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The Evolution of State Sovereignty: A historical overview

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Abstract: *The concept of the sovereignty has recently become a major bone of contention within international law and international relations theory. More recent scholarship has focused on the changing meanings of this concept across a variety of historical and political contexts. Moreover because of a process that has increasingly placed constraints on the freedom of action of states; the substance of the notion of sovereignty has changed and will further change in future. The very idea of absolute sovereignty is in many respects an outdated concept in modern international law and there are various factors causative to its erosion. As a result of especially globalization, there is a growing trend of interdependence and co-operation between states. Therefore this paper aimed at exploration of concept of sovereignty in light of its historical development. In short in this Paper the theoretical foundation of state sovereignty will be discussed by giving a broad overview of the historical development of the notion of state sovereignty.*

Key words: *Sovereignty, International law, Globalization, State*

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I. Introduction

Sovereignty is regarded as essential element of the state system. The term 'sovereignty' is derived the Latin word *superanus* meaning supreme. Therefore, sovereignty denotes supreme power of the state. In fact, the modern theory of the state system was perfected only when the concept of sovereignty was introduced into it. Jean Bodin, a French writer, was the first to formulate the concept of the sovereignty systematically. Although Aristotle in ancient days had also talked of supreme power located in different bodies according to the form of government ,but he had not given the idea of the sovereignty because, according to him, the power of the ruler or ruling body limited by law which existed above them. Further conditions in the middle ages were not favourable to the development of the concept of the sovereignty because the emperor's power was limited on the one side by the rights of the feudal lords, and on the other side by the claims of the pope to superior authority. Thus the idea of sovereignty made its appearance with the drawn of the modern epoch. In this Paper the theoretical foundation of state sovereignty will be discussed by giving a broad overview of the historical development of the notion of state sovereignty.

1.1 Defining sovereignty

The idea of absolute sovereignty is in many respects an obsolete concept in modern international law and there are various factors causative to its erosion. As a result of especially globalization, there is a growing trend of interdependence and co-operation between states. The sovereignty of states, therefore, continues to be limited by, for example, the internationalization and universalization of the human rights. Although state sovereignty is a basic principle of international law, the precise meaning of the term sovereignty is not clearly defined. Therefore the following possible definitions of sovereignty have been offered:

The Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein[1]

The ideas and views about sovereignty may vary from time to time, as changing times necessitate different approaches[2]. Fassbender notes that the concept of sovereignty has proven to be highly adjustable.[3] According to him sovereignty is a collective or umbrella term that indicates the rights and duties that a state is accorded by international law at a given time. These sovereign rights and duties constitute state sovereignty. The Sovereignty

[1] Bodley "Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia" 1993 New York University Journal of International Law and Politics 419.

[2] Jennings "Sovereignty and international law" in Kreijen (ed) State, Sovereignty and International Governance (2002) 27

[3] Fassbender "Sovereignty and constitutionalism in international law" in Walker (ed) Sovereignty in Transition (2003) 115.

is thus the legal status of a state as defined, and not only protected, by international law. Therefore, sovereignty is neither "natural" nor static. Because of a process that has increasingly placed constraints on the freedom of action of states; the substance of the notion of sovereignty has changed and will further change in future. Although it is not possible to formulate an all-inclusive definition of sovereignty, two major points of view with regard to the concept of sovereignty can continuously be identified. The first view is that sovereignty means absolute power above the law and that absolute sovereignty constitutes one of the most powerful and inviolable principles in international law.[4] The second view is that it is of utmost significance that states – as the most important subjects of international law – do not claim that they are above the law or that international law does not bind them.[5] Finally in this contribution the theoretical base of state sovereignty will be discussed by giving a broad overview of the historical development of the notion of state sovereignty.

