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SENSE ON SOVEREIGNTY

Noel Malcolm

CENTRE FOR POLICY STUDIES

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Sense on Sovereignty

An anachronism?

Any Martian who spent the year 1991 observing events on Earth would have concluded that something called 'sovereignty' was one of the most important elements of human affairs. The year began with a military confrontation in the Gulf, which then turned into a full-scale war, to restore the sovereignty of Kuwait. The focus of world events then turned to the Kurds, who not only wanted to topple Saddam Hussein but also wanted a sovereign Kurdish state. Then it shifted to the Baltic states, and to republics elsewhere in the Soviet Union, which were proclaiming or preparing to proclaim their own sovereignty. Throughout the second half of the year, people were dying and homes were being destroyed as a consequence of the decision of the republican governments of Slovenia and Croatia to declare sovereignty too. Finally, in December, our Martian would observe a meeting of 12 heads of government at Maastricht, where the term 'sovereignty' may possibly be mentioned, if we are lucky, from time to time.

If our Martian had been spending the last few years mainly in Britain, learning the meaning of political terms from their usage in contemporary British debate, he would by now be rubbing his antennae in disbelief. From a speech by Mr Edward Heath, for example, he would have discovered that 'the traditional concept of national sovereignty is the doctrine of a period that has passed'.[1] From Mr Paddy Ashdown he would have learned about the dangers of being 'obsessed by abstruse, abstract, almost medieval arguments about sovereignty'.[2] An official publication of Mr Ashdown's party would have confirmed that 'increasingly, then, the concept of national sovereignty is outdated.'[3]

1. Speech to the Belgian Royal Institute for International Relations and the College of Europe, Brussels, 29 May 1989.

2. Speech to the Royal Institute of International Affairs, London, 28 June 1990.

3. *A Europe for Democrats* (Federal White Paper no. 1, Jan 1989), p. 2.

If he read *The Spectator,* he would have been struck by an article by Sir Leon Brittan comparing the theory of sovereignty to the geocentric theories of medieval astronomy, which had long ago been 'smashed by ... new facts'.[4] And if, searching for a wider perspective, he had gone to the Office for Official Publications of the European Communities, he could have bought (for 3.6 ecus) a copy of a collection of speeches by the late Altiero Spinelli, where he could have read a stern warning about the dangers of 'the delusion of anachronistic national sovereignty'.[5]

Delusions of power

In order to see why all these distinguished people came to the conclusion that sovereignty was outmoded, we must understand what they thought it was in the first place. Mr Heath offers a useful explanation: 'At its most extreme, it [i.e. the traditional concept of sovereignty] holds that the national will should not be limited or affected by influences originating outside the national boundaries.' So sovereignty is an ideal of invulnerability and omnipotence: the ability to remain untouched by all external 'influences', or, if need be, to overcome them. He continues: 'This creed was at its height in the nineteenth century with the growth of the colonial powers .... Power depended on wealth; wealth depended on strength; and a strong country could do what it liked.' Today, however, no country can do entirely as it likes; therefore no country is sovereign. Take the interdependence of trade, for example. 'We in Britain export over a third of everything we produce'; we are deeply affected, therefore, by the external influence of foreign buyers and producers; and yet 'we do not object in order to protect our sovereignty'. Interdependence means no country is absolutely powerful. Therefore no country is sovereign, and sovereignty is obsolete.[6]

4. 'The Discarded Image', *The Spectator,* 15 December 1990, p. 14 (citing a phrase from C. S. Lewis).

5. Spinelli, *Battling for the Union,* Brussels-Luxembourg 1988, p. 15.

6. Brussels speech (see note 1 above).

Now, one does not need to be a philosopher or an historian to notice that there is something odd about this argument. It is historically odd because, if international trade is incompatible with sovereignty, then sovereignty should have gone out of fashion around the time of the Phoenicians. The nineteenth century saw the flourishing of a colossal and elaborate system of world trade; yet according to Mr Heath, sovereignty was then in its heyday. And his argument is philosophically odd because it suggests that there could never be more than one properly sovereign country in the world: only global omnipotence could count as full sovereignty. Given that no such country existed, all the countries which lacked such absolute power could only have differing degrees or percentages of sovereignty; and those degrees of sovereignty would constantly be changing in response to events both inside the country and outside it. Every time a Swedish child developed a liking for chocolate, for example, the strength of an external influence (the economic bargaining power of cocoa producers) would increase, and Sweden would become a little less sovereign.

This equation of sovereignty with power is not inherently absurd or self-contradictory, but it does contradict the normal usage of most informed users of the term (particularly lawyers and political philosophers) in the past. Nevertheless, Mr Heath's view of sovereignty is shared not only by Liberal Democrats and Italian Communists, but also by many Conservative politicians and some Labour ones. Mr Michael Heseltine has criticised what he calls 'an old yearning for power', a desire for 'imperialism ... able to exercise "sovereign" power rather than having to share it. The very language is about a long-lost world. The modern world is interdependent'.[7] He is not against yearnings for power, of course, nor is he complaining about the identification of sovereignty with power itself. On the contrary, he argues that because sovereignty means nothing other than power, it has no connection with independence. 'Continental Europeans', he thinks, have understood this already: 'their determination to exert continuing influence in a world of multinational companies, of vast currency flows ... has

7. *The Democratic Deficit* (CPS Policy Study no. 110), London 1989, p, 12.

taught them that they can enjoy a greater measure of sovereignty together than apart. They want to be in charge of events and not submerged by them. They want true sovereignty'.[8] So the greater the power you have — or at least, the greater the power that belongs to the larger body of which you are a part — the more 'true sovereignty' you have also.

