SOVEREIGNTY KNOWLEDGE, LAW

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Sovereignty, Knowledge, Law

Panu Minkkinen



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Introduction

An Unknown Origin

Psychoanalytic experience provides the only ray of light into this darkness.

-Sigmund Freud (Freud 1999c: 154)

The Festive Transgression

Sigmund Freud's contemplations on the origins of society and morals in *Totem and Taboo*, and especially in its fourth essay on the affinities between totemism and the death wish, are an attempt to understand the emergence of social institutions such as law with the help of psychoanalytic theory. With few exceptions, the text has often been neglected in mainstream legal scholarship because of its allegedly 'mythological' and, consequently, non-scientific character. With the help of his interventions into ethnology and social psychology, Freud constructs an account of how the worship of the totem animal and the primary rules regulating exogamy – for Freud, exogamy is the social expression of the prohibition of incest – can be better understood with an analogy as to how prohibitions and their ceremonial transgressions operate in the human psyche.

Relying heavily on the ethnological literature of his time, Freud notes that the most primitive form of a social rule in any society is the prohibition of incest. In primitive societies, intercourse amongst people who are regarded as kin is regulated by what is known as a 'taboo.' Freud duly points out that the term 'taboo' has numerous connotations:

'Taboo,' however, refers to everything, to persons and to places, to things as well as to transitory conditions that are the vehicle or source of this mysterious attribute. Taboo is also the prohibition that arises from the same attribute, and, finally, it has a connotation that includes simultaneously 'sacred,' 'above the ordinary,' as well as 'dangerous,' 'unclean' and 'uncanny.'

(Freud 1999c: 31)

In addition to the prohibition of incest, one of the most common taboos in primitive societies applies to leadership. The leader of a social group is often

regarded as taboo to the extent that certain restrictions apply to the way in which other members of society may approach him. Forms of royal etiquette such as the curtsey are contemporary expressions of such restrictions. But numerous restrictions also apply to the leader's own comportment. For the moment it suffices to note that the leader's power must be approached with due care because, just like taboos in general, it includes within itself a certain dimension of uncanniness.

But in primitive societies, the relationship between society and its leader is marked by a certain ambivalence. Freud namely claims that psychoanalytic research can verify how the apparent adoration of the leader's power is simultaneously an actual expression of an unconscious and repressed hostility towards it. While the leader is respected and honoured, the ceremonial worship is also a displaced wish-fulfilment involving the repressed hatred of the members of society towards him. Freud comes to this conclusion by drawing on the parallel of how the father complex and the neurotic child's displacement of his hateful feelings towards his father are expressed in an exaggerated worship of his magnitude.

Freud goes on to note that the substitute for the worshipped father figure in primitive societies is the totem animal. It represents the ultimate source of the supreme leader's taboo powers. The totem animal is also regarded as the historical origin of a clan or a tribe in the sense that it has created the world, and all members of the given society are regarded as its offspring. This is why the totem animal also regulates the prohibitions that govern exogamy in such societies. But regardless of the stern prohibitions that are related to the totem animal itself – it is never hunted, usually not even touched, it is worshipped, and so on – men in primitive societies gather occasionally together to break the prohibitions relating to the totem animal. The ceremonial transgression of the taboo develops into a festive meal, a phenomenon that Freud claims to be common in many primitive societies.

Freud attempts to unravel the reasons behind this seemingly odd diversion from the totemic rule with the help of an analogy from psychoanalytic experience. For Freud, the totem meal during which the sacred animal is devoured in a frenzy is a commemoration of the killing of the original paternal leader of the primal horde and a celebration of the subsequent fraternal pact that developed amongst the surviving sons:

The totem meal, perhaps the first feast of mankind, would be a repetition and a commemoration of this memorable and criminal deed that initiated so many things: social organizations, moral restrictions and religion.

(Freud 1999c: 172)

The murder of the paternal leader of the horde has the potential of escalating into a full-scale war amongst the surviving sons for power and a supreme status within the group including the privileges that come with it. But Freud notes that this would ultimately lead to the total disruption of the group. Therefore, the

crime is revoked by instituting two prohibitions, by positing the two original laws of social organization: respect for the totem animal as the representation of the killed father, and the prohibition of incest by declaring the women of the primal father as taboo to all surviving sons:

In the first instance, the fraternal clan assured through the blood tie replaced the paternal horde. Society was now based on complicity in a common crime, religion on the sense of guilt and the relating remorse, and morality partly on the necessities of this society, partly on the penance demanded by the sense of guilt.

