

Competing Sovereignties

Richard Joyce



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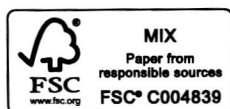
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Competing Sovereignties

Competing Sovereignties provides a critique of the concept of sovereignty in modernity in light of claims to determine the content of law at the international, national and local levels. In an argument that is illustrated through an analysis of debates over the control of intellectual property law in India, Richard Joyce considers how economic globalisation and the claims of indigenous communities do not just challenge national sovereignty – as if national sovereignty is the only kind of sovereignty – but in fact invite us to challenge our conception of what sovereignty ‘is’. Combining theoretical research and reflection with an analysis of the legal, institutional and political context in which sovereignties ‘compete’, the book offers a reconception of modern sovereignty – and, with it, a new appreciation of the complex issues surrounding the relationship between international organisations, nation states and local and indigenous communities.

Richard Joyce is based in the Faculty of Law at Monash University, Australia.

For Premala

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Introduction

The Crisis of Modern Sovereignty

‘Everything must begin by uprooting.’¹

Modern sovereignty is in crisis. The nation-state, presumed to be the sole site of sovereignty in modernity, appears threatened by a multitude of challenges. The intense flow of goods, information, capital, people and violence across national borders suggests a world whose various forces cannot be contained and regulated by national polities.² These factors prompt many to ask whether or not the sovereignty of the state is in decline.³ However, beyond the limited question of the perceived rise and fall of state sovereignty lies the question of what, if anything, the factors which

1 Jacques Derrida, ‘The Laws of Reflection: Nelson Mandela, In Admiration’, trs M. Caws and I. Loenz in Jacques Derrida and Mustapha Tlili (eds), *For Nelson Mandela*, New York: Seaver Books, 1987, p. 22.

2 Barbour and Pavlich eloquently evoke the sense of crisis and its commonly perceived causes in their introduction to Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings*, Abingdon: Routledge, 2010, p. 1.

3 See, e.g., Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalisation*, New York: Columbia University Press, 1996; Manuel Castells, *The Rise of the Network Society*, 2nd ed., Chichester: Wiley-Blackwell, 2010, p. xviii; David Held and Anthony McGrew, *Globalisation/Anti-Globalisation: Beyond the Great Divide*, 2nd ed., Cambridge: Polity Press, 2007, pp. 1–10; James Fulcher, ‘Globalisation, the Nation-State and Global Society’, *The Sociological Review* 48, 2000, 522–43.

seem to put sovereignty in crisis reveal about sovereignty itself. That question is the focus of this book. In short, its premise is that the crisis of sovereignty necessitates a critique of sovereignty.

The ubiquity of claims that sovereignty is in crisis is perhaps unsurprising when one considers the etymological connections between these two words. 'Crisis' derives from the Greek *krisis*. Its various meanings include 'turning point', which is perhaps the one most closely connected to the present usage of crisis.⁴ But other meanings include 'separating', 'distinguishing', 'decision' and 'judgment'⁵ all of which, we will see throughout this book, are central to the figure of the sovereign itself. Sovereignty involves the act of marking out borders and boundaries, of separating and distinguishing between inside and outside. It also involves the power to determine law, to decide and to judge. This suggests that sovereignty is not (only) in crisis, but that sovereignty is crisis. Not only is crisis intimately bound up with sovereignty itself, but the etymology suggests it is intimately connected to critique. Critique derives from the Greek *kritikē*, which means the 'act of discerning', but both *krisis* and *kritikē* derive from the verb *krinō*, 'to decide'.⁶ Like crisis, critique is somehow embedded in sovereignty itself. Sovereignty lends itself to critique, it demands questioning.

