Concept of sovereignty: Monism, pluralism and new development in the context of globalisation

DEBADITYA DAS
M. Phil Scholar
Department of Law, Himalayan University, Naharlagun (Arunachal Pradesh) India

ABSTRACT

Globalization is transforming the contemporary international system. Two major developments have arisen at the expense of the law of the sovereign state. First, specialized regimes of public international law have proliferated into areas previously monopolized by the state, such as human rights, environmental law, and trade law. Second, rules enacted by intergovernmental organizations and transnational corporations have become increasingly prominent. Inevitably, intertwined with these developments is the undermining of the Westphalian constitutional concepts of state sovereignty. Combining the approaches of international political economy and sociolegal theory, this paper contributes to the jurisprudential debate by arguing that globalization is far from the simple negation of sovereignty and state law. Global processes have transformed state law in remarkable ways. At the same time, state law is highly adaptive and plays a significant role in recasting transnational developments. More importantly, the current distinction between global and state law is increasingly blurred in practice. The outcome of these interactions demands a rethinking of what "law" is.

Key Words : Constraints, Improved production technology, Socio-economic profile, Suggestions

INTRODUCTION

Since the seventeenth century, the legal framework of the sovereign state has served as the paradigmatic arena for political governance and economic exchange. The institution of sovereignty has been constitutionalized on both national and international levels. Domestically, it is usually channeled through a prominent legal fiction, the national constitution, which gives "formal notice that a people had legally and legitimately self-determined their form of self-rule." State law typically claims "final authority" over matters within its territorial jurisdiction. Similarly, traditional international rules have been fundamentally concerned with interstate relations and not domestic matters. Public international law's formal insistence on equal sovereign rights both constitutes and guarantees state law's independent constitutional identity and autonomy. However, a number of recent developments have rendered assertions of the absolute juridical sovereignty of state law increasingly problematic. Nonstate actors such as intergovernmental organizations (IGOs), international nongovernmental organizations (INGOs), and transnational corporations (TNCs) have assumed greater political and economic importance in the contemporary world. Many of these non-state actors have penetrated deeply into national legal systems and contributed "progressively" to the transnationalization of international law.

Men do not wield or submit to sovereignty. They wield or submit to authority or power. Authority and power are facts as old and ubiquitous as society itself; but they have not everywhere and at all times enjoyed the support or suffered the restraints which sovereignty, a theory or assumption about political power seeks to construct for them. Sovereignty is a concept, which men in certain circumstances have applied a quality they have attributed to the political power.

The term 'Sovereignty' is derived from Latin word, 'Superanus' meaning supreme. Thus, sovereignty denotes supremacy or supreme power of the state, The origin of the concept of sovereignty are closely linked with the nature, the history of state. The concept of 'sovereignty' implies a theory of politics which claims that in every system of government there must be some absolute power of final decision exercised by some person or body recognized both as competent to decide and as able to enforce the decision. This person or body is called the sovereign. The concept of 'sovereignty' was formulated in conjunction with the founding of the modern state system in the 16th and 17th centuries. By the end of the 15th century there were up to 500 semi-independent political units in Europe, although the trend was towards centralization under monarchs. At the same time, these units saw themselves as the municipal embodiments of a universal (Christian) community. For most civilizations sovereignty has not been a defining characteristic of political life. The notion would have meant little to the tribal communities of Africa and Oceania organized primarily around ties of lineage and kinship. The multi-state system of ancient China with its subtle but fluid relationship between the monarchy and feudal lords and princes could scarcely be described as a system of sovereign states. The Greek city states, frequently engaged in war over territory, trade and personal rivalries were not internally organized in accordance with the logic of sovereignty. The ancient Greeks did not differentiate between state and society and the ruled were citizen - governors ... who were simultaneously subjects of state authority and creators of public rules and regulations. Europe is regarded as the cradle of the modern sovereign state. In which both the rulers and the ruled were subject to universal legal order which reflected and derived its authority from the law of God.

Meanings and definitions of sovereignty :

The foundation of modern democracy is based on the concept of sovereignty especially popular sovereignty. 'The idea of sovereignty is integrally bound up with the most fundamental concept of modern politics such as freedom and democracy'. The basic principle of democracy is that the ultimate authority resides in the mass and this is what popular sovereignty too stresses upon. Bryce considers it as "… the basis and watchword of democracy." Sovereignty, an important part of the state, may exist in a single person or in a group which prevents the state from disintegration and helps to keep all parts of the state together through obedience or use of power.

Sovereignty as a term has its origin in the Latin word '*Superanus*' meaning supreme.4 The word itself implies that the state enjoys supreme power over its citizens and has authority to enforce obedience to its laws and regulations. This is a sovereign power of a state which provides it the power to do things according to its wishes or as Jellinek defines it:

"… that characteristic of the state in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself."