This idea of true sovereignty was also expressed by Mr (as he then was) Geoffrey Howe in the debate on the EEC Membership White Paper in 1975, when he said: 'I believe that continued membership will act to the benefit of true sovereignty, sovereignty of the kind for which we have striven as elected representatives — namely, our power to influence our own destiny'.[9] He was then echoing the Wilson Government's White Paper itself, which declared that membership was desirable because it would make us 'better able to advance and protect our national interests — this is the essence of sovereignty'. More recently, Sir Geoffrey Howe has defined sovereignty as 'a nation's practical capacity to maximise its influence in the world'.[10]

The identification of sovereignty with power is nowadays so widespread that it passes without comment in almost every parliamentary debate on European affairs. From a debate in December 1990 I select, almost at random, two comments. One is by a Tory, Mr Anthony Nelson: 'What sovereignty or independence can there be if one's country is economically dominated by one's neighbour?' The other is by a Labour member, Mr Robert Wareing: 'If we remain outside an expanded Europe which contains within it a central bank and a single currency, what sovereignty shall we have? How shall I be able to fight

8. Heseltine, *The Challenge of Europe: Can Britain Win?,* London 1989, p. 210.

9. Hansard, 8 Apr. 1975, col. 1139.

10. 'Sovereignty and Interdependence: Britain's Place in the World', *International Affairs,* vol. 66 (1990), pp. 675-95. In this article, Sir Geoffrey describes sovereignty as something like a bundle of sticks. On a previous occasion, he explained that sovereignty is 'not something you keep in an urn on the mantelpiece', I suppose this might depend on how small the neck of the urn was, and how large the bundle of sticks.

for the jobs of people in Liverpool if I have no access to funds?'[11] Mr Nelson, one presumes, must find the sovereignty of the Baltic states absurd. And Mr Wareing thinks that sovereignty means having access to other people's funds. Any reader who can see nothing odd about Mr Wareing's concept of sovereignty should probably stop reading at this point.

The myth of 'economic sovereignty[1]

The attempt to identify sovereignty with power does sometimes lead to claims so bizarre that any normal user of the English language will baulk at them. But it has also produced statements apparently so plausible that they have become commonplaces of our contemporary political wisdom. One example of this is the term 'economic sovereignty', as popularised by Sir Leon Brittan. When the West German Bundesbank raised its interest rates in October 1989, the Chancellor of the Exchequer raised British interest rates less than half an hour later. In a succession of interviews, Sir Leon commented that Britain's 'economic sovereignty' had lasted roughly 20 minutes. This claim was then widely repeated by commentators and politicians who were keen to argue that since our 'economic sovereignty' was evidently so worthless, our sovereignty in general must be worthless too.

'Economic sovereignty' is indeed a worthless concept, an Aunt Sally created by Sir Leon for the pleasure of throwing stones at it. The meaning he attributed to it was something like 'total economic power', the power to resist all forces or influences in the economic sphere. It is only surprising that he did not also invent the term 'meteorological sovereignty', meaning total control over the weather, all the better to convince us that sovereignty is a silly, mythical idea. He could then have argued that a government which brought in new heating allowances during a cold winter was displaying its lack of sovereignty, because it could not control the weather.

The raising of interest rates by the Chancellor was indeed a sign

11. Hansard, 6 December 1990, cols 525, 536.

that he did not possess total economic power. But it was also, in fact, an instance of the exercise of sovereignty in the non-mythical sense of the word. The Chancellor was exercising his authority as the finance minister in the government of a sovereign country. British interests rates rose when they did because the Chancellor of a British government, elected by the British people, was pursuing a particular financial policy which involved a stable exchange rate between the pound and the deutschmark. If his policy had been to let the pound sink, interest rates would not have been raised. It may be (though opinions differ on this) that the Chancellor was doing the only sensible thing. Similarly, if I am carrying an umbrella and it starts to rain heavily, observers may say that I am doing the only sensible thing when I put my umbrella up. Nevertheless, the decision is mine, freely taken on my own authority. Sir Leon might say that my meteorological sovereignty had lasted only a few seconds between the first drops falling and my umbrella going up, so that my sovereignty in general, my right to take my own decisions over my own actions, was a worthless thing. He would go on to argue, perhaps, that I would gain 'true' sovereignty if I handed over control of my umbrella to a committee of meteorologists in Brussels.

The heart of the matter

The central fault of all the statements about sovereignty that I have quoted so far is that they fail to make any distinction between power and authority. That distinction is the basis of all legal understanding: if you do not have the concept of authority as something differing from mere power, then you cannot have the concept of law as anything other than the mere application of force. It is not a very difficult distinction to grasp, even though it seems to be beyond the reach of many of our leading politicians. To illustrate: a terrorist holding a group of people hostage has power, but he does not have authority; a government-in-exile in London during the second world war may have had authority, but it had little or no power. Imagine two cases of violent entry to a house. In each case, a heavily built man kicks down the front door, enters the house, intimidates the occupants with a gun and begins ransacking their possessions. In the first case, the man is a dangerous criminal. In the second, he is a policeman with a search warrant entering the house of a drug dealer. A purely physical or ’scientific' de-

scription of what happened in each case would detect no difference: they would both be equal examples of the exercise of power. The only difference between the two cases is the difference between power and authority.