(Freud 1999c: 176)

Freud's account of the institution of society and its first laws is motivated by an analogy of the child's father complex, that is, of the Oedipal desire that the child feels for his mother and the corresponding rivalry with his father for a common object of desire. For Freud, the great crime that is revived in the festive ceremony is always the killing of the father; it is a reliving of a guilty pleasure and the pacification of the subsequent feelings of remorse. The father expresses his supreme power by appropriating the maternal object of desire, and the only way to come to terms with the omnipotent nature of this ruler is to kill him and, simultaneously, to posit two laws: one which establishes a totemic surrogate to be henceforth respected in the father's stead, and one which declares the maternal object of desire as taboo. For Freud, this is the foundation of society and the origin of all law. With one move, the wish to overcome the paternal leader is fulfilled and the consequent feelings of guilt and remorse soothed.

But what is less developed even in Freud's own account is the origin of the profound feelings of hatred for the paternal leader in the death wish. The rivalry between father and son for the same object of desire embodies within itself a trauma much more horrific than the patricide that eventually follows: the unspoken act with which the primary father has appropriated the maternal object. The nature of this appropriation is never clearly elaborated, and yet it is the original manifestation of supreme power of which all totemic surrogates are merely symbolic representations. In other words, even after the symbolization, a residue of crude paternal power must inevitably be left over, a remainder that cannot be symbolized.

If law as a totemic surrogate can be regarded as an attempt to represent the bellicose foundation of social fraternity, what is the motivation behind the patricidal crime? What is the original traumatic appropriation that must by necessity lead to the institution of law? In other words, what is the traumatic origin of law? All such questions relate to a supreme power as the manifestation of a paternal appropriation, an unspeakable exercise of brutal force. The search for such an origin for law does not obey the economy of the pleasure principle for it promises no satisfaction or fulfilment. It is a plunge into the abysmal depths where law as totem must by necessity also disintegrate and abolish itself.

Freud's Social Contract

But let us first have a closer look at Freud's allegedly mythical account.¹ The 'social contract' that Freud describes – for the fraternal pact leading to the formation of the clan is surely a form of social contract – is entered into in three concurrent stages. In its first stage, the myth is literally given a point of origin and a beginning: 'One day the banished brothers came together ...' (Freud 1999c: 171).

'One day'; that is, at a particular moment in time even if this moment remains unspecified. The fraternal gathering is the origin of the myth, the action that establishes it. The members of the primal horde are united as brothers in two different ways. What the brothers obviously have in common is a profound powerlessness in relation to the omnipotent *Urvater* who autocratically controls two fundamental objects of desire: women (sexuality) and power (language). But common resentment is not enough to unite the brothers. In addition, the members of the primal horde must also be able to come to terms with the reciprocal rivalry that can potentially destroy their newly found accord. So any individual attempts to overthrow the leader must be prevented. This is the most rudimentary form of social solidarity; the members of the horde can become brothers only by recognizing each other.

Correspondingly – and this is one of the peculiarities of Freud's interpretation – if a shared hatred and resentment unites the subjugated members of the horde as brothers, the leader of the horde can become a father only if he is killed; only the object of the death wish can be a father. Only after the leader has been (symbolically) killed can he become a father, and such a father can correspondingly only exist as a mythical being. The dead mythical father that is represented in the totem is never either loved or hated, but he is loved, respected, feared, and hated all at the same time. But with his power he had inhibited his sons' instinctual life – or, in Freudian terms, he had castrated them – and so he deserved to die. In other words, if the *Urvater* of the horde can become a father only after he has been killed, this would also mean that he can be truly omnipotent only after the patricide has been committed and the appropriate totem erected.

