

Sovereignty and International Order: On the Constitutive and Regulative Rules of Sovereignty

Paulo Rigueira
[University of Bath](#)
pr241@bath.ac.uk

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This paper seeks to provide an overview of the aims and goals of the thesis as well as develop the theoretical framework that will be used to analyse them. It will emphasise mainly two issues: (1) How can the importance of debates on sovereignty be extracted from broader debates about the development of international order; (2) How to theoretically analyse these developments. The idea that sovereignty is a legal institution comprised of constitutive and regulative rules will be first developed. It will be further stressed that the main purpose will be to stress challenges promoted by changes in conceptions of humanitarianism.

1- Sovereignty and International Order: Sovereignty as a Legal Institution

As James Mayall concludes, “The design of the society of states is extremely simple. The model is derived from the principles on which the 17th century European peace treaties were based and from the assumptions, requirements and additions which were introduced by the conference diplomacy of the 18th and 19th centuries. The model rests firstly on an agreed legal settlement, and, secondly, and more contentiously, on an institutionalised political dispensation” (1990:23). Ian Clark makes a distinction between what he calls legitimate membership and rightful conduct to further consolidate the simplicity of configurations of international order (Clark 2007).

The defining characteristic of the international system is anarchy, the absence of any legitimate hierarchical source of authority. Anarchical systems can, however, vary with regard to specific substance of rules and institutions and the extent to which these rules are recognised and consequential. Writers in the English School have made a distinction between an international system, lacking a hierarchical structure of authority, and an international society, an international system in which shared rules exist (Bull 1977, Bull and Watson 1982). Alexander Wendt (1998) suggests that there can be three different cultures of anarchy. In a Hobbesian world other actors are regarded as enemies who have no inherent right to exist. In a Lockean world, states see each other as rivals, but recognise a mutual right to exist. In a Kantian world, states see each other as friends and expect disputes to be settled without violence.

Aside from such generic distinctions between an international system and society, historically there have also been variations in the specific rules or institutions that have been part of different international environments. The “political dispensation” (Mayall 1990), by contrast, involved the major powers in acknowledging to each other that, notwithstanding the legal equality of all states, they had special responsibilities for maintaining international order, and, realists would say, that this gave them the right, if necessary, to override general international law. Traditionally there were two answers to the question of how to maintain order. Once ideological warfare has been ruled out by the agreement of the powers, force could be used as a political instrument to achieve limited political ends, not to bring about the total destruction of the enemy state or the elimination of its political identity. Self-interest will thus ensure that force is not used unless there is a reasonable expectation of success, and since there is no appeal from a defeat in battle, that it will only be used as a last resort. Liberal oriented reasonings would emphasise the power of peaceful diplomacy, commerce and the regulated movement of people across political frontiers. These would soften the effects of great power conflict and consolidate peace (Bull 1977, Wight 1977, Keohane and Nye 1977).

The question becomes on how to translate this broader theoretical debate into a way that stresses the role that sovereignty (and membership) plays in this game. In other words, how to clearly extract the role of sovereignty from this messy and broad

picture. Robert Jackson initiated this effort (1990:32-50, see also Wight 1977). According to him, “sovereignty is essentially a legal order defined by rules it can very appropriately be understood as a game” (1990:32). He goes on to conclude that “one can intelligibly employ the metaphor only in the analysis of rule-articulated political orders: games as activities constituted and regulated by rules ... Constitutive rules define the game: number of players, size and shape of playing field, time of play, prohibited actions, and so on. Instrumental rules, on the other hand, are precepts, maxims, stratagems, and tactics which are derived from experience and contribute to winning play. They are prudential or opportunistic considerations put into practice by players or teams” (1992:32-33). Daniel Philpott further consolidated this effort by developing his notion of constitution of international society (Philpott 2001:11-27). As he argues, “[M]ore precisely, *a constitution of international society is a set of norms, mutually agreed upon by polities who are members of the society, that define the holders of authority and their prerogatives, specifically in answer to three questions: who are the legitimate polities? What are the rules for becoming one of these polities? And, what are the basic prerogatives of these polities?*” (2001:12). Philpott defragments these ideas by developing what he calls faces of authority. In an effort that in my view both simplifies and consolidates these views, Georg Sorensen (1999) picks on the work developed mainly by Robert Jackson (1990) and further develops his notion of sovereignty as an legal institution (see also Werner and de Wilde 2001).

If institutions are defined as ‘persistent and connected sets of rules, formal and informal, that prescribe behavioural roles, constrain activity, and shape expectations, then sovereignty is an institution. In order to find out whether the institution of sovereignty is changing dramatically, we have to know what it was and is. It is helpful to look at the rules of sovereignty as making up a special kind of game played by a special type of player: the sovereign state. We may distinguish between two qualitatively different kinds of rules in the sovereignty game: constitutive rules and regulative rules (Rawls 1955; Searle 1995).

