

The Elusive Sovereign

Philip Pettit

Background

If a state has a sovereign, then that agent or agency will be uniquely authorized, under constitutional or framework laws, to determine the laws of the country.¹ Some (framework) laws may unalterably constrain the mode or range of its law-making but otherwise the sovereign will be the ultimate authority on what the laws are.² The sovereign will dictate all those laws and, qua sovereign, be an unbound binder; and consequently, supreme in relation to other authorities recognized in law.³

But most constitutions in contemporary democracies are decentered or modular: they distribute power among different centers of legal decision-making. They operate to determine the law on the basis of institutional procedures: something like Hart's secondary rules (+/- Dworkin) or Kelsen's basic norm.⁴ They support a 'mixed constitution' insofar as at least the judiciary are independent; this, despite not exactly conforming to the democracy-aristocracy-monarchy trope.

Proceduralists like Hart and Kelsen reject the idea of sovereignty, with Kelsen explicitly arguing that the concept should be 'radically suppressed'.⁵ They agree with the absolutists (Bodin, Hobbes, Rousseau) that there is no sovereign in a mixed constitution, but disagree in holding that there still can be a state. Thesis: such skepticism about sovereignty in a decentered regime is unwarranted; the mixed constitution, whatever its form, allows, and even requires, a sovereign.

1. The requirements of a decentered regime

a. Agency

Whatever form decentered, law-fixing procedures take, they depend on agents: individuals or bodies that implement the procedures and determine the law. The lesson is as old as Kant: 'the ruler' has to be 'the organ of the sovereign', even if 'the sovereign...is the personified law itself, not its agent'.⁶

b. Constitutional agency

The agents who implement relevant procedures are not identified by their power but rather by the authority they enjoy under the framework or constitution.⁷ Otherwise, there would be no difference between a regime's evolving constitutionally and its suffering an external shock: at the limit, a revolution or a coup d'état.⁸ Assumption: a state is individuated by its (amendable, evolvable) constitution; thus, any unconstitutional change will affect the identity of a state (Aristotle).

c. Organized agency

Although many agents are involved in implementing law-determining procedures, they must be organized so that they don't cut across one another's aims or efforts. Otherwise the law might be an inconsistent, non-directive mess of instructions; it would fail the basic requirement for establishing a stable order. The organization required must ensure that the agents coordinate with one another and that at least general inconsistencies of law are avoided or capable of repair. We may assume it will program for uniformity of interpretation, as in a rule of law; but it must at least promote measures to establish 'a rule of judgment' (Athens).⁹

2. The case for why there is no sovereign in the decentered regime

Bodin, Hobbes, Rousseau hold that sovereignty requires just a single legislator/-ure; for them, executive and judicial interpretation does not involve law-making.¹⁰ And they each allow that the sovereign may merely preside over legislation, monitoring but not managing it: and this, as a standby or reserve authority.¹¹ But still, they all deny that a decentered regime involves a sovereign—or a state.

For *Hobbes*, a state emerges only when people authorize a spokesperson/body to judge for them, pledging to fall in line; this will be their sovereign. That sovereign, he says, must be an individual or a majority assembly (elite or popular). Like other absolutists he holds that the decentered regime lacks any such figure, so that it constitutes ‘not a state, but rather the corruption of a state’ (Bodin).¹²

Schmitt disagrees, arguing that there must be a sovereign agent/-cy within any regime: an agent with power to ‘decide on the exception’: i.e. whether normal law rules.¹³ But this is confused: there may not be such an agent recognized in a decentered regime, and an unrecognized power will not be sovereign, only capable of a *coup d’état*.

Hart thinks that there is no reason to posit a sovereign in the decentered regime: since he ties sovereignty to Austin’s view, which he rejects, that law is command. If law is command, as Bodin also argued, then as a commander, the sovereign cannot depend on another’s permission or be subject to its own commands. The sovereign will be an unlimited or absolute, not just a supreme, authority.¹⁴

But *Austin* identifies the democratic sovereign with the electors, so a question is: does electoral democracy ensure the presence of a sovereign, just on its own?¹⁵ No, since the electorate is not an agent, able to monitor and manage law-making (Hart). This counts against a variety of claims about popular sovereignty (R.Tuck).¹⁶

3. The case for why there is a sovereign in the decentered regime

Absolutists and proceduralists commit Whitehead’s fallacy of misplaced concreteness like Ryle’s Oxford visitor: ‘I’ve seen the Colleges. Can you show me the University?’.¹⁷ The independent agents and agencies in a decentered regime, being suitably organized, will constitute a corporate body, the state, as the Colleges do the University. And the state in that sense will be the supreme, if constituted, law-making authority.

The decentered constitution will authorize those who are to speak in the state’s name, and constrain and pressure them, so that they speak with one voice in ruling by law. Those authorized suitably may include the constituting, electing, contesting citizens, as well as the duly elected and/or appointed legislators, administrators, and judges. They act as a Hobbesian spokes-body—as well as the body’s eyes, legs and arms—in ruling domestically over subjects and in pursuing international relations.¹⁸

If the mixed constitution allows citizens power over (and under) the constitution, then this state may be identified with the people qua politically organized.¹⁹ It will support Hobbes’s equation between the state and the (constituted) people: an equation that he thought would be impossible under a mixed constitution. This was due to his hostility to ‘mixarchy’ and the strife he thought it would allow.

Whether or not it is a popular body, the decentered state will be the legal sovereign, acting with supreme authority in forming and imposing law on its subjects. The state is ordinarily taken to be an external sovereign in international relations; that same state, on this view, will be the internal sovereign too. The state will enjoy this status, indeed, under any constitution that makes it an agent.