The first stage of Freud's social contract is finally sealed when the union of the brothers is congealed with a common objective. But in this respect the originality of Freud's interpretation has less to do with the existence of any such objective. It is its quality that is decisive. The first union can namely only be a scheme against an other whose power is specifically experienced as evil. So even if the common bond amongst the brothers requires the solidary recognition of the other, this other must at the same time be annihilated. The only reason why the brothers would want to enter into their post-patricidal pact is because they all feel threatened by one another. As is the case in any such contractual arrangement, the ultimate function of the pact is to contain the threat that the other represents.

In the second stage of Freud's social contract, the power and authority of the other that has been destroyed is appropriated and internalized: the brothers

'killed their father and ate him ... '(Freud 1999c: 171). At the end of the day, the killing of the father may not be as important as it first seems. Because even if the patricide brings the horde together as a fraternal clan, it is only at the festive meal that the brothers acknowledge each other as equals. The meal in which power and authority are appropriated immortalizes the omnipotent father into an ideal and makes him the common origin against which the equality amongst brothers is both recognized and acknowledged.

Freud's social contract is finalized in its third stage where the brothers who have first killed the father that they both loved and hated and have then consumed him in the festive meal must now appease the feelings of guilt that have consequently arisen. The dead father is mythisized into a totem, and his most valuable possessions – his women – are prohibited to those who are left behind. Thus is born the first law of all societies, that is, the prohibition of incest, and the mythical power from which it draws its authority.

Freud was not, of course, the first to claim that the prohibition of incest that regulates exogamy is the original law. The same claim was made by, for example, Émile Durkheim in his well-known essay that had been published some 15 years earlier (see Durkheim 1896-97: 28). But what makes Freud's interpretation so unique is the way in which he couples together the law with the object that it prohibits. The prohibition of incest is essentially about the repression of a sexual desire. Social life requires that the instant gratification of instinctual desires is prevented, for the uninhibited expression of such desires would destroy the foundation of social life. Yes, social life is always founded on desire, but this latter desire also includes within itself a manifestation of a law delimiting instinctual life. Hence the basic strain in all social forms of human existence is a consequence of the incessant tension between a desire for a particular object and a law that prohibits that very object. In Freudian terms, social life is structurally akin to neurosis.

Originally Freud's phylogenetic interpretation about the origins of society and law was criticized for its explicitly mythological character. But one can view this from another perspective, as well. Perhaps it is precisely the myth that provides the account its strength. Claude Lévi-Strauss who recognized Freud as a forerunner of modern social science famously claimed that:

... the myth that is presented in Totem and Taboo with such dramatic vigour can as all myths be interpreted in two ways. The desire of the mother or sister, the patricide, and the sons' remorse do not, of course, correspond to a fact or set of facts that could be assigned a particular moment in history. But it may be a symbolically articulated interpretation of a dream that is at once both enduring and ancient. And the authority of this dream, its ability to affect someone's mind without him knowing it, is based on the fact that the acts that it urges people to do have never been committed because culture in all places and at all times is opposed to them. The symbolic satisfaction into which, so Freud claims, the prohibition of incest defuses itself is then not the commemorative feast of an event. It is

something else and much more: the persistent expression of the desire for disorder or, to be more accurate, for counter-order.

(Lévi-Strauss 1967: 563)

But if we do want to find something incoherent in Freud's 'armchair ethnology,' it would probably have more to do with the way in which he describes the rather gloomy stage on which his primal horde is set to act out its destiny. Namely in the horde, a group of men - literally 'men' as androi, not anthropoi - crave the same object; woman, Within the Oedipal triangular drama this. of course, corresponds with the way in which both father and child compete over the affection of the mother. Freud seems to reduce the attachment to the mother into something resembling a biological drive that would not require further explanation in itself. But in the background there is something else.

Long before the totemic meal, allegedly the 'first feast of mankind,' the human being receives an acknowledgement of his most basic need when the child's demanding mouth first encounters the mother's breast. Contrary to what Freud seems to claim, the first feast of mankind is not the guilt-ridden commemoration of a great crime. It is a celebration of love in relation to which everything else is consequential.

For something to be worth killing for, it must first be experienced.

Sovereignty: A Non-concept?

And how does this all relate to sovereignty?