Constitutive rules are foundational, they define the core features of what sovereignty is. Constitutive rules ‘do not merely regulate, they also create the very possibility of certain activities’. This type of foundational rules, says Searle, comes in systems which characteristically have the form ‘X counts as Y in context C’ (Searle 1995:27). On the other hand, regulative rules ‘regulate antecedently existing activities’ (Searle 1995:27). The regulative rules of sovereignty regulate interaction between the antecedently existing entities that are sovereign states. How do states go about dealing with each other in war and peace, who gets to be a member of the society of states on what qualifications, are examples of areas of regulative rule. Such regulative rules would not be meaningful or necessary without the prior existence of the special type of player which is subject to regulation: the sovereign state. In other words, constitutive rules come first, the regulative rules second, without the former there would be no object of the latter. The next sub-sections will analyse more precisely how this interplay between the constitutive and the regulative rules of sovereignty is played out.

The Constitutive Rules of Sovereignty

First, what are the features of the entities which satisfy the X term in the game of sovereignty? Not any association can become sovereign; transnational corporations, churches, or football clubs do not satisfy the X term. Only a certain type of player

does, the one we label 'state'. Which features must the state have to satisfy the X term? It is commonly agreed that three elements are necessary: territory, people and government.

That is to say, the emergence of the constitutive rules of sovereignty (the Y term) is predicated upon the previous existence of states with a delimited territory, stable population and a government. The international legal order does not provide foundation for the state; it presupposes the state's existence. Recognising the appearance on a territory of a political entity showing the characteristics generally attributed to the state, it merely invests it with personality in the law of nations. Robert Jackson concludes classical international law is therefore the child and not the parent of states.

Once we have the X term we can proceed to the constitutive rule of sovereignty (the Y term). What is the definitional content of sovereignty that is bestowed on some (but not all) states? It is recognition of the fact that the state entity possesses constitutional independence. As emphasized by Alan James, sovereignty 'in this fundamental sense amounts to constitutional independence'. Constitutional independence, according to James, is a 'legal, an absolute, and a unitary condition'. That it is a legal condition means that sovereignty is a juridical arrangement under international law. The sovereign state stands from other all other sovereign entities, it is 'constitutionally apart' (James 1986:34). That means the sovereign state is legally equal to all other sovereign states. Irrespective of the substantial differences between sovereign states in economic, political, social, and other respects, sovereignty entails equal membership of the international society of states, with similar rights and obligations. The fact that every sovereign member state, irrespective of differences in substantial powers, has one vote in the UN general assembly is a concrete expression of this legal equality.

Constitutional independence is also an absolute condition: it is either present or absent. Finally, sovereignty as constitutional independence is a unitary condition. That means that the sovereign state is of one piece; there is one supreme authority deciding over internal as well as external affairs. Such is the case even in federal states or states with a high degree of political decentralisation; powers may have been delegated, but there is one supreme authority (James 1986).

To sum up so far: the constitutive content of sovereignty can be seen as a foundational rule in the form of "X counts as Y in context C". The X term are states with territory, people, and a government. The Y term is constitutional independence which is legal, absolute and unitary condition.

Context C is the international society of states. It has been customary in the neorealist tradition to talk of an international system, immediately reveals why this image is misleading. Relations between sovereign states involve social acts of recognition and of mutual obligations between states. Hedley Bull and Adam Watson (1992) made the distinction between system and society clear in their definition of international society. Note that the act of recognition confers a special status on states. The sheer physical features of the X term are not in themselves sufficient to guarantee the status and function specified by the term Y.

It is necessary to emphasise, even if the formulation is awkward, that the constitutive rule content of sovereignty is constitutional independence in the sense discussed above. It is this constitutive content which has remained fundamentally unchanged since the dominant principle of political organisation in the 17th century. The history of sovereignty from then to now is a history of the victorious expansion of the principle of political organisation embodied in sovereignty: constitutional independence (Spruyt 1994, Ruggie 1993).