This book will cede to that demand and provide a theoretical critique of the concept of sovereignty in modernity. Its chief aim is to break the seemingly exclusive link between sovereignty and the nation-state and open the field to other claims to authority to determine the content of law. I will argue that the received conception of sovereignty, exclusive to the state, fails in significant ways to allow us to adequately comprehend and respond to the relationship between rival claims to determine law at the local, national and international levels. In its place, a new conception of

4 Henry Liddell, Robert Scott and Henry Jones, *A Greek-English Lexicon*, Oxford: Clarendon Press, 1968, p. 997. Thanks to Emeline Marquis for invaluable guidance on the meaning and use of these terms in ancient Greek.

5 Ibid.

6 Ibid., p. 996.

sovereignty will be offered. This conception will build on and combine the work of Jacques Derrida on sovereignty, Jean-Luc Nancy on community, and Peter Fitzpatrick on law. I will argue that sovereignty in modernity is not grounded in the state but is in fact, to use Derrida's term, 'autopositioned'.

This kind of thinking on sovereignty takes place in light of the void announced by what we might call, using a shorthand Derrida would hesitate to adopt, the death of God.⁷ It is, of course, axiomatic that modernity marks the end of our reliance on God for legal and political authority on earth. Indeed, if pre-modern sovereignty in Europe could be accounted for by the concept of the divine right of kings, the Enlightenment and its revolutions would leave us without both the divine and the king. In its place we have authority grounded in the 'nation' and its 'people'. What God used to do for sovereign authority was to provide a settled point of transcendent reference guaranteeing the authority of those who had the strength to claim it in His name. Without such transcendent reference, as has been pointedly observed, the heirs of divine authority – 'nation' and 'people' – are required to take on and effect qualities which, if not easily characterised as 'sacred', then at least put incredible strain on the secularity of modern authority.⁸

Indeed, while awareness of the death of God might be commonplace in thought on modern sovereignty, its consequences are usually overlooked or suppressed.⁹ What distinguishes the

7 Jacques Derrida, 'Faith and Knowledge: The Two Sources of "Religion" at the Limits of Reason Alone', tr. Samuel Weber, in Jacques Derrida, *Acts of Religion*, ed. Gil Anidjar, New York: Routledge, 2002, p. 65.

8 See Peter Fitzpatrick, 'What are the Gods to Us Now?: Secular Theology and the Modernity of Law', *Theoretical Inquiries in Law* 8, 2007, 161–90; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr. George Schwab, Chicago: University of Chicago Press, 2005.

9 For example, Kant's acute awareness of the difficulties in grounding legal authority without God was accompanied by a stern warning against questioning the origins of an existing legal authority. See Immanuel Kant, *The Metaphysics of Morals*, ed. and tr. Mary Gregor, Cambridge: Cambridge University Press, 1996, p. 95. See also Chapter 1 below, text accompanying notes 125–9 and 142.

line of thought which takes us to Derrida's conception of 'auto-positioning' is its rigorous insistence on the void which God's death announces. For Derrida, the death of God, or more precisely '[t]he "deaths of God," before Christianity, in it and beyond it, are only figures and episodes' of a fundamental absence.¹⁰ 'Everything begins with the presence of *that* absence.'¹¹ The absence of a settled and settling transcendent reference to guarantee our social formations, including sovereignty, nation, people etc., means that it is left up to us to bear witness to their validity. Derrida's 'deconstruction' operates in view of this lack. It 'tries to show ... that convention, institutions and consensus are stabilisations (sometimes stabilisations of great duration, sometimes micro-stabilisations) ... of something essentially chaotic.'¹² This 'chaos and instability' is 'fundamental, founding and irreducible'.¹³ Derrida's analysis and critique of sovereignty takes place against the background of this void.