The term 'sovereignty' can be used more or less loosely, of course. It is not something with a strictly stipulated meaning, like the term 'titanium'. As with most concepts, it inhabits a whole area of meaning; but we can distinguish between the core of that area and the periphery. In some of its peripheral senses, it may mean little more than power: the phrase ’a sovereign remedy', for example, means something that is a very powerful cure. But the core of the meaning of sovereignty is located in the language of political philosophy, constitutional theory and international law; and in all of these fields, it has a meaning which involves authority rather than simply power. There is nothing question-begging about beginning an enquiry into the meaning of sovereignty by asserting that the concept of sovereignty involves the concept of authority: that is simply a recognition of how the notion of sovereignty is used by people who mean something distinctive when they use it. Some theorists may want to take the concept of authority, break it down and resolve it entirely into the concept of power: legal positivists do this (including, as it happens, one of the leading exponents of the modern theory of sovereignty, John Austin), and so do most sociologists and some so-called political scientists — that is, people who assume that all human relations can be reduced to power-relations. But at least they usually start by recognising that the concept of authority is used differently from the concept of power. That difference is what they set out to explain, and, if they are successful, to explain away. Only our modern politicians seem not to notice any difference in the first place.

One small potential difficulty can be eliminated at this point. The distinction I am concerned with is the distinction between the *concepts* of power and authority, not between the *words* 'power' and 'authority'. The word 'power' is often used, in legal discourse, to mean a particular authority — as in 'power of attorney', for example. A Minister may be said to have the 'power', under an Act of Parliament, to make certain orders or administrative decisions. In these cases the *word* 'power' is used to signify the *concept* of authority, So long as the distinction

between concepts remains clear, the double usage of the word 'power' should not pose any problem to the argument.[12]

Another potential difficulty is either so small that it can be ignored, or so large that it must stop all arguments about sovereignty in their tracks. This is the claim that the term 'sovereignty' is used in so many different ways that it cannot have any proper meaning, and should therefore be dispensed with altogether for the sake of clarity.[13] The claim is usually supported by a bewildering list of different meanings, culled from different theorists writing in different contexts. A similar exercise could easily be performed with almost any important legal-political term, such as 'right', 'liberty' or 'law'. Banning the use of the terms is surely the least helpful way of solving any of the arguments in which those terms are normally employed. The multiplicity of usage need not stop us from trying to find the core meaning of the term 'sovereignty'.

In reality, the lists of different meanings of this term are not so bewildering after all. They can first of all be divided into authority-meanings and power-meanings; I propose to concentrate on authority-meanings. These can then be divided into the two traditional categories of 'external sovereignty' (the sovereignty of a state in the international sphere) and 'internal sovereignty' (the authority of a state and its organs over its citizens).[14] I propose to start with external sovereignty, because the issues involved are comparatively clear and straightforward. If a clear meaning can be found for external sovereignty, this may help to clarify the meaning of internal sovereignty too; and if it can also be shown that the two are inherently connected, then the objection about multiple meanings can be pushed aside.

12. For a lucid statement of this point, see K. \V. B. Middleton, 'Sovereignty in Theory and Practice', *Juridical Review,* vol. 64 (1952), pp. 135-62; here pp. 135-6.

13. For a classic and influential statement of this claim, see S. I. Benn, 'The Uses of "Sovereignty"', *Political Studies,* vol. 3 (1955), pp. 109-22.

14. The distinction goes back to Wheaton, *Elements of International Law,* 3rd edn, London 1846, pp. 55-7.

Sovereignty at large

International law has a fairly clear concept of sovereignty. Indeed, public international law could hardly exist without such a concept, any more than ordinary civil law could exist without the concept of a person. Public international law is concerned with the relations between states. Not all states need be sovereign states: they may be dependencies, colonies or protectorates, for example. But non-sovereign states must be dependent, directly or indirectly, on other states which are sovereign. One classic text, the Montevideo Convention on the Rights and Duties of States (1933), describes statehood as follows: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations into other States'.[15] This description would fit some entities which are not sovereign states: Bavaria, for example, has the right to conduct foreign relations in matters which come under its own competence. So to convert the Montevideo wording into a description of a sovereign state, we need to alter (c) into something like 'independent government' or 'government not subordinate to some other government'.

A sovereign state is one which is fully independent; this independence, obviously, is a matter of authority rather than power. A small state may be dwarfed by a powerful neighbour, but so long as it is not legally subordinate to that neighbour, it is a sovereign state. In the words of a famous opinion delivered by Judge Anzilotti on the Austro-German Customs Union case in 1931, the independence of Austria was 'nothing else but the existence of Austria ... as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as *sovereignty (sttprema potestas),* or *external sovereignty*, by which is meant that the State has over it no other authority than that of

15. D. J. Harris, *Cases and Materials on International Law,* 3rd edn, London 1983, p.80.

international law.'[16] In another classic judgement, the Island of Palmas case (1928), Judge Huber declared: 'Sovereignty in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[17] As Judge Anzilotti pointed out, 'independence' does not mean complete freedom from obligation: on the contrary, it is a characteristic of sovereign states that they can make treaties, and they may then be bound by their treaty obligations in all sorts of ways. However, 'As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.'[18]

Sovereignty at home and away

The so-called 'external sovereignty' of a state, then, is its independence (in terms of authority) of other states. As an independent state it must have full competence to act internationally: it acts, that is, under its own authority, not needing to get authorisation from any superior state. Does this tell us anything about the nature of 'internal sovereignty' as well?

The author of one standard modern work on statehood in international law begins his list of 'the exclusive and general legal characteristics of States' with the following two distinct principles: '1. In principle States have plenary competence to perform acts, make treaties and so on, in the international sphere ... 2. In principle States are exclusively competent with respect to their internal affairs ... This means that their jurisdiction [over those internal affairs] is *prima facie* both ple-

16. Ibid., p, 85. Judge Anzilotti went on to contrast such states with 'the exceptional and, to some extent, abnormal class of States known as "dependent States"'.