Another way of bringing home the point that constitutional independence is a permanent feature of sovereignty is to visit authors who want to discuss changes in sovereignty. Robert Keohane, for example, analyses the changes in sovereignty in the context of the European Union, but also notes the stable, unchanging element in sovereignty, namely that a state has ‘independence from the authority of any other nation and equality with it under international law’ (1995:172). Robert Jackson identifies the changes in sovereignty driven by the emergence of quasi-states, but he also stresses the stable core of sovereignty: “constitutional independence of other states” (1990:32). Joseph Camilleri and Jim Falk, discuss at length the contemporary challenges and changes in sovereignty, but they also note how the world come to be organised in states who did not ‘acknowledge an external authority higher than their own’, and that “the ‘trappings of legal sovereignty remain intact” (1992:28). Samuel Barkin and Bruce Cronin analyse how ‘the rules of sovereignty vary’, yet they employ a fixed notion of state sovereignty: ‘institutional authority within a set of clearly demarcated boundaries’ (1994:128). Finally Cynthia Weber studies ‘various meanings of sovereignty’ but she still holds on to a constant core of that concept, namely sovereignty as the ultimate foundation of state authority (1995: 29-30).

In sum, there is a stable element in sovereignty which marks the continuity of that institution. That stable element is the constitutive core of sovereignty: constitutional independence possessed by states which have territory, people, and government. Even all those that discuss changes in sovereignty do not ignore this vital element of continuity. The question arises on how different theoretical frameworks approach this constitutive debate.

Sovereignty and its Regulative Rules: Emphasizing Transformation Promoted by Humanitarianism

The regulative rules of the sovereignty game have changed in several ways over time. One important area of change concerns the rules of admission. For a very long time, the sovereignty game was a European game, played by a European society of sovereign states. Other would-be members were held out because the Europeans found they did not satisfy basic criteria for statehood: a delimited territory, a stable population, and a dependable government with the will and capacity to carry out international obligations. When non-European states eventually became members, they did so by meeting the membership criteria set up by the Europeans. Consequently, the international society of states was ‘based on a selective membership principle which discriminated between a superior class of sovereign states and an inferior class of various dependencies’ (Jackson 1990:67). The precise criteria for recognition have always been a subject of debate in the society of states and for a very long period there were no clear rules supported by all sovereign states.

I cannot further pursue the discussion of recognition rules here (Bull and Watson 1984, Gong 1984, Jackson 1990:32-49). Even from these few remarks it ought to be clear that the rules of admission to the society of states have changed in several ways over time. Let me turn to the rule of the sovereignty game itself. Once the membership issue is decided, by what rules is the game played? Robert Jackson identifies a number of playing rules, among them ‘non-intervention, making and honouring of treaties, diplomacy conducted in accordance with accepted practices, and in the broadest sense a framework of international law ... In short, the rules include every convention and practice of international life which moderate and indeed civilise the relations of states’ (Jackson 1990:35).

It is immediately clear that these regulative rules of the sovereignty game have changed substantially over time. The geographical expansion of the international society of states was combined with a trend towards a more dense regulation of the relations between states. It is precisely at this stage that challenges to sovereignty arise. When the norms of non-intervention and equality of states prescribed by the game of sovereign states come under challenge then the all game becomes unsettled and in a state of potential flux. This dissertation is concerned with mainly one challenge to this stable condition.

Challenges arise from mainly two sources. First, developments promoted by capitalism, (western) modernity and globalisation: international regimes have been set up in a large number of areas; the size and number of international organisations has grown dramatically (Thomson and Krasner 1989; Agnew 2009; Grande and Pauly 2007). Second challenges promoted by changing configurations of practices of interventions which after the end of the Cold War have reinstated humanitarianism and concerns with weak or failed states in the vocabulary of international society (Krasner 1999).

If it would be exciting to pursue the transformations that the processes of globalisation are producing on state sovereignty, this dissertation will concentrate on the second of the challenges: those derived from changing configurations of practices of intervention. These practices have in themselves changed from an emphasis on human rights to an increasing preponderance of concerns with terrorism. Understanding these changes and the challenges to state sovereignty is the main concern of this dissertation.

2- Theoretical Framework

There are mainly two ways of how to develop a particular theoretical framework to approach sovereignty. One way to go would be to approach developments in sovereignty as a closed historical process (Philpott 2001, Jackson 1990, Weber 1995, Krasner 1999).

This theoretical reading of sovereignty is perfectly illustrated by Daniel Philpott (2001). As he concludes, “How do we identify legitimate constitutional provisions? How do we know when polities recognize obligation and which obligations they recognize? We simply look at claims about obligation which the polities agree upon. In the modern west, provisions of international constitutions are usually codified; they can be discovered in founding charters and major treaties, and are regularly reaffirmed and reinforced in protocols, pacts, and pronouncements. Decolonization was legitimated in a 1960 UN Declaration; the laws of the European Community were approved in the 1957 Treaty of Rome and revised in the 1991 Maastricht Treaty; minority provisions were codified in 19th century treaties and the League of Nations covenant.” (2001:23). He goes on to emphasise that there can be moments of instability where legal definitions appear to be changing. As he argues “[S]ometimes, as in Westphalia’s elevation of sovereign statehood, we must look beyond the mere text of a treaty to the signers’ understanding of the treaty”, but he further consolidates this period of legal indeterminacy with the idea it a “matter of ‘customary law’”. In the end he concludes “[T]hat constitutional provisions are expressed as obligation in codification or custom distinguishes them not only from mere habitual behaviour but also from mere moral ideas, which need only exist in human minds, and which find their expression in books, speeches, or conversations” (2001:23-24). This need to assess developments in sovereignty as a reflection of a closed legal process in further