1 2 Internal and external sovereignty

States whose subjects or citizens are in the habit of obedience to them, and which are not in themselves subject to any other (or paramount) State in any respect …. In the intercourse of nations, certain States have a position of entire independence of others …. This power of independent action in external and internal relations constitutes complete sovereignty (Bodley).[6]

Therefore, it is necessary to distinguish between the internal and the external sovereignty of a state. The internal sovereignty may be described as the competence and authority to exercise the function of a state within national borders and to regulate interior affairs freely. Further internal sovereignty thus comprises of the whole body of rights and attributes that a state possesses in its territory. The external sovereignty is traditionally understood as legal independence from all foreign powers, and as impermeability, thus protecting the state's territory against all outside interference.[7]According to Perrez external sovereignty broadly includes international independence, the right to international self-help and the authority to participate in international society.[8]In a view of MacCormick the distinction between internal and external sovereignty makes it possible to contemplate the division and limitation of state sovereignty.[9]

II. Traditional understanding of sovereignty

2 1 Jean Bodin (1530-1596)

The traditional understanding of sovereignty as independence and supreme authority may be attributed to Jean Bodin. According to Jean Bodin, the concept of sovereignty primarily entails the absolute and sole competence of law making within the territorial boundaries of a state and that the state would not tolerate any other law-creating agent above it. According to Bodin sovereignty is the supreme power of a state, but not the absolute power. Thus sovereignty may therefore be constitutionally restricted.

2.2 The Spanish philosophers: De Vitoria (1486-1492), Suarez (15481617) and Gentili (1552-1608)

Like Bodin, these philosophers subject sovereignty to the existence of a higher or supreme law. They all refer to the role of the ius gentium that governs the relationship between the states comprising this world community, but differ in certain respects on its meaning and relation to international law. According to Francisco de Vitoria, the ius gentium is the result of man's rational nature and natural law and therefore common to all mankind. A state cannot refuse to be subjected to international law as international law has been established by the whole world. The sovereign independence is thus not absolute as the sovereignty of a state finds its limits in the common good of the world community to which all states are subject.[10]

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[4] The Problem of Sovereignty in the Charter and in the Practice of the United Nations (1970) 2 is of the opinion that since the early stage of its growth, certain elements remained the attributes of sovereignty in the subsequent stages of its development such as "the notion that 1. Sovereignty is an essential attribute of state power, and, 2.that the essence of sovereignty is constituted by the independence of state power from any other power. We may also, however, observe a tendency to free the state from any form of limitation, both legal and moral, as well as an inclination to identify sovereignty with force (ie with material force or the physical possibility of realizing sovereignty), in which we find the main ingredients of the so-called theory of absolute sovereignty".

[5] Bodley "Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia" 1993 New York University Journal of International Law and Politics.

[6] Bodley refers to the definition of the concept "sovereign states" in Black's Law Dictionary (1993).

[7] Fassbender (n 3) 117; Fassbender "Article 2(1)" in Simma (ed) The Charter of the United Nations: A Commentary (2002) 70; Lee "A puzzle of sovereignty" 1997 California Western International Law Journal 253

[8] Perrez Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law (2000).

[9] MacCormick Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (1999)

[10] See Scott The Spanish Origins of International Law: Francisco de Vitoria and his Law of Nations (1934)

Also Francisco Suarez regards the freedom of states as limited by both international and natural law. While the communications and association between states are to a large extent regulated by natural reason, certain special rules could be established by the customs of different nations .The Alberico Gentili regards the ius gentium, as closely connected to, but not identical with international law.[11] It therefore appears that his idea of ius gentium is that of universal law, rather than a law between states.

2. 3 Hugo Grotius (1583-1645

The discussion of the concept of sovereignty is incomplete without reference to the ideas of the father of international law, Grotius. The Grotius distinguishes between the ius gentium, which is the customary law of nations or voluntary law (ius voluntarium), and the ius naturae, which concerns the international relations between states.[12]According to Grotius, the universal and binding natural law is the primary source of international law. Natural law is supplemented by the secondary corpus of international law associated with the consent of states.[13]Although international law is partly independent of the will of states, Grotius yet sees it as binding on sovereign states.

