Introduction

Sovereignty in Action

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1   Sovereignty (Re)activated

Sovereignty is the 'boomerang' concept of Western legal and political thought. For all the best efforts of scholars, politicians, lawyers and citizens to consign it to oblivion, sovereignty always returns, typically with a vengeance. The more its normative and explanatory force and its political valence are challenged, the more ubiquitous the concept of sovereignty seems to become. Unsurprisingly then, despite the recent intensification of supranational and transnational patterns of legal and political authority, once believed to be one more – and perhaps final – nail in sovereignty's coffin, we stand today at yet another critical juncture, with sovereignty flying back in our faces.

Sovereignty's tendency to 'stir' whenever its demise is threatened seems significant, but it is not immediately clear why. Does sovereignty's apparent inescapability suggest something about the deep and resilient institutional structure of Western societies, or does its resonance have cultural roots – speaking to an understandable but problematic longing for a past that never was, a 'golden era' of unchallenged, autonomous statehood? Or does it perhaps indicate sovereignty's propensity to adjust and reconstruct itself under new conditions and in response to new sets of problems?

Whatever account we give of the pressure that sovereignty is under today, and however we understand or envisage the response to that pressure, there is widespread agreement in most of the recent literature that sovereignty – particularly the modern tradition of popular sovereignty – *is* under pressure. Some writers have declared the concept at

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odds with the fragmented, multipolar and multi-layered integration and development of European and other international and transnational political and legal systems. They have pointed out that the spread of governance technologies to which democratic input becomes increasingly remote has altered the political architecture in ways that challenge the centrality – and perhaps even the continuing relevance – of popular sovereignty. And it is also hard to ignore the increasing number of transnational political and legal projects that seek to overcome the sharp edges of the modern Westphalian system by reducing the scope of state sovereignty and enacting non-sovereign authoritative frameworks. Theoretically and practically then, the consensus seems to be that sovereignty – at least in its high modern, state-centred modality – can no longer provide an adequate framework for the explanation, justification and organisation of legal and political authority. In this vein, scholars have either rejected sovereignty as a concept no longer able to make sense of emerging patterns of political and legal authority,[1] or they have tried to modify or weaken the concept by means of its 'fragmenting',[2] 'layering',[3] 'pooling'[4] or 'mixing'[5]. Hence, the ubiquitous claims of sovereignty's 'conflict',[6] 'transition',[7] 'slipping' and the proclamation of periods of 'competitive', 'cooperative', 'late-'[8] or 'post-'sovereignty. Even recent attempts to re-assert sovereignty's status as a fundamental legal and political category depict the sovereign as an inactive, 'sleeping' force.[9]

And yet, sovereignty is making a comeback. Most clearly so in the realm of political practice. Here, we witness populist movements and

[1] Joan Cocks, *On Sovereignty and Other Political Delusions* (Bloomsbury, 2014).

[2] Hent Kalmo and Quentin Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press, 2011).

[3] Thomas Ilgen, *Reconfigured Sovereignty: Multi-Layered Governance in the Global Age* (Aldershot: Ashgate, 2003).

[4] Bruno De Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition', in: Anne Marie Slaughter, Alec Stone Sweet, & Joseph H. Weiler (eds.), *The European Courts and National Courts* (Hart, 1998).

[5] Richard Bellamy, *Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU*, in: Neil Walker (ed.), *Sovereignty in Transition* (Hart, 2003).

[6] Samantha Besson, 'Sovereignty in Conflict', in: S. Tierney & C. Warbricks (eds.), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (British Institute and Comparative Law, 2006).

[7] Neil Walker (ed.), *Sovereignty in Transition* (Hart, 2003).

[8] Neil Walker, 'Late Sovereignty in the European Union', in: *Sovereignty in Transition* (Hart, 2003).