In a lecture delivered in 1996, Eli Lauterpacht summed up a common sentiment amongst most public international lawyers and constitutional theorists regarding the usefulness of the word:

... to invoke the concept of national sovereignty as in itself a decisional factor is to fall back on a word which has an emotive quality lacking meaningful specific content. It is to substitute pride for reason.

(Lauterpacht 1997: 141)

By the end of the Second World War, 'sovereignty' had clearly passed its best by date understood both as a constituent element of the state and as a regulator of international affairs. The irrationality that Lauterpacht above refers to echoes the general setbacks that the legal community - both academic and nonacademic - had suffered in trying to secure peace by domesticating the tensions of a turbulent world with the use of 'sovereignty,' And in this respect, not much has since changed. What has followed can easily be seen as a frenzied attempt to rehabilitate the word either by fleshing out its Westphalian origins or by redefining it into something completely new. The amount of literature written on sovereignty during the past 10 years is staggering. According to the British Library catalogue, approximately 330 books with the word 'sovereignty' in the title have been published in English during that period. Many of the political

controversies that have arisen in conjunction with the war on terrorism have been argued in relation to sovereignty, and it has also been a key notion in the attempts of emerging economies to attain recognition as equal partners on the global scene.

But a concept – and I reserve the right to reconsider the conceptual status of sovereignty later – need not be reduced to its instrumental value. The aim of this book, slightly detached from the polemics of everyday politics, is to shed light on how a modern understanding of sovereignty has morphed and developed in complex ways beginning from its Westphalian heyday and ending in the current rhetoric of international politics. Partly this complexity is due to the seemingly disconnected ways in which the word has been used. Freud's phylogenetic myth reveals three such uses that will all be considered during the course of this book.

Firstly, we have the sovereignty of the dead father who reigns over the fraternity of men through the symbolic totem that has been erected to commemorate him. We might think of this as sovereignty proper where the traditional hierarchical understanding of a juridical constitution stands in for the totemic symbolization of power. Not only does the totem rule over the clan, but it also regulates all fraternal relationships which are intrinsically bellicose regardless of any rudimentary solidarity that mutual acknowledgement may have brought about.

But Freud's account also reveals – even if it does not discuss at great length – a second possible understanding of sovereignty. For the *Urvater* of the primal horde rules over his underlings in a way that would allow us to consider sovereignty as the brutality of crude force even after the symbolization has taken place. Regardless of how complete the symbolization of the dead father's power may be, a residue or a remainder of the primal father will always be left over. The totemic symbolization can function only if the traumatic experience of the primal horde is bracketed out, but any such bracketing out is bound to leave a trace of what has been banished from memory. This would be precarious power, the very essence of untamed and arbitrary caprice that sovereignty proper with its juridical symbolization is so intent on domesticating.²

But the account includes within itself a third possible way of understanding sovereignty that *Totem and Taboo* does not explicitly address but that it by necessity implies: the position represented by the patriarchal figure of Freud himself. It is clear that Freud thinks of himself as a representative of modern science, and as such he is sincere about the validity of his analogies between the social and the psychic. The scientist positions himself in such a way that he claims to be able to observe, to record and to interpret the regularities of the human world in an accurate way. From that position, the scientist's arguments emerge as a potential discourse of mastery, framed by a technical interest, and motivated by a desire to appropriate the world.³ As the pinnacle of enlightened humanity, modern science represents the possibility of a fully realized self-knowledge and, as such, also of an individual sovereignty, of a 'sovereign subject.' This is not intended as a criticism of Freud. Indeed, if a modern theoretical discourse that was not permeated by the hubris of mastery was conceivable, Freud and psychoanalysis would surely be one of its starting points.