III. Westphalian Sovereignty

The Thirty Years War in Europe was ended in 1648 with the Peace of Westphalia. It was concluded in two different treaties, namely the Treaty of Munster and the Treaty of Osnabruck. The new world society that was established after the Peace of Westphalia was premised resting on the absolute sovereignty of its constituent members. The Peace of Westphalia recognised the equality of states as a principle of modern international law. Further the nation state was seen as an instrument of effective power, and international law was regarded as a law between the free and independent states which were primarily concerned with the promotion of their individual interests.[14] The Peace of Westphalia, however, obliged states to secure and protect the peace and thereby combined the principle of sovereignty with a duty to cooperate.

IV. The classical understanding of sovereignty

In the 18th century a distinction was made between absolute, perfect or full sovereignty on the one hand, and relative, imperfect or half sovereignty on the other. Absolute sovereignty was ascribed to monarchs who had an unqualified independence within and without their states. Relative sovereignty was attributed to those monarchs who were to some extent dependent on other monarchs in the different aspects of the internal or foreign affairs of the state. As a result of the distinction between absolute and relative sovereignty, the divisibility of sovereignty was recognised, although not universally, during this century.[15]Further according to this classical notion of sovereignty, international law has no binding force and a state therefore has the power to define freely its own competencies.[16] The revolutionary changes in the late 18th and early 19th century gave rise to a new concept of sovereignty which now included the concept of the equality of states as one of its essential elements. The internal order of the individual state was not only shielded from intrusion by other states, but also from any intrusion by international law.[17]International law was seen as a set of voluntary rules found in treaties or which derived from custom. It was basically bilateral and was not considered to extend beyond the correlative rights and obligations of its subjects.[18]

V. A new understanding of sovereignty

Since the beginning of the 20th century it has become increasingly apparent that the classical approach to sovereignty as absolute and unlimited authority constitutes a threat to international peace and to the existence of independent nation states. Duguit is of the opinion that the state is no longer a sovereign power issuing its commands. He argues that the idea of public service replaces the idea of sovereignty. To him the concept of

(translated by Gwladys L Williams)

[11] See Alberico Gentili De Iure Belli Libri Tres (translated by John C Rolfe in 1933) 67-68.

[12] See Grotius De Iure Belli ac Pacis (translated by Campbell in 1814).

[13] Ibid.

[14] Perrez Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law (2000).

[15] Lauterpacht (ed) Oppenheim's International Law Vol 1 (1947) 116.

[16] Perrez Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law (2000)

[17] Fassbender (n 7) 117; Fassbender "Article 2(1)" in Simma (ed) The Charter of the United Nations: A Commentary (2002)

[18] Lotus Case 1927 PCIJ Reports, Series A, No 10

sovereignty is in the process of disintegration insofar as the idea of public service increasingly forms the base of modern state theory.[19] Lauterpacht describes sovereignty as "an artificial personification of the metaphysical state". As such, sovereignty has no real essence and is only a bundle of rights and powers accorded to the state by the legal order. Therefore, sovereignty can also be divided and limited.[20] The principle of absolute sovereignty is therefore replaced by a concept of relative sovereignty, where the freedom of each state is limited by the freedom of other states and the independence of a state is subjected to international law.[21]