[9] Richard Tuck, *The Sleeping Sovereign* (Cambridge University Press, 2016).

parties, sub-state groups vying for independence and illiberal, authoritarian governments alike relying on the language of (national) sovereignty to assert their autonomy against larger, encompassing legal and political structures. But sovereignty has also returned in the theoretical domain. Although its status as the 'master concept' of Western legal and political thought may never be fully restored, several scholars have sought to reinstate sovereignty as central to an emancipatory politics. Some have delved deep into the concept's chequered history and found, in the shadows of the dominant tradition of sovereignty as command, a democratic store of sovereign thinking revolving around the notion of constituent power. Antonio Negri, for example, argues that 'to speak of constituent power is to speak of democracy'.[10] Similarly, Andreas Kalyvas writes that constituent power is 'attuned to the emancipatory promises of popular sovereignty'.[11] For their part, legal scholars, and in particular constitutional lawyers with their longstanding preoccupation with the formal pedigree of political authority,[12] have renewed their insistence on the importance of (national) sovereignty as an anchor of democratic self-rule and a bulwark of effective citizen participation against the encroachment of higher-level governance and the forces of global capital.

Clearly then, the proliferation of legal and political orders beyond the state leads not only to a challenging of old sovereign (state) claims but also to the emergence of new claims to sovereignty at a variety of (state, non-state and post-state) sites. Sovereignty today, in other words, is a concept 'in action', whether that involves *re*action to its many threats and provocations or new forms of *pro*active practice under its expanding umbrella. Its enduring legacy in a not yet transcended Westphalian imaginary fuels increasingly frequent re-assertive claims of traditional state sovereignty. At the same time, it is used to frame claims to legal and political authority of sub-state (e.g. new nationalist movements) and supra-state (e.g. the EU) polities. Protest movements more generally, whether nationally embedded or border-crossing transnational movements, also increasingly tap into an imaginary of sovereignty or constituent power to substantiate their claims in the face of already constituted powers.

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[10] Antonio Negri, *Insurgencies* (University of Minnesota Press, 1999) 1.
[11] Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', *Constellations* 12 (2) 2005, 225.
[12] See, for example, the essays collected in Walker, *Sovereignty in Transition*.

Sovereign practices are thus undergoing a renaissance of sorts. Sometimes insidious, as witnessed in the recent rise of authoritarian, illiberal states framing their claims and actions in terms of nationalistic sovereign statehood. Sometimes farcical yet destabilising, as in the over-blown 'America first' rhetoric (and selective practice) of Donald Trump. Sometimes dubious and deeply contentious, as in recent attempts of nation-states reasserting and demarcating their national sovereignty in the face of secessionist claims (e.g. Catalonia & Spain) or reclaiming sovereignty from more cooperative models of sovereignty (e.g. how Brexit was sold to the British electorate in terms of reclaiming national sovereignty). But in other cases, these new sovereign practices involve more rounded attempts to reclaim and renew the modern tradition of sovereignty as a model of popular self-government of a community of free and equal persons. Consider, for example, attempts to create a new sovereign authority based on a foundational collective commitment by plural *demoi* in (previously) fractured states such as South Africa.[13] Or consider the European Union's attempts to 'soften' the mutual exclusivity of Westphalian sovereignty by 'rationing' the sovereignty of its member states, or its attempts to accommodate in its multi-layered polity some version of the awakening sovereign self-consciousness among sub-state communities such as Scotland, Catalonia and Flanders. For all the diffi-culties of these developments, and their darker slipstreams, they also intimate a creative reconfiguration of legal and political arrangements stimulated by the activity of newly self-asserting sovereign actors.

Despite growing recognition that the concept of sovereignty remains an enduring – and variable – staple of political thought and reality, there are currently no collective studies dedicated to what we are calling 'sovereignty in action'. And so it is this headline that supplies the title, and the flagship theme, of the current volume. It is a theme that embraces the dynamic relationship between sovereignty and constituent power in the generation of old and new (*re*active and *pro*active) frames, claims and guides for collective action within, beneath and beyond the state. The chapters presented in this volume seek to illuminate various aspects of such sovereign activity. They situate sovereignty's political dimension in balance with its legal dimension. The historical dimension plays an especially important role in capturing the diachronies of sovereignty in

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[13] Andrew Arato, *Adventures of the Constituent Power* (Cambridge University Press, 2017); G. O'Donnell and P. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Baltimore and London: Johns Hopkins University Press, 1986).

action. It does so whether as a means of identifying key crossroads within the long development of the concept across political modernity, or of illuminating tensions within more recent debate, or of understanding the roots of interventions aimed at articulating newly 'active' components within contemporary sovereigntist politics.

