing notions of sovereignty, the four types of sovereignty proposed in this book should not be used in reference to existing concepts, nor should they be evaluated on the basis of their proximity to and correspondence with current and actual usage of sovereignty. Instead, they should be used independently of preconceived notions of sovereignty and evaluated with a view to coherency and their ability to clarify discussions involving "sovereignty". This book discusses them one by one.

Internal Constitutive Sovereignty

Internal constitutive sovereignty is the extra-legal power of peoples to constitutive, maintain and deconstruct a legal system. It explains how all state power emanates from the people: peoples constitute the legal system, which in turn constitutes the governing institutions of the state. A people exercises this form of sovereignty by creating, maintaining or deconstruction the convention to regard the norms of the system in question as pre-emptive and final, though the convention needs to be efficacious in addition to existing and being maintained. This understanding of sovereignty is reminiscent of HLA Hart's rule of recognition, though the rule of recognition is a social norm created and maintained by legal officials, while internal constitutive sovereignty is created and maintained – and potentially deconstructed, in cases of revolution – by an entire people. Each time an individual acts in conformity with a norm of the system, this instantiates the convention that these norms are pre-emptive and final. In this way, actions by individuals contribute to exercises of internal constitutive sovereignty; nevertheless, individuals are not sovereign in this way. This understanding of internal constitutive sovereignty as convention-based explains why norms of the system – or rather, their legal consequences – are applied to individuals who have not consented to the norm or the system, be they criminals or revolutionaries., without affecting this kind of sovereignty. This has two important implications: first, internal constitutive sovereignty is a matter of degree. A people can be more or less sovereign, depending on how many individuals of the set take an internal viewpoint to the governing convention, how many approve of it, and how many are forced to comply with the norms without accepting the convention. Second, for internal constitutive sovereignty to exist or to be exercised, it is not necessary that all individuals subject to the legal system in question give their consent, or even that they deliberately act with the intention to instantiate the governing convention. This indicates that there is no necessary link between internal constitutive sovereignty and legitimacy, despite the fact that popular sovereignty, the existing notion that most closely corresponds to internal constitutive sovereignty, is often considered to legitimise state power.

Internal Constituted Sovereignty

Internal constituted sovereignty describes the sovereignty of a state on the territory of that state – and hence internally. This form of sovereignty is a status which is attributed to the state by the legal system which has been constituted and is maintained by the internal constitutive sovereign, that is, by the people(s) of the state in question. While this sovereignty is in principle constituted by the legal system, and differences between legal systems are therefore possible, we are here interested not in the concept of sovereignty of one legal system, but in general. In short, the concept of internal constituted sovereignty is doctrinal rather than internal.[1]

Internal constituted sovereignty is the status of one organization, namely the state, as authoritative over other organizations on the territory, such as the church or the local chess club. In some legal systems, such as England, the question has mainly been which state organ is supreme to other organs, but this is a conceptual confusion. Organs of the state such as Westminster Parliament are composite entities made up of sub-entities such as the House of Commons and the House of Lords in the same way that the state is a composite entity. To ask which organ of the state is sovereign is as much a conceptual confusion as it would be to ask whether the House of Commons is sovereign, or whether one of its Members of Parliament is sovereign. Sovereignty should be attributed to the composite entity, not one of its elements, and the composite entity in question is the state.

Defining this kind of sovereignty as a status divorces sovereignty from its consequences. This means that states are still sovereign even when certain consequences of sovereignty are lost or transferred to another entity, as is the case for example with regard to the European Union and its Member States.

External Constitutive Sovereignty

External constitutive sovereignty is similar to internal constitutive sovereignty, in that it is the extra-legal power to construct, maintain and deconstruct a legal system as well. Unlike internal constitutive sovereignty, which is exercised by peoples and geared toward the national legal system – though it could in theory also constitute other legal systems, external constitutive sovereignty is exercised by the set of actors on the international level, primarily by states. Just as individuals on the national level can instantiate the governing convention through their actions and thereby contribute to an exercise of internal constitutive sovereignty, states instantiate a convention to regard the norms of international law as preemptive and final and thereby contribute to an exercise of external constitutive sovereignty. Consequently, individual states are no more sovereign in this sense than individuals are in the internal constitutive sense. Instead, it is the set of international actors exercising external constitutive sovereignty, that is, states collectively rather than individually.

This view of international law as convention-based rather than consent-based explains how and why it is possible that legal norms such as *ius cogens* are applied to states which have not given their (explicit or tacit) consent to these norms. It furthermore

[1] The difference between internal and doctrinal concepts rests on an understanding of law as an institutional part of social reality. In short, internal legal concepts are those constituted by legal rules, while doctrinal concepts are external to law and used in e.g. legal science.

allows us to transpose insights from constitutional theory and political philosophy to the international level.

External Constituted Sovereignty

External constituted sovereignty can also be considered in parallel to internal constituted sovereignty. The difference is that we had to develop a doctrinal concept of internal constituted sovereignty, while external constituted sovereignty is dependent only on the rules of one legal system, namely international law. External constituted sovereignty, just as its counterpart on the internal level, is a status attributed to particular entities by the legal system. In the case of external constituted sovereignty, the entities given this status are, of course, individual states.

The status expresses the idea that on its territory, a state can do anything it wants, in the absence of a more restrictive rule, and that no other state may intervene, in the absence of a more permissive rule. This means that the consequences of sovereignty (such as the doctrine of non-intervention) can change without a state losing its sovereignty. This explains how states can create treaties with other states which lead to permissive rules allowing one state to perform acts on the territory of the other (for example military exercises) that would not otherwise be allowed, without limiting the sovereignty of the one or expanding the sovereignty of the other state. It hence accounts for sovereign equality in international law and shows how treaties which create obligations can be considered exercises of sovereignty, rather than limitations thereof.

Application, Relevance and Conclusion

If we consider sovereignty in these four ways, it becomes possible to hold discussions in which "sovereignty" plays a large role in a conceptually clear and consistent manner; it will be clear at all times what is meant when the term "sovereignty" is used. This impacts discussions such as that surrounding the European Union and its relationship to its Member States, but also those regarding humanitarian intervention and the concept of the Responsibility to Protect (R2P). Understanding sovereignty as a status which is independent of its consequences demonstrates, with regard to the former discussion for example, that the real question concerns the transfer of competences and what competences should be transferred, to what degree, rather than whether states are losing their sovereignty and need to regain it.

Defining sovereignty in these four ways also shows that there is no paradox between the sovereign as constituted and the sovereign as constituting and therefore outside of the legal framework. The distinction between constitutive and constituted sovereignty is not only necessary for conceptual reasons; it also clarifies our understanding of sovereignty. That is precisely the purpose of this book.