17. Ibid., p. 151.

18. Ibid., p. 85.

nary and not subject to the control of other States.'[19] At first sight these two principles may seem to have little in common. On closer inspection, they are two sides of the same coin. When a state makes a treaty, it is not just acting as an abstraction in a realm of legal entities; it is entering into obligations which will affect the real lives of some or all of its own citizens. A treaty on coastal waters may change the rights or duties of its fishermen, a treaty on reparations may require new obligations on its taxpayers, and so on. This is why the provisions of treaties are so often also embodied in national legislation. If some areas of a state's internal affairs were not within its own competence — if, for example, its fishing industry or its tax system were within the competence of some other, superior state — then its competence to make external undertakings would be limited accordingly. This helps to explain why the *Land* of Bavaria, although able to act externally in some regards, is not a sovereign state. It lacks full external competence because it lacks full internal competence - and vice versa.

The claim is sometimes made (usually by writers who are hostile to the whole concept of sovereignty) that 'external and internal sovereignty do not in any obvious way refer to the same thing'.[20] They may not refer to the same thing, but they do connote different aspects of the same thing, A way of checking this is to perform a simple thought-experiment: try to imagine a state possessing one without the other. Could it have full external competence if it were internally subject to some other state's authority? This is hard to imagine; perhaps the closest to this in the real world is the so-called 'sovereign' order of the Knights of St John of Malta, which is not a state at all, and merely enjoys (parasitically, so to speak) some of the privileges of sovereign states, such as diplomatic immunity for its accredited representatives. Could a state have full internal competence without full external competence? Here the nearest historical example is the status of British Dominions such as Australia in the years leading up to the Statute of

19. J. Crawford, 'The Criteria for Statehood in International Law', *The British Year Book of International Law,* vol. 48 (1976-7), pp. 93-182; here p. 108.

20. C. R. Beitz, 'Sovereignty and Morality in International Affairs', in D. Held, ed., *Political Theory Today,* Oxford 1991, pp. 236-54; here p. 243.

Westminster of 1931. But although the government of the Commonwealth of Australia had authority over most aspects of its people's lives, it did not have full internal competence, and Australia was not a sovereign state. It had come close to being sovereign; but a state either is sovereign, or is not.

It is a useful corrective to the commonly made separation of external from internal sovereignty to point out that they are two sides of the same coin. But this statement must itself be slightly corrected, since it implies an exact equilibrium of importance between the two. Again, a simple thought-experiment is sufficient. If some unfortunate detonation of neutron bombs were to destroy all human life outside the borders of the United Kingdom, the United Kingdom's external sovereignty would become inoperative. In the long run, if no new independent settlements ever occurred outside the United Kingdom's borders (or if the United Kingdom as such expanded to fill the rest of the world), the very term 'external sovereignty' might come to be regarded as meaningless. But the internal sovereignty of the United Kingdom could still be referred to as a kind of authority which was operative and real. There is something prior, something fundamentally more important, about the 'internal' half of the argument, One way of confirming this point is to look at the internationally accepted principles for the *recognition* of sovereignty. A state can only start to exercise external sovereignty once it has been recognised as a sovereign state; and among the criteria for recognition is the requirement that that state should already have a government which exercises, or at least enjoys the right to exercise, authority over its population and territory.[21] As a general rule, internal sovereignty must come first.[22] *

21. See Crawford, 'The Criteria for Statehood[1] (above, note 19), pp. 116-19.

22. The question 'is recognition declaratory or constitutive?' is often debated by international lawyers. The answer must surely be that it declares a pre-existent fact, but that this declaration itself then creates or constitutes a new legal situation at the international level.

The constitutional crux

We have come very close, then, to identifying what it is that qualifies a state as sovereign. It is a matter of plenary and exclusive competence, a matter of enjoying full authority internally and not being subordinated to the authority of another state. The term 'competence' is a legal term; we are talking here not only about the state's entire system of laws and law-making, but also about the whole range of activities of legitimate government, whether legislative, judicial or executive. There is one term which can be used to stand for the way in which all such authority operates within a state: 'constitution'. If the state's constitution is itself subordinate to the constitution of another state, or of some larger entity of which it is (like Bavaria) merely a part, then it is not a sovereign state. If a state is constitutionally independent, it is sovereign: the neatest definition of sovereignty, therefore, is 'constitutional independence'.[23] As the best recent writer on this subject has put it, 'A sovereign state may have all sorts of links with other such states and with international bodies, but the one sort of link which, by definition, it cannot have is a constitutional one.'[24]

At this point we have perhaps solved one problem only to raise another. We have found a clear and sensible meaning for the term 'sovereignty', but only by using another much debated term, 'constitution'. I have never seen a neat definition of this term, so let me offer one of my own. A constitution is 'a set of rules for the exercise of political authority in a legal order'. Some of these rules may be written down in a single document which is endowed with special legal authority, such as the American Constitution. Other rules, even in the case of America, remain unwritten: these are known as constitutional conventions. In the United Kingdom many of the rules are unwritten, but quite a few can be found in written form, in documents such as the Parliament Acts, the Representation of the People Act, the Royal Assent Act and so on. It is sometimes claimed that the United Kingdom does not have a constitution; but this is just a misleading piece of shorthand, meaning that the United Kingdom does not have a single

23. See Alan James, *Sovereign Statehood: the Basis of International Society,* London 1986, especially pp. 24-39, to which I am indebted.