More generally, instead of focusing on the constancy of sovereignty's role as a core concept in the international order of states, the chapters in this volume emphasise sovereignty's iterative remodelling and resurgence as a bottom-up notion and its theoretical and practical role as an imaginative framework for collective action. Against the grain of that seam of contemporary scholarship that portrays a redundant or reduced role for sovereignty in the near future, or argues that sovereignty can only be maintained as an important legal and political concept at the state level, the present collection seeks to characterise sovereignty as an important and resilient legal and political action-framing concept in *and* beyond the state. Going beyond claims of sovereignty's 'waning'[14] and such like adjectives signalling its reduced significance, and, in a different register, the claim that the popular sovereign is largely dormant,[15] our authors take issue with the literature that all too easily declares sovereignty's demise and argue that the awakening and re-assertion of popular sovereignty can be considered in more flexible and adaptable terms. They discuss the prospects and pitfalls for sovereignty's (re-)activation and focus on the manifold ways in which sovereignty can be, has been and continues to become active through the constitutive work of social, legal and political actors and institutions.

In differing measures, all of the chapters in this volume combine theoretical analysis and commentary on sovereignty's institutional history and contemporary direction. They seek to understand pivotal political events as framed and shaped by emergent theoretical understanding of sovereignty, just as they trace the challenges to and refinements of sovereignty theory to the history of political events and the debates surrounding these events. Sovereignty in action – these chapters therefore instruct us – is both about situating history in its formative ideational and theoretical context and, reciprocally, about situating theory in its formative historical context. These complementary focal points of inquiry – historical events and patterns emerging from (and reacting upon) ideas, and ideas emerging from (and reacting upon) history – provide the volume with its organising logic. The

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[14] Wendy Brown, *Walled States, Waning Sovereignty* (MIT Press, 2014).
[15] Tuck, *The Sleeping Sovereign*.

volume's early chapters – attentive to the long evolution of ideas about sovereignty in the history of political modernity (Part I – *Theory in History*) – return to hitherto understudied yet fundamental debates constitutive of sovereignty's meaning and use. And in their broad sweep they revisit a number of key points of conceptual innovation, including the so-called *Sattelzeit* of the late eighteenth and early nineteenth centuries, during which newly imagined and intensely theorised calls for (popular) sovereignty were the driving force for legal and political transformations in the American and French Revolutions. The volume's more focused historical-theoretical chapters (Part II – *History of Theory*) consider, in different ways, how variations in our deep conceptual frames reflect and capture the context-specific aesthetic, representational and institutional issues and dilemmas accompanying sovereignty's iterative manifestations. Across both parts of the book, however, there is a common general purpose. Each of the authors makes a concerted effort to connect the vital early modern events and debates on sovereignty with the developments and problems of today. Or, to put it in terms of our guiding 'action' theme, the authors are each, in their quite distinct approaches, interested in examining how the ways in which the sovereignty frame 'acts upon' events and 'is acted upon' by events today are intimately connected to the ways in which that frame 'acted upon' events and 'was acted upon' by events in the key formative period of political modernity.

2   An Outline of the Chapters

The chapters in the first section of the volume, *Theory in History*, provide a variety of reflections on the immediate and enduring relevance and influence of the sovereignty idea. Taken together, these offer a long historical perspective on the concept. They canvas sovereignty's gradual development in relation to a fluctuating set of conditions of possibility. Moreover, they provide a synoptic overview of the manifold ways in which sovereignty is in the process of adjusting itself to contemporary conditions. Although the authors in this section differ in the way they approach sovereignty, they converge on the idea that today's sovereignty discourse remains an active influence over our shifting legal and political constellation.