For purposes of presentation, the three interrelated perspectives into sovereignty – as a juridical question in relation to the sovereign state (Chapters 1–3), as a political question in relation to sovereign power (Chapters 4–6), and as a metaphysical question in relation to sovereign self-knowledge (Chapters 7–9) – have been structured under the notion of the 'head,' the *cephalus* that stands alone at the summit of the political body and that an ousted sovereign will be eager to hold on to.⁴

As the paradigmatic example of constitutional democracy, the autocephalous state exercises its sovereignty by making manifest its internal power arrangements including any limitations to the competences of its branches and institutions of government. It is sovereign to the extent that it is autonomous and politically self-determined and is able to exercise supreme power within its autonomy and self-determination. This is the sovereignty of the constitutionally ordered state as conceived by the representatives of the continental school of constitutional theorists and the architects of the Rechtsstaat such as Hans Kelsen, Georg Jellinek and Paul Laband who are discussed in the first part of the book. But the aspirations of constitutional theory to capture sovereignty within the framework of modern science can only be materialised through a series of contradictions that require setting state sovereignty against the sovereignty of an emerging juridical science, a conundrum or a 'contradiction' that Immanuel Kant attempted to evade by postulating sovereignty 'inscrutable.'

If autocephaly stands for the sovereign self-determination of a constitutionally ordered state, then *heterocephaly* would imply a difficulty or even an impossibility to locate sovereign power at any single point. Sovereign power emanates from myriad sources that resist the attempts of mainstream constitutional theory to contain power within normative frameworks. In that sense, heterocephaly with its multiplicity of sovereign powers runs counter to the theoretical intuition of the juridical tradition. The second part of the book investigates the gradual disintegration of juridical and constitutional framings of sovereignty into factual technologies of power. Historically speaking, the traditional Westphalian interpretation has gradually made way for what has contradictorily been called an 'ethical sovereignty.' The apparent contradiction – sovereign power delimited by an ethics cannot strictly speaking be 'sovereign' – is then further elaborated through Carl Schmitt's decisionist and politicised variant of constitutional theory and Michel Foucault's texts on the relationship between what he called the 'society of normalization' and sovereignty.

The third part of the book is, in a manner of speaking, a transposition of the two previous perspectives onto the metaphysical plane. As an assertion pronounced by modern science, the theory that posits a constitutionally ordered state already presupposes a subject that has reached full self-knowledge and that is also capable of 'knowing' the world that surrounds it. In that sense, the 'containing' that a constitutional framework provides is introduced by a sovereign subject, that is, the subject of knowledge and science. The sovereign 'mastery' of such a sovereign subject is represented in Alexandre Kojève's Hegelian account of the anthropogenic desire for recognition from which law

allegedly originates. But sovereign subjectivity must by necessity include within itself the seeds of its own disintegration. The 'decapitation' of the acephalous subject is traced first in Georges Bataille's texts on sovereignty as 'non-knowledge' that are in part seen as a critical response to Kojève's anthropological Hegelianism and, finally, in Jacques Lacan's work on jouissance, on the sovereign enjoyment that escapes symbolization.

Some of the material presented in this book is revised and rewritten from articles and essays published elsewhere. A shorter version of Chapter 1 has appeared as 'Why Is Law a Normative Discipline?: On Hans Kelsen's "Normology",' Res Publica, 11(3) (2005): 235-49. Most of Chapter 4 has been published in 'The Ethos of Sovereignty: A Critical Appraisal,' Human Rights Review, 8(2) (2007): 33-51. Parts of Chapter 5 have previously appeared in 'Hostility and Hospitality,' No Foundations: Journal of Extreme Legal Positivism, (4) (2007): 53-60. A version of Chapter 8 has appeared as 'Bataille's Contestation,' Law, Culture and the Humanities, 1(2) (2005): 247-63. I thank the publishers for permission to use these texts.

A final note on the texts cited. I have attempted to use original editions whenever possible even though many key texts that had long been unavailable in English - Michel Foucault's Collège de France lectures, Carl Schmitt's Verfassungslehre, Alexandre Kojève's Esquisse, and so on - have recently been translated. Partly this insistence arises from what might well be a misguided work ethic. With few exceptions like the second edition of Hans Kelsen's Pure Theory of Law, substantially the choice has less to do with any alleged inaccuracies in the English editions. I simply find situating arguments within a more general intellectual framework and identifying the relevant correlations considerably easier if I concentrate on the texts in the languages in which they were both thought and written. Even if all the translations presented in the following chapters are my own, I have consulted an English edition whenever one has been available. In trying to keep the referencing apparatus as light as possible, I have not included bibliographic details of the consulted editions. But especially with regard to 'classics,' I have noted paragraphs and/or sections in order to facilitate checking across editions.