24. Ibid., p. 24,

privileged document. All states have constitutions.

Even the most unpleasantly capricious autocracy must have a) the rule that the autocrat's will is to be obeyed, and b) some other rules by which the subjects can distinguish the authorised agents of the autocrat's will from unauthorised thugs. Without some such rules, the people would be living not in a state at all, but in mere anarchy.

In normal states, however, the legal order is vastly complex, and every aspect of the government's activities will be covered by some legal provision or other. If one looks at any particular action by the government and asks whether it has the authority to do such a thing, a specific answer in legal terms can usually be given. There may be a relevant clause in an Order in Council, for example. These justifying reasons are part of a hierarchy of legal reasoning; if one asks why the Order in Council is legally valid, the answer is that it was made under the provisions of a valid statute. But if one asks why the statute should be enforceable in court, the only answer is that it is a valid statute - that is, it was properly entered in the statute book and has not yet been repealed. At some point legal reasons come to a halt. To the question, 'why should the courts follow what is laid down in statutes?', no further legal reason can be given. This rule is simply 'the ultimate political fact upon which the whole system of legislation hangs'.[25]

It is important to understand this point in order to see that although a constitution cannot exist without a legal order, and although the most important rules of a constitution will usually be laid down in legal provisions of some kind, nevertheless the overall validity of a constitution cannot be explained in purely legal terms. In order to justify or validate the legal order, we have to step outside it, into the political realm. Hence the third term in my definition, which is 'political authority'. Without political authority, a structure of rules and legal order is a formal skeleton with no life in it. After a popular revolution, for example, one may be able to point to the laws of the land and the rules of succession to demonstrate that the heir to the executed king is now

25, H. W. R. Wade, 'The Basis of Legal Sovereignty', *Cambridge Law Journal,* 1955, pp. 172-94; here p. 189.

the rightful monarch. But if the new rulers enjoy real political authority and the heir to the old king lacks it, those new rulers will be able to remodel the constitution, and no legal objections deriving from the old order will prevent them from doing so.

I am *not* making the familiar claim that authority, being merely legal, has to be backed up by power, which is political. What I am saying is that legal authority has to be validated by political authority.[26] In any settled state, these two kinds of authority are almost inextricably linked: for instance, electoral laws, when correctly followed, convey a legal authority on an elected government. But just occasionally — at moments of constitutional crisis, of revolution or successful usurpation — history can make it graphically clear that legal authority and political authority are not the same things.

The basis of political authority is that it is recognised, or granted, or willed, or believed in, by the people who are subject to it, the members of the political community. I have used a deliberately large range of terms in order to cover a range of specific theories of political authorisation (of which 'social contract' theory is merely one example). What matters is that the people should accept that the government is entitled to rule them; their reason for accepting this may be that they are able to express their will in elections, or it may be that they think the government has divine right, or it may be one of many other reasons. If they do accept it, then the government has political authority.

The rules for the exercise of that authority in a legal order make up the constitution of the state. If those rules include the subjection of

26. Nor am I employing a quadruple scheme of legal authority / legal power; political authority / political power, I am using three terms: legal authority, political authority, and power. The argument I am sketching about the relation between legal authority and political authority will, I believe, solve some of the problems encountered by those legal philosophers who assume that the only alternative to law is mere power or force. It also enables one to dispense with one of the most awkward features of Dicey's theory, namely his division of sovereignty itself into two forms, 'legal sovereignty' and 'political sovereignty' *(Introduction to the Study of the Law oftlie Constitution,* ed. E. C. S. Wade, London 1959, p. 73).

that authority to some higher political authority in some higher legal order, then the state is not sovereign, If the people accept that state of affairs, then they are recognising (or granting, etc.) the higher political authority of the ultimate sovereign. If they do not accept that state of affairs then they will want to secede: this means declaring that they no longer recognise that higher authority, and breaking the legal order so that in future its highest point will lie within their own state. Whenever such changes occur, it is the shift in political authority that carries the day; vestiges of the old legal order, if not actually abolished, will become dead letters whatever their formal validity.

Once the state has become sovereign (that is, once its constitution has become independent), then we can describe the ultimate political and legal authority which is exercised in it as 'sovereign authority'. This is the authority the workings of which are described by its constitution; it is, at the same time, the authority *of* the constitution; and it is the authority by which the constitution can be changed. Most constitutions, whether written or not, include procedures for changing the constitution. And if no such procedure has ever been provided for in an independent constitution, then the ultimate political authority will find one, and validate it, when the crunch comes. Does this mean that political authority is the ultimate, real sovereignty? No. Political authority is the basis or necessary condition of sovereignty; but only when it is embodied, so to speak, in a legal order and operating according to rules does a state have a constitution, and only when that constitution is independent can the state be described as sovereign.

Can sovereignty be limited?

The argument of the preceding section was deliberately abstract and non-specific, because it applied to all states in general. I gave one example involving statutes in the law of the United Kingdom, but the point could just as well have been made with clauses of the Constitution in American law. The United Kingdom is a sovereign state; so is the USA, and so are more than 150 other states in the world. We cannot say that one is slightly more sovereign than another, any more than we would say that the headmaster of Eton is slightly more a headmaster than the headmaster of Harrow. If a state is constitutionally

independent, it is sovereign; if it is not, it is not. There can be no scale of percentages in between.

One would get a different impression, however, from listening to the people who advocate a written constitution for the United Kingdom. According to these people, the problem with the United Kingdom is that sovereignty here is unlimited because of the lack of a written constitution. Their basic assumption, then, is that a constitution is a device for limiting sovereignty. If the reader has followed my argument up to this point, I need only ask him to pause and consider the oddity of that assumption.