In his characteristically lucid style, *Dieter Grimm* declares the claim that we have now entered a post-sovereign era to be premature. Through a careful consideration of changes in the historical conditions under which sovereignty once emerged and how these changes affected it as

a concept and as a practice, Grimm shows that we live in an unprecedented
world in which public power is divided between national and supranational
entities. Historically, the identity between public power and state power was
the nexus that tied together differing conceptions of sovereignty. In this
light, the ongoing transfer of sovereign rights and competences from states
to supranational institutions poses a fundamental challenge to sovereignty's
viability as the organising axiom of Western legal and political thought.
Public power now also exists outside the state. Yet, as Grimm shows, the
concept's history is one of regular adjustment between theory and practice.
Since the advent of the modern constitutional state, sovereignty has been
progressively 'tamed', both internally and, with some delay, externally. The
division of public powers between national and supranational powers is just
another phase in that process. It does not follow, Grimm argues, that
sovereignty is now divided, abolished, or transferred to supranational insti-
tutions. Sovereignty is merely *limited* by international law. Supranational
bodies do not have state-like self-determination regarding their existence
and competences, and they have seldom if ever claimed sovereignty. The key
to understanding our current predicament, therefore, is to distinguish
between public powers and sovereignty. Public powers can be transferred
while sovereignty is retained. States have not yet thinned down their set of
competencies to such a degree that they can no longer reasonably claim to
be sovereign. Crucially, rather than declaring sovereignty obsolete, Grimm
argues that it is worthy of defence. Now tamed, sovereignty can no longer
justify wars of aggression, nor can it be relied on to systematically violate
human rights. But importantly, contemporary sovereignty still leaves space
for – even protects – democratic self-determination, which for the time
being still depends on a bounded citizenry that shares a political identity and
is capable of collective action. These conditions are presently much stronger
in states than in supranational organisations. Rather than a post-sovereign
era, Grimm concludes, ours is one in which sovereignty can be a haven of
democracy against the encroachment of international authorities.

Whereas Dieter Grimm approaches the present state of sovereignty
from a deep historical perspective, *Neil Walker*, while also grounding his
study in the historical origins of modern sovereignty, takes a more con-
temporary approach in order to probe the limitations and indispensa-
bility of a sovereignty-centred approach. He aims to overcome, or at least
challenge, the reductive logic of the recently revived Hobbesian meta-
phor of a 'sleeping sovereign'[16] – a dormant underlying power only

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[16] Tuck, *The Sleeping Sovereign*.

occasionally roused to action – by inviting us to consider instead the adjusted figure of the 'stirring sovereign'. The Hobbesian imaginary, Walker writes, leads to settlement bias and precludes or marginalises the activities of putative sovereigns who seek to rouse themselves within and beyond the boundaries of existing political communities. The universality of form, comprehensiveness of authority, and mutual exclusivity of claims of Hobbes's paradigmatic state-sovereigntist figure fits uneasily with today's highly differentiated mosaic of legal and political entities. The image of sovereign stirrings, Walker claims, provides a better grip on the increasingly complex and interlocking patterns of authority and contestation that have emerged in the global political sphere. The stirring metaphor helps us escape the binary understanding of sovereignty, shifting our focus to the multiplicity of actors, activities, factors and processes involved in the emergence of sovereigntist actors and claims. Walker identifies four 'stirring tendencies': the *reassembling* of sovereignty in more elaborate and inclusive democratic procedures; the *raising* of sovereignty through territorial claims that challenge or reassert the present pattern of sovereign authority; the *rationing* of sovereignty by supranational or transnational bodies to overcome the omnipotence of sovereign entities by distributing sovereignty over a set of overlapping and interacting bodies; and the more reactionary *reassertion* or reaffirmation of (national) sovereignty in response to challenges associated with reassembling, raising and rationing. Unlike the image of a sleeping sovereign, these modes of sovereign stirring allow us to make sense of the patterns of innovation in sovereigntist claims-making and politics, while reminding us of certain timeless framing patterns and associated limitations inherent in the deep structure of the sovereign imaginary.

Wary of recent attempts to theorise the people as an abstract legal entity and bring popular constituent power into the fold of liberal constitutionalism, *Jason Frank* draws our attention to an issue largely neglected by democratic theorists: popular manifestation. Rather than treating such manifestation as a measure of collective identity or a source of legitimacy, this aesthetic-political inquiry into forms of public political display is concerned with the varied detail of how 'the people out of doors' appear, self-present and act. In his unique brand of historically inflected political theory, Frank shows the importance of the various modes of popular assembly outside established legal authority and authorised procedures. Popular manifestation played a crucial role in the development of the democratic idea that collectives can act deliberately, that the people can manifest itself as a collective actor capable of