Moreover the first theory of relative sovereignty identified by Ninčić calls for a rejection of the classical idea that states are the only subjects of international law and claims that individuals are also subjects of international law. The result of this theory is that if the state is deprived of its status as a subject of international law, it can also no longer have sovereignty. The second, and probably the most prominent theory of relative sovereignty, contends that the theory of sovereignty is no longer in accordance with the development of positive international law and must therefore either be totally discarded or modified to new international realities through a process of "relativisation".[22] Thirdly, the theories of the common interest and the common good involve that states are required to sacrifice their individual interests as well as certain aspects of their sovereignty in favour of the common interest and the common good. A common feature of this theory is the striving to adjust the sovereignty of states in various ways and to varying degrees to the norms of international law. Sovereignty may to a certain extent be subordinated to international law. The sovereignty of one state, however, cannot be subordinate to that of another state because sovereignties are, by their very essence, equal. A consequence of this is that the concept of sovereignty tends to merge increasingly with the concept of independence. However, the independence of a state is not absolute. It is constrained by the equal freedom and independence of other states as well as by international conventions and specific agreements entered into by states.[23]

5. 1.Sovereignty as the responsibility to protect

The shift away from the idea of unconditional sovereignty is obvious in the emergence of the concept of responsible sovereignty. The Independent International Commission on Intervention and State Sovereignty was established in September 2000 by Canada. It was given the mandate to examine the relation between intervention for human protection purposes and state sovereignty. The Commission suggests that sovereignty should be seen as the responsibility to protect. According to the Commission the state authorities are responsible for the functions of protecting the safety and the lives of citizens and the promotion of their welfare.

5 .2.The United Nations and sovereignty

Since the United Nations Organisation was founded in 1945, the traditional idea of sovereignty has experienced a thoughtful modification and limitation. In its preamble and in Article 1 the Charter of the UN sets out its aim to prevent wars, to maintain international peace and security and respect for human rights. It furthermore aims to promote justice and welfare and to enable the necessary collective measures and international co-operation.

5.2.1. Sovereign equality

The article 2(1) of the Charter of the United Nations does not refer to the term sovereignty in isolation, but states that the United Nations is based on the principle of the sovereign equality of its members.[24]

5.2 .2.Sovereign equality

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5.2.3 The use of force

With regard to the use of force, Article 2(4) of the Charter of the UN stipulates that all Member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. The Charter therefore recognises the right to resort to force only in two instances: First, under the authority of the Security Council and secondly, when states exercise the right of individual or collective self-defence in terms of Article 51. Therefore, a state's sovereign equality depends on a

[19] Duguit Law in the Modern State (1921) (tr by Frida & Harold Laski) xliv 89.

[20] Lauterpacht Private Law Sources and Analogies of International Law (1927) 299. Also see Koskenniemi (n 90) 365.

[21] Perrez Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law (2000)

[22] Ninčić The Problem of Sovereignty in the Charter and in the Practice of the United Nations (1970

[23] Ibid.

[24] Cassese International Law in a Divided World (1986) 129 argues that the United Nations is not based on the full equality of its members, because Art 27(3) of the Charter grants the right of veto to the permanent members of the Security Council only. Therefore, the principle of equality laid down in Art 2(1) is to be interpreted merely as a general guideline, which is weakened by the exceptions specifically laid down in law

comprehensive prohibition of the use of force and an effective mechanism to implement and enforce this prohibition.

5 3.4. International human rights

The promotion of international human rights is a fundamental aim of the United Nations. The Charter therefore gives formal and authoritative expression to the protection of human rights. In the Preamble of the Charter it is stated that the United Nations is determined to reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small .Further The recognition of erga omnes norms in the realm of international human rights, for example the prohibition of torture and of discrimination based on race, sex, political beliefs and religion, indicates a far-reaching development in the process of universalising the meaning of human rights.

VI. Conclusion

Traditionally sovereignty has been denoted as the independence and supreme authority of a state. Therefore, sovereignty is often conceived as an absolute concept which implies that states are totally independent with regard to all other states and are above the rules of international law. However it is clear that state sovereignty is in the process of evolving from an absolute concept of unlimited freedom and independence to a relative concept where the freedom and independence of states are limited both by the freedom of other states and by international law. Internationally there has been a significant movement away from the classical idea of sovereignty as an absolute and unlimited concept. This evolution is still an ongoing process.

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