What does this mean for modern sovereignty, which has taken the contours of its form from Jean Bodin's definition of the sovereign as a person recognising 'nothing, after God, that is greater than himself'?¹⁴ Would we not find that in the absence of divine authority, the sovereign is simply an entity which recognises no authority greater than itself, with respect to that over which it claims authority? If the sovereign recognises no authority greater than itself, then it has only itself to justify its authority. It is this line of thought that takes us to Derrida's notion of sovereignty as self-authorising and self-justifying – or, in his precise term, 'autopositioned'.¹⁵ Viewed in this way, the crisis of modern

10 Derrida, 'Faith and Knowledge', p. 65.

11 Ibid. (original emphasis).

12 Jacques Derrida, 'Remarks on Deconstruction and Pragmatism', tr. Simon Critchley, in Simon Critchley, Jacques Derrida, Ernesto Laclau and Richard Rorty, *Deconstruction and Pragmatism*, London: Routledge, 1996, p. 83.

13 Ibid., p. 84.

14 Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, ed. and tr. Julian Franklin, Cambridge: Cambridge University Press, 1992, p. 4.

15 Jacques Derrida, *Rogues: Two Essays on Reason*, trs Pascale-Anne Brault and Michael Naas, Stanford: Stanford University Press, 2005, p. 142.

sovereignty lies in its having to distinguish and separate, decide and judge, without any guarantee of its own validity.

The theoretical critique advanced in this book will be contextualised by reference to two particular challenges to the sovereignty of the nation-state. One comes from the international level. It is the challenge to national sovereignty posed by the World Trade Organisation (WTO). The second comes from the local level, from local and indigenous communities which challenge the primacy and exclusivity of the sovereignty of the state. Both challenges manifest themselves in many different settings and in a wide variety of locations. Here, the focus will be on control over intellectual property law in India, in particular patents and traditional knowledge. This may seem a very narrow and particular example to illustrate the much broader question of the grounds of law in modernity. It has been chosen for a number of reasons. The first and most important reason is that the example provides a single substantive area of law in which two key challenges to national sovereignty, economic globalisation and the rights of indigenous and local communities, meet. By addressing the challenges of economic globalisation (via the WTO) and of local and indigenous communities claiming sovereignty, the example goes beyond its narrow substantive confines. Those substantive confines, though, are also significant. Since the argument here suggests that the boundaries of rival sovereign claims are to be found in the detail of the law, the focus on a single area of law helps to illustrate this point by enabling close consideration of the law itself and not just the broader politico-legal formations at play. The second is that participants (on many sides) in the intense and vibrant debates over the control of patent law and traditional knowledge in India have frequently turned to the concept of 'sovereignty' to advance their causes. Often these uses are contradictory, and the theoretical argument pursued here assists to understand why such contradictory uses are possible (indeed, perhaps, inevitable).

I will take two common claims about sovereignty in India which present themselves in this field. The first is the claim that India's sovereignty was undermined by the requirement that it enact strict patent laws in order to meet its obligations as a

WTO member. The second is the claim made by and on behalf of local and indigenous communities that they hold 'sovereignty' over their 'traditional knowledge', thus seeking to place a certain mode of regulating knowledge and information beyond the reach of the state. I will spend some time now setting out the nature of these challenges so as to enable the reader to keep this context in mind throughout the theoretical analysis which forms the core of this book.

I International and Local Challenges to National Sovereignty: Patent Law and Traditional Knowledge in India

The context for the first claim is India's membership of the WTO. The WTO oversees the most comprehensive multilateral system of trading rules in history. Its 153 member states are required to comply with common standards in a wide range of policy areas affecting trade. Given the breadth of the areas covered and specificity of many of these standards, the WTO is commonly seen as something which marks the decline of the sovereignty of the state. Even within the United States, the state with the most negotiating power at the WTO, the possible impact of the organisation on its sovereignty was highly contentious.¹⁶ However, the argument that the WTO undermines state sovereignty is most frequently made in respect of its developing country members. The gist of this argument is that the rules administered by the WTO reflect the wishes of powerful states and that the organisation operates as a neo-colonial tool used by those states to control the law of less powerful states. One particular example of this argument concerns the effect of India's membership of the WTO on its patent law.

As a condition of India's membership of the WTO, it was required to adopt patent laws (and other intellectual property laws) which met the minimum requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)

16 John Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', *Columbia Journal of Transnational Law* 36, 1997, 157.