consolidated by a particular theoretical understanding of these processes. Philpott develops a particular conventional constructivist approach to the analysis of the evolution of ideas in what he denominates as ‘revolutions in sovereignty’. A similar kind of closed legal approach to developments in sovereignty is adopted by other scholars. Robert Jackson consolidates this theoretical reading of sovereignty but develops a reading of the ideas that lie at the core of the legal developments rooted in the work of Michael Oakeshott (Jackson 1990:82-108). In a somehow different approach, Cynthia Weber magestly develops a post-structural theoretical micro-foundation for accounting for the development of practices of intervention (Weber 1995:27-35). But if this is a way to go about reading developments in sovereignty, most times the literature just focuses on what scholars and practioners say about sovereignty rather than any specific theoretical framework.

A different way to go on how to read theoretically sovereignty would emphasise, instead, how this concept evolves along with the discussion of what practioners and academics say about it. There is not a closed affirmation of a particular theoretical approach in this case – although one can aknowledge the meta-theoretical and theoretical differences of different theories along the way. There is, however, a conviction that sovereignty is in constant process of developing and this development derives from evolving rethoric. As Michael Ross Fowler and Julie Marie Bunck conclude, “operating on the assumption that those writing on international relations should analyze the actual conduct of states as well as the writings of scholars, we will approach sovereignty trying to discover what states say about the concept through their behaviour as well as what academics say about sovereignty in their works” (Fowler and Brunck 1995:23). In this sense the stability of the law is subject to the evolutionary nature of political balances. When a particular balance is codified and legally sanctioned, the evolutionary process enters a period of intermittent pause, a period that lasts as long as the new legal codes are effective and sustain the balance between the opposing forces that press for a resumption or reversal of the prior trendline. Viewed in this way, codified legal arrangements – such as those that define sovereignty in any era – are end points of numerous and diverse non-legal developments. Their codification reflects the premises that underlie those moments of convergence wherein past changes are synthesized in the hope of achieving a respite from uncertainty and a measure of stability. And for a while the law does stabilize relationships and institutions as its precepts evoke compliance and introduce regularity into public affairs. But eventually the political side of the balance resumes its evolution, at which point habits of compliance begin to attenuate, ambiguity begins to spread, and the legal arrangements begin to undergo recodification (Werner and de Wilde 2001). As James Rosenau succinctly puts it “[T]his is a conception that allows us to treat sovereignty as the culmination of complex psychological and socio-political processes rather than as simply an unwavering legal principle. The theoretical evolution of the concept of sovereignty is to be found not in constitutional documents, court decisions, or any other formal assertions of national or global norms, rather they stir in the minds and hearts of publics and officials and also take root in the practices and institutions of collectivities” (1995:199).

In order to record changes of regulative rules – as they relate to human rights – this last theoretical framework will be used.

3- Conclusion

This paper argued that the constitutive content of sovereignty can be seen as a foundational rule in the form of “X counts as Y in context C”. The X term are states with territory, people, and a government. The Y term is constitutional independence which is legal, absolute and unitary condition. In sum, there is a stable element in sovereignty which marks the continuity of that institution. That stable element is the constitutive core of sovereignty: constitutional independence possessed by states which have territory, people, and government. The question arises on how different theoretical frameworks approach this constitutive debate. It is the aim of this dissertation to develop on how this is done. On the other hand, it was argued that notions of sovereignty have evolved throughout history and time due to changing rules of international recognition.

On the other hand, two theoretical frameworks were emphasised that read developments in sovereignty in different ways. The first takes evolutions in sovereignty to be a closed legal process where the effort is to identify what was clearly stipulated in particular moments of history or address the developments of customary law. This closed approach reads sovereignty and its evolution as a end-product. A different approach will be, instead, used in this dissertation. Developments in sovereignty are rooted in what academics, lawyers, public opinion, journalists say sovereignty is. There are some ‘ground rules’ that govern the sovereignty debate – the constitutive and regulative debates emphasised above – but the way to approach these debates needs to be loose and undetermined. Sovereignty is rethoric, it is what we all say it is, it is rooted in the development of its practices.

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