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Dividing the Indivisible

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Dividing the Indivisible*

Of all the terms used in modern political and legal theory, »sovereignty« must surely be the most contested. The concept – if not, as many of the contributors to this volume insist, the reality – emerged in the 16th and 17th centuries in a bid to create a Europe of states that would be capable of bringing to an end the confessional conflicts which had divided most of the continent since the Reformation. It has subsequently been extended to cover a multiplicity of other domains of human interaction from gender to resource allocation; but, as the editors state in their introduction to this remarkable, and remarkably far-reaching, global history, it remains »both a product of and a causal agent behind the establishment of ›statehood‹.«

Sovereignty was, as Jean Bodin – who, together with Thomas Hobbes, was responsible for ensuring that the term would henceforth be the prime concern of any state – defined it as »the most high, absolute and perpetual power over the citizens in a commonwealth« *(république)*, which meant that it was the power to determine what the laws of the commonwealth should be. No other entity, neither secular nor religious, could participate in any way. Bodin's and Hobbes' prime concern was, as Philippe Denis reminds us here, not, as so many previous discussions of the state had been, with the form of government but with the nature of power. Within a true state, sovereignty could only be, in Hobbes's words, »immortal, incommunicable and inseparable«; hence Bodin's, and subsequently Hobbes', rejection of »the century-old theory of mixed government«.

In a striking, and highly persuasive, new reading of *Leviathan* (and *De Cive*), David Dyzenhaus argues, however, that what he calls the »all or nothing« understanding of Hobbes' conception of sovereignty – a conception that, as he says, has become »one of the forces behind Brexit, MAGA, and various other trends towards ›illiberal democracy‹« – is an oversimplification. Hobbesian sovereignty should instead be understood as a continuum at one end of which there is the »healthy sovereign«, the artificial person of the »Commonwealth«, and at the other the point at which he or they »cease to be a sovereign at all«. While the sovereign is still healthy, the state requires far more than simple power; above all, it requires a fully operative civil order that will guarantee the »safety of the people«. On this reading, the »all or nothing« conception of sovereignty has a role to play only at »the point where the continuum of *legality* [emphasis added] begins« and as »marking the end of the continuum […] at the point the sovereign ceases at once to be a sovereign«.

As sovereignty, in Bodin's understanding (but not Hobbes'), was still tied to the traditional idea of patriarchy, it could even, as Michael P. Breen argues in his essay, be asserted over crucial aspects of family life. Marriage granted the husband sovereignty over his wife; but it was possible for a civil court to adjudicate if a marriage was valid by deciding, by means of what was widely recognised to be a highly unsavoury and unreliable process known as the *épreuve du congrès*, whether the husband was impotent or not – further evidence that, in this period at least, sovereignty could be very largely »performative and contingent«.

In practice, it could also, as Fabrice Micallef demonstrates, be transferred from one sovereign to another – although this clearly violated Hobbes' claim that it was »incommunicable« – as when in 1585 the Dutch offered the sovereignty of the Netherlands to Henri III of France in exchange for his support in their struggle against the Spanish. It could never, however, be divided or shared; and this implied that it could have no place in any federal state, any kind of empire, or indeed any form of »international law«. As Henry Maine stated categorically in 1888, »indivisibility of Sovereignty […] does not belong in International

* Cornel Zwierlein, Daniel Lee (eds.), Sovereignty. European and Global Histories, 1400–1800 (Intersections 93), Leiden: Brill 2024, XIV + 416 p., ISBN 978-90-04-21862-8 (e-book)

Law«.[1] For anyone who wished to think beyond the monist state, this posed serious problems.

One of the greatest challenges to the Bodin / Hobbes conceptions of sovereignty derives from hitherto unoccupied and thus inevitably »shared« spaces, most contentious of which, in this period, was the sea. In 1619 the Venetian jurist Giulio Pace, in his defence of Venice's claim to the Adriatic, argued – in what Joshua Freed in his essay calls a »wildly interesting conception of sovereignty and the sea« – that the sea was, in effect, *terra nullius*: merely a piece of unoccupied land that happened to be covered in water. Venice could, therefore, claim the Adriatic in the same way that it had claimed parts of the *Terraferma*. This inevitably raised the troubling question of whether, or to what degree, possession and sovereignty were distinguishable. As Kenneth Pennington points out in his essay on sovereignty and property rights, sovereignty was clearly not, in Europe at least, synonymous with ownership, as Pace's supposition would suggest. Indeed, for most jurists, at least until the 19th century, the sovereign could not deprive its subjects of their property rights except, in Hugo Grotius' words, »for common use«. Anything less would have made any form of taxation a violation of the private rights of the individual. Anything more would be a form of tyranny.