A constitution does not limit sovereign authority in the sense of opposing it and reducing it. What it does is to determine — that is, state the rules for — the ways in which that authority is exercised. It is absurd to talk about this as if it were a matter of imposing some superior authority on that sovereign authority. If that were so, one would have to ask: by what super-sovereign authority does a written constitution prevail over sovereign authority? As Hobbes put it, 'whosoever thinking Soveraign Power too great, will seek to make it lesse; must subject himselfe, to the Power, that can limit it; that is to say, to a greater'.[27]

What people really mean when they say that sovereignty is unlimited in the United Kingdom is that in our constitution there is a single direct procedure for the exercise of sovereign authority through legislation, namely, the passing of statutes by Parliament. Because it is a single direct procedure (that is, it is not subject to any higher set of rules), the courts of the land have no higher criteria to turn to by which to judge some statutes invalid or 'unconstitutional'; therefore the statutes of Parliament have legal supremacy in the courts.[28] This is the so-

27. *Leviathan,* London 1651, p. 107.

28. This is discussed in E. C. S. Wade and G. G. Phillips, *Constitutional and Administrative Law,* 9th edn (revised), ed. A. W. Bradley, London 1980, p. 59, where il is described as 'essentially a rule which governs the legal relationship between the courts and the Legislature'. I would argue that that rule is not the essence of the legal supremacy of Parliament, but merely a consequence of the unitary nature of our legislative

called 'parliamentary sovereignty' which is the most distinctive feature of the United Kingdom's constitution. Parliament (i.e. 'the Queen in Parliament') has, in Dicey's famous phrase, 'the right to make or unmake any law whatever'.[29]

Dicey wrote with great clarity on this subject, but he also introduced, or perpetuated, a fundamental confusion when he referred to 'the sovereignty of Parliament'. The idea that sovereignty inheres in a particular body or institution within the state creates all sorts of problems, which may not be apparent when one is talking about the United Kingdom, but which become acute when one considers other sovereign states. Which body is sovereign in America, for example? The written Constitution there imposes higher-order limits on legislation; but those limits can be changed by amending the Constitution. If one is looking for a body with final legislative authority, then, one has to settle for the people who can amend the Constitution — which, according to Article 5, must consist of a three-quarters majority of the individual State legislatures. Dicey thus ended up in the odd position of saying that this nebulous entity ('the States' governments as forming one aggregate body represented by three-fourths of the several States') was the real holder of sovereignty in the USA.[30] It seems very odd to say that sovereignty resides in a body which does nothing for years or decades on end. Meanwhile, day after day, every valid Act of Congress and executive action by the President are equally expressions of US sovereignty. The way to solve this problem is to stop trying to locate sovereignty in one particular body. Sovereignty belongs to the USA as a state with an independent constitution; its sovereign authority is exercised in different ways by different organs of government, according to the rules of that constitution. The United Kingdom's constitution enables sovereign authority to be exercised in a peculiarly direct and simple way through legislation; other states have more complicated rules, but the sovereignty is the same in every case.

I am playing down the special significance of British 'parliamen-

29. ***Introduction*** **(see note 26 above), p. 40.**

30. Ibid., pp. 148-9.

tary sovereignty' for two reasons. The first is conceptual clarity: where the essential nature of sovereignty is concerned, the peculiarities of Westminster are neither here nor there. The second is to do with the nature of current debate on the creation of a federal Europe. Federalists often tell us in Britain that we have a special 'hang-up' about sovereignty because our sovereignty consists of a specially quaint and archaic system of parliamentary supremacy. Only Britain has this problem, they say, because only Britain has this bizarre 'sovereignty'; other countries with more rational constitutions can see nothing problematic about becoming part of a federal union. This argument, I am suggesting, is worthless. Whether other countries see it or not, the problem is the same in every case, because the real nature of sovereignty is the same in every case. The irony is that, far from posing special problems, the nature of our constitution makes it specially easy for us to give up the exercise of sovereign authority by the simple procedures of signing a treaty and passing a statute; whereas the USA, for example, would need large-scale constitutional amendments even to join the EEC.

Can sovereignty be divided?

I have already said enough, I hope, to indicate that sovereignty cannot be divided up into percentage units. But the kind of division I now want to consider is the so-called 'horizontal' division of sovereignty which one finds in federal constitutions. The idea here is that the legislatures of the lower level may have an exclusive competence over certain matters, which excludes even the upper, federal legislature. Does this mean that each regional assembly in such a system is enjoying a kind of mini-sovereignty? No, it does not. What authorises them to exercise these so-called exclusive powers is the constitution of the federal state as a whole. The local assemblies are merely being allowed to exercise locally the sovereign authority of the federal state in certain spheres of activity. If an objector to this argument puts forward the Tenth Amendment, which says that powers not expressly delegated to the United States are reserved to the individual States, his objection is self-defeating: the Amendment is authoritative because it is part of the *federal* constitution, the constitution of the United States, not the individual ones.