facilitating political change. Thus, Frank argues, democratic theorists should not approach popular constituent power as a juridical problem, or at least should not do so exclusively, but as a complex and dynamic political process that is mobilised and enacted in a range of ways. The problem of accommodating popular manifestation within a sovereigntist politics was recognised by major writers such as Carl Schmitt, Giorgio Agamben and Claude Lefort, but, as Frank shows, their emphasis on incarnation, incorporation and identity rather than appearance and collective enactment caused them to misrecognise its singular importance. Their otherwise divergent interpretations of popular manifestations coalesce in the more familiar framework of political theology, and so in a tendency to relate and reduce such manifestations to a sacralised (con)figuration of authority. Frank's contribution instead clears the ground for a fuller articulation of a theory of popular manifestation as part and parcel of a contested politics of democratic representation.

Raf Geenens returns to some of the issues that exercised Dieter Grimm in the opening chapter. He stands against a trend in the recent literature that, in response to cumulative challenges to the pre-eminence of a robust state-centred conception of political authority, holds that the concept of sovereignty has become conceptually incoherent and empirically redundant. He argues that we must rescue sovereignty because it might be our last vestige of resistance against the encroachment of global capitalism upon structures of democratic self-government. Geenens proceeds to defend a downsized but not emaciated conception of sovereignty as autonomy. Stripping the concept to its essentials, he contends that sovereignty's core purpose concerns the very possibility of consciously steering society. Rid of connotations of supreme and undivided power, sovereignty refers to the perspective a community adopts when it sees itself as collectively autonomous. Sovereignty therefore plays out at the level of our collective 'self-image'. It allows citizens to adopt a perspective from which they see themselves as a collective agent capable of autonomously choosing its own course.

The idea of sovereignty in action also guides the reflections in the second part of this volume, *History of Theory*. Its chapters focus on key moments or trends in sovereignty's history in which new manifestations of political power, critical junctures of political authority or shifting conditions of political possibility have led to innovations not only in practice but also in the theoretical conceptualisation of sovereignty, with its attendant aesthetic, representational and institutional dimensions.

Miguel Vatter argues that instead of constitutionally separating sovereignty and government, liberal constitutional thinking under the sign of contemporary 'public law' tends to turn sovereignty into the instrument of government. Rather than limiting government, Vatter claims, a constitutionalism based on the public law idea of a 'sleeping sovereign' produces a discourse that undoes any limitations on government. Vatter's chapter is distinctive in how it ties together debates on sovereignty, constitutionalism, neoliberalism and republicanism. Yet its core innovation consists of a novel interpretation of Ernst Kantorowicz's classic *The King's Two Bodies*. Overlooked in the recent recovery of 'public law' by scholars such as Martin Loughlin, Richard Tuck, Dieter Grimm and Quentin Skinner, Kantorowicz developed an innovative theory of political theology which he brought to bear on the origins of modern constitutionalism. Through his engagement with Kantorowicz, Vatter tells a cautionary story, criticising the dominant contemporary public law conception of sovereignty, according to which state sovereignty employs constitutionalism to limit government. Under the metapolitical narrative often associated with this conception, neoliberalism has emerged as a threat against which state sovereignty must be protected. But according to Vatter, the public law-centred conception of sovereignty, with its historically rooted suspicion of the unbridled sovereign, *in fact* leads to government assuming constituent power and employing constitutionalism in order to limit the political life of citizens. In Vatter's perspective, then, a public law conception of sovereignty, rather than a protection from or counterpoint to neoliberalism, is the condition of possibility for neoliberal governmentality to emerge. If sovereignty is to remain a viable concept to counteract the ongoing symbiosis between neoliberalism and global constitutionalism, Vatter concludes, we need instead an alert republican sovereign, not a sleeping one.

Pasquale Pasquino explores the double role of the people as both constituent and constituted power in our constitutional imaginary. These 'two bodies' of the people reflect the complex genealogy of constitutional thought. Not until Sieyès and his efforts both to justify and set limits on the prerogatives of the monarchical sovereignty of the early modern French state, did we acquire the basic distinction between constituent and constituted power, and so the conceptual means for the double invocation of the people. Pasquino's reflections dwell on the modern, post-Sieyès concept of popular sovereignty as constituent power. He shows that the constituent power of the people is the