Daniel Lee pursues this further in an essay which brings together Bodin, Grotius and Pufendorf to situate some kind of economic control over the sovereign's power within the all-embracing natural-law concept of the »duties of humanity« – those duties that, while they cannot be made binding in civil law, may nevertheless effectively prohibit »sovereigns from exercising their sovereignty in any way that might undermine their duty to strengthen their ties with foreigners, the rest of humanity«. These ties depend primarily upon commerce, and commerce depends upon money, and money, as Lee puts it, is »a juridical creation of sovereign authority«. Yet as it is money alone that makes commerce possible and, therefore, »preserves humanity«, once created it must be subject not to the civil law but to the »law of nations«. But this definition has the effect, once again, of dividing the sovereign authority; for it makes it impossible for the sovereign to alter in any way the value of its own money (for instance, by devaluation) without thereby threatening the »duties of humanity«.

One of the most contested forms of divided sovereignty in this period was between church and state. As Sylvio Hermann De Franceschi argues in his study of Paolo Sarpi's writings on the Venetian Interdict Crisis of 1606–1607, in which Pope Paul V attempted to impose papal juridical authority over significant »areas of Venetian political life«, Sarpi succeeded in establishing a broadly Hobbesian view of territorial and jurisdictional sovereignty in 17th-century Italy. It also, however, once again demonstrated just how fraught the notion of indivisibility could be.

Other places beyond Europe clearly had analogous conceptions of sovereignty. In his essay on Tokugawa Japan, for instance, Mark Ravina demonstrates how »sovereignty« was effectively divided between the shogunate and the emperor. The former claimed exclusive jurisdiction over the earth while the latter »ruled the heavens«. In the 1780s and 1790s, however, the shogunate turned increasingly to the imperial court to enhance its legitimacy. The consequence was ultimately to dissolve the distinction between the two, until the Meiji Restoration of 1868 effectively invested the emperor alone with a species of indivisible sovereignty. As Ravina says, the »failure« of the Tokugawa »to pursue exclusive sovereign claims enabled, rather than undermined, the creation of a modern state«. What, however, it apparently did not lead to was any subsequent awareness of the need for an unassailable concept of »sovereignty« (or indeed, of the »state«).

The definitional problems posed by any notion of undivided sovereignty inevitably become most acute in the context of the European overseas empires. In her essay on the Nawab of Arcot's dealings with both the British Crown and the East India Company in the second half of the 18th century, Tiraana Bains demonstrates how the Nawab was able to sustain an independent status between what were, in effect, competing sovereign powers, even though in his negotiations he, like other South Asians, »did not necessarily deploy the term ›sovereignty‹ or a straightforward Persianate equivalent«. And we must assume that he did not use one because he did not have one.

1 Henry Sumner Maine, International Law, London 1888, 58.

Something similar applied to other regions of Mughal India. Nicholas Abbott in his essay explains that as early-modern Muslims in India (and elsewhere) were beholden to a »perpetually expanding imperium bestowed by God«, they were inevitably far less concerned than »their European contemporaries to define the origins, facets, and limits of sovereignty – or to contemplate when and how it might be resisted – than to urge that it be put to its proper ends«. Cornel Zwierlein's account of the ultimately frustrated attempt to reconcile competing notions of sovereignty in the 18th century between France and the Ottoman Empire further underlines just how Eurocentric a concept sovereignty could be. This, as he phrases it, was an historical situation »where the *verba* are those of the (Western) historian and the *res* has (more or less) two coexisting forms, a European and an Ottoman one«.

In a compelling analysis of the role sovereignty played in early modern »company-states« – those private bodies that Hobbes tellingly called »worms in the entrails of a natural man« – Andrew Fitzmaurice and Kajo Kubala demonstrate how sovereignty, where it could not be divided, might simply be ignored. The company-states claimed »a type of political authority that enabled them to function in a state-like manner« without ever making any but indirect claims to sovereignty. They all recognised the ultimate authority of the state to which they were bound, until something, political or economic, seriously threatened their existence. Then, as in the case of the heirs to the General Court of Massachusetts Bay, they sought to become sovereign states themselves or – as in the case of the Dutch and British East India Companies – were absorbed by the state. As the authors conclude, whatever their ultimate fate might have been, »company-states« demonstrate not only »the limits of thinking about sovereignty, but also the possibility of divorcing assertions of political authority from sovereignty itself«.

This volume is an immensely valuable contribution to a subject of immeasurable importance, past, present and future. My only regret is that it stops at 1800, before the emergence of the modern »nation-state« and the beginning of the struggle, which is still with us, between the sovereign state and any real or imagined international order. Perhaps we may hope for a sequel?

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