It is true that the federal union was created by individual States; but at the moment of that creation they ceased to be constitutionally independent, which means that they ceased to exist by their own authority and began to exist by the authority of the higher constitution. Abraham Lincoln made this point in a striking statement in his first message to Congress: 'the States have their status in the Union, and they have no other legal status. The Union is older than any of the States, and in fact created them as States'. Commenting on this statement, the great federal constitutional theorist Georg Jellinek (who might be described as the German equivalent of Dicey) described it as 'the foundation and cornerstone of the constitutional law of every federal state.'[31]

A similar point arises from the constitutional history of a non-federal state, the United Kingdom. The Treaty of Union between Scotland and England in 1707 laid down solemn 'unalterable' conditions about the preservation of Scottish institutions such as the Church of Scotland. But the consequence of this treaty was that the political entities of Scotland and England, the makers of the treaty, ceased to exist; they were absorbed into the new political entity of Great Britain. And this new entity automatically had an authority superior to that of its two defunct predecessors. In 1853, for example, the Universities (Scotland) Act abolished the requirement that the professors of the ancient Scottish universities should be confessing members of the Church of Scotland, thus casually repealing an 'unalterable' provision of the Treaty of Union. This topic is usually presented by British legal theorists in terms of the peculiarities of our 'parliamentary sovereignty'.[32] But it is also an illustration of a much more universal principle which operates when any state makes its constitution dependent on a higher constitution — whether in a federal system or in a united kingdom. Whenever that happens, sovereign authority passes to the higher constitution, In Great Britain the simplicity of our statute procedure made this principle obvious. In the United States it was less obvious.

31. R. Emerson, *State and Sovereignty in Modem Germany,* New Haven 1928, p.108 (note).

32. E.g. Wade and Phillips (above, note 28), pp. 78-80.

What Parliament at Westminster achieved with the Universities (Scotland) Act of 1853, Abraham Lincoln achieved in the following decade by more troublesome means, involving the deaths of several hundred thousand men.

Can sovereignty be delegated?

Sovereignty itself cannot be delegated. But the exercise of a state's sovereign authority in certain areas can be delegated, whether downwards within the state (to the local units of government in a federal state, for example), or outwards and upwards to another state or an international body. The difference between delegating the exercise of sovereign authority to another state and becoming constitutionally dependent on that state is usually quite clear. Delegation grants a limited and specific competence to perform a specific task. This task may be a small matter (allotting a radio wavelength, for instance) or it may be a very large one, such as the defence of the realm. The United Kingdom has delegated a very important part of the exercise of its sovereign authority by becoming a member of NATO. But in becoming a member of NATO it was not acknowledging or setting up a higher constitutional authority above its own constitution. NATO has a certain field of competence which has been delegated to it; it does not have the competence to determine its own competence.

Can sovereignty be pooled?

Sovereignty means constitutional independence, the exercise of plenary and exclusive political authority in a legal order. The idea that constitutional independence can be 'pooled' is therefore an evident absurdity. Why do people believe in this idea, or say that they believe in it?

The simplest reason is that they think sovereignty means nothing more than power. Power can be 'pooled', obviously: when four men lift up a grand piano, they are pooling their physical power to achieve an effect which none could have achieved individually. But what can it mean to say that authority is 'pooled'? The weasel-significance of this word is that it suggests that you can both keep your authority and give it away at one and the same time. But if authority itself is pooled, a

new kind of authority is created.

When the sovereign authority of the United Kingdom is 'pooled' in Europe, the sovereign authority of the United Kingdom will cease to exist, because the United Kingdom will have become subject to a higher authority. So far, this has not happened. What has happened is that we have delegated the exercise of some areas of our sovereign authority to some joint bodies, the three European Communities, on which we are represented.[33] We have delegated the exercise of some important elements of jurisdictional authority, administrative authority and legislative authority. These delegations were made by treaty and by statute: such legal acts were expressions of the United Kingdom's sovereign authority, and, as with any other treaties or statutes, so long as we remain sovereign we have the capacity to denounce the treaties and repeal the statutes.

However, the nature of our delegations to the EEC are rather different from those involved in any previous treaties. The Council of Ministers is a law-making body, and its laws have 'direct effect' in Britain, overruling British laws. So long as the Council of Ministers reached its decisions unanimously, we could pretend that the whole procedure was still contained within the rules for our own exercise of our own authority. We could simply say that a new procedure has been established for the operation of our sovereignty in legislation: over and above the traditional method, statute-making, there is now a new method of ministerial decision under special circumstances. With majority voting, however, it is difficult to keep up this pretence: whenever we are in the minority, it becomes obvious that we have delegated the exercise of legislative authority to a body which we do not control. Majority voting is not unknown in international organisations, but it is normally confined to those organisations which have a narrow competence to make decisions for specific purposes: examples include the International Sugar Council and the Central Opium Board.

33, The EEC, the European Coal and Steel Community and the European Atomic Energy Community. There is no such thing as 'the European Community', The administrations of the three bodies were merged in 1967, but without creating a new, single legal entity. The correct way to refer to them is either as 'the European Communities' (as in official documents), or as 'the EEC' (the traditional one-for-all term).

One other example from history, however, is the German Zollverein — the prime means by which Germany was transformed from a trading area into a state. Article 100A of the Single European Act allows majority voting on measures 'which have as their object the establishment and functioning of the internal market'. If the phrase were only 'the establishment of the internal market', it would be clear that majority voting was only intended for the completion of a specific task. But the inclusion of 'and functioning' ensures that a huge area of legislative authority has been delegated in a thoroughly open-ended way.

The delegation of the exercise of areas of sovereign authority is not in itself a threat to sovereignty. If most areas were subject to long-term delegation, however, there would come a point where the United Kingdom would cease to resemble a sovereign state, and our long-term delegation could simply be converted into a formal arrangement of constitutional dependence, Each time we delegate the exercise of important areas of our authority to 'Europe', we do not lose sovereignty or become less sovereign; we merely become more likely to lose our sovereignty. We come closer, that is, to the moment when our constitution will be remodelled into a subordinate part of a federal constitution.

In order for that to happen, changes must take place in the two types of authority which I have identified as bound up in the nature of a constitution: legal authority, as expressed in a legal order, and political authority. The change in the legal order has already taken place. In fact it happened as long ago as 1964, when the European Court gave its ruling in the case of *Costa v. E.N.E.L.* This ruling established the supremacy of EEC law over national law; and it is that supremacy, rather than majority voting itself, which is the most significant thing about the laws which are made in the Council of Ministers. This is what the Court declared:

> Unlike ordinary international treaties, the EEC treaty established its own legal order, which was incorporated into the legal systems of the Member States and to which the courts of the Member States are bound. In fact, by establishing a Community of unlimited duration, having its own institu-

> tions, personality, and legal capacity ... the States relinquished, albeit in limited areas, their sovereign rights and thus created a body of law applicable to the nationals and to themselves ... This incorporation ... has as a corollary the impossibility for the States to assert as against a legal order accepted by them on a reciprocal basis a subsequent unilateral measure which could not be challenged [by that legal order].[34]

The meaning of that last sentence is a little troubling. It implies, in a shadowy sort of way, that if the British Parliament were to pass a statute repealing its accession legislation and withdrawing from the EEC, the European Court would over-rule it. Whether such a ruling was regarded as a piece of empty legal formalism or as the justification for a latter-day European Abraham Lincoln would depend on the political realities of 'Europe' at the time. Which brings me to my second category: political authority.

A federal constitution cannot be put together without some semblance of political authority. It must at least be possible to make people think that the federal authority is entitled to rule them; and if enough people do think this, then of course it will be. There are all sorts of minor ways in which people can be persuaded to think this: the use of the 'European' flag, for example, or the adoption of what many people believe (quite falsely) is a 'European passport'.[35] But above all, the role of the European Assembly here is crucial — much more important than that of majority voting. This Assembly was set up under the Treaty of Rome as an advisory and supervisory body, not a legislature; its role, as with the Assembly of the Coal and Steel Community, was to provide a forum for national delegates, who would scrutinise the EEC's affairs rather as a shareholders' annual meeting scrutinises a company. But with the shift first to direct elections and then, under the

34. P. Hay, *Federalism and Supranational Organizations,* Urbana 1966, pp. 171-2.

35. There is no such thing as a European passport. There are national passports in a common 'European' format. This format includes the prominently printed wording: 'European Community'. There is no such thing as the European Community (see above, note 33).

Single European Act, to some subsidiary legislative powers, the Strasbourg Assembly acquired the pretensions of a parliament. The more these pretensions are accepted, the more likely it is that the EEC will become a fully federal state; for this Assembly is the sole body that can convey political legitimacy directly from the citizens of the member states to the supranational structures of the EEC. Living as they do in representative democracies, the citizens of the member states think of the election of a legislature as the essential feature of a state, the feature which justifies their granting of political authority to it. Anti-federalists who complain about the 'democratic deficit' of the Strasbourg Assembly, or about the generally 'undemocratic' nature of the EEC, are cutting the ground from under their own feet: to judge the EEC as a democracy is to concede that it is, or ought to be, a state. If enough people think this, it will become one.

Why worry?

If a federal Europe is created, sovereignty will not disappear: it will merely be transferred upwards to a new federal constitution. Everything I have said about the nature of sovereignty will still be just as valid. So why worry?

In the first place, I am worried by the appalling lack of conceptual clarity shown by so many of our leading politicians. I have no quarrel on this point with the handful of honest federalists who say that they want to create a federal state. I am objecting to those politicians who, it seems, would happily stumble into such a state (dragging the people of this country with them) without any real understanding of what they were doing.

In the second place, I do have a fundamental objection to the creation of a federal European state; but it is an objection not directly related to anything I have said about the nature of sovereignty. It concerns the nature of a political community. For a European federal state to work as a proper political community, it will need to have representative politics on a Europe-wide scale. It will need, in other words, European parties, functioning across Europe in the way that the Republican and Democratic parties function across America. This is not an

historically absolute requirement, of course; in the middle ages, such a state could have managed without representative politics at all. But it is the kind of politics we are used to, the kind that satisfies our desire for democratic institutions, the kind we have developed so successfully in an admittedly small number of nation-states over the last hundred years or so. It works very well in an established political community, where people share the same customs, political traditions, and, above all, the same language. It works in European nation-states, and it works in America (which is, essentially, a giant nation-state).

But can we really imagine this kind of politics writ large in Europe? Can we imagine a London housewife during a Euro-general election watching the leader of her preferred Euro-party on television — a Greek, perhaps, making a rousing speech in Greek? This is not a trivial point. For if we do not have a genuine political community, then although we may agree to set up a European constitution, it will be a peculiarly artificial creation: it will have a kind of political authority derived not from any sense of participation in real political life, but only from a hazy mixture of wishful thinking and benign indifference. If it survives, either of two things may happen. The first, which is the most likely, is that our political life in this country will be gradually stunted: our own Parliament will be reduced to a regional assembly, and while we contribute a small proportion of the elected members of the European federal parliament, we shall have lost the sense that we, as a political community, have any real control over our own destiny. European politics will be mainly a competition for advantage (i.e. funds and patronage) between national groupings, conducted increasingly not in any open political forum but in the ante-rooms of the administrators.

The other possibility is that, in time, we do come to feel that we are part of a genuine European-wide political community. I do not believe that this is impossible. It could happen, but it would take many generations, and would involve huge changes to many aspects of our lives. Every time I meet a federalist, I just ask why anyone should think it necessary to embark on such an enormously artificial, disruptive and risky project. I have not yet heard a single sensible answer.