Rise and development of sovereignty :

Sovereignty, like all other political terms and theories too has evolved with time. Though Sovereignty is a modern concept, it did exist in ancient and medieval times in the very idea of

supremacy. From the time of classical writers, like Aristotle Sovereignty or as he referred it 'supreme power' of the state, had its existence. Aristotle classified his states on the basis of whether few people or many bore the supreme power.23 A concept of sovereignty existed with the Romans who used notion like *imperium* that is authority and *majestas* to explain sovereignty. The very idea of 'legal and political sovereignty' existed during this period. They considered the state as the legal sovereign and people as the political sovereign. During the later part of the Roman Empire 'absolute sovereignty' evolved but with time it gave way to 'popular sovereignty' especially with Teutonic people. These people believed in the idea of individual independence and formed popular assemblies powerful enough to elect and to remove rulers.24 The concept of legal sovereignty or absolute sovereignty of the state diminished with the coming of the theory of the '*Two Swords*' which came during the Medieval Age. This theory was against the practice of both secular and spiritual power being bestowed on a single person or a group of people. With the coming of this theory, power began to be shared by the state and the church with 'ecclesiastical affairs' handled by ecclesiastical courts.25 This hampered and went against the sovereignty of the state. The concept of '*Two Swords*' created a relationship between Emperor and the Pope. They both performed their respective functions and citizenship of the state and membership of the church were closely related to each other. With time with the coming of powerful Popes and weak emperors the church though became independent of the state; the state remained dependent under the mighty church.

This age also began to believe that political authority of all rulers was the result of the willing submission of the ruled people. They believed that the state is the result of the will of the community. Even if a ruler came into power by conquest, he becomes a sovereign only by the consent of the people and therefore it was the people who were considered the true sovereign. They believed that a ruler is given merely the authority by the people to exercise sovereignty. This idea of a ruler being selected and remove at the will of the people was propounded by Marsiglio of Padua (1270-1340) who considered people to be the spring of authority.26 The king in medieval world was bound by the 'Law of God' and the 'Law of nature'. The law of nature contains a set of rules of good conduct, which are derived from nature and were discovered through moral intuition and by the application of human reasoning. The 'Law of God' or the divine law is also a set of rules of good conduct which are derived from holy books and scriptures and are said to be the will of God. The king was given the divine right to rule but his powers were limited. If a king became a tyrant the subject could remove him. His powers were checked and curtailed by the church, the people and the law of nature. Medieval ages therefore favored the growth of sovereignty of the people rather than the sovereignty of the state.

Thus, during Middle Ages with universalism of Papacy, and the empire and with its feudal society having no unity of power, sovereignty could not further develop. The concept of sovereignty, therefore, can be said to first arise during the emergence of secular monarchy in the fifteen century in Europe. During this period different circumstances led to the emergence of sovereignty. By the end of Middle Ages feudal lords became weak owing to their own conflicts and crusades. Their monopoly over wealth was destroyed with the development of commerce and towns and their military supremacy was badly affected by new methods of warfare. Also the ruling monarch achieved a greater degree of unification and centralization of authority helping them to break the shackles of Pope's control. Thus, in the struggle for supremacy between church and kings, the kings triumphed and sovereignty became equivalent to authority of monarch. Thus during this period, the doctrine of sovereignty aimed at making the monarch supreme over his feudal lords as well as church in the state. But with Jean Bodin's theory, sovereignty became the attribute of the

state.

Theories of sovereignty:

Monistic theory of sovereignty :

John Austin (1790-1859): In the nineteenth century, the theory of sovereignty as a legal concept was perfected by Austin an English utilitarian jurist, and an exponent of Monistic Theory of Sovereignty. In his lectures on jurisprudence in 1832, he observed that the concept of legal sovereignty and command theory of law are associated. The state, for Austin, was a legal order in which the specific authority is ultimate source of power. This authority, which issues the commands that are habitually obeyed but which is itself immune to the commands of others, is the sovereign power in the state. Its authority is unlimited. In this theory he asserts that moral character of the law is irrelevant. What matters is its effectiveness. The law is the command of the sovereign, expressing his wish backed by sanctions. John Austin and Hans Kelson (1887-1973) are thus leading exponents of logical positivism that advocates the study of actual legal systems and avoids the search for independent justifications in terms of natural law. The analytical school to which Austin belongs argues that sovereignty rests in a determinate person or body of persons and law emanates from this body. The analytical jurist describes it as a political but not a legal fact. This concern is only with law.

Pluralist theory of sovereignty :

The pluralist theory of sovereignty has been fully developed by J. Neville Figgis, Harold J. Laski, A.D. Lindsay, Leon Duguit, Earnest Barker, Mary Parker Follett and Krabbe. The pluralists pointed out that the interdependence of states in the modern world and the internal complexity of advanced industrial states makes the issue of state sovereignty untenable. The pluralist theory sought to redefine the nature of the state as one of the several associations of human beings operating in society to secure multifarious interests of individuals; it envisages new role for the state as an arbiter over conflicting claims of different associations. It repudiated the exclusive and absolute claim of the state to an individual's allegiance.

Sovereignty in the context of globalization: A constitutional pluralist approach :

It is an understatement to say that the contemporary international society of states is deeply divided. Despite the happy consciousness of those who believed in the worldwide triumph of liberal democracy in the early 1990s, the legitimating principles for domestic polities around the globe remain diverse. True, the sovereign state form was globalized in the second half of the twentieth century. Yet we still inhabit a global pluri-verse of 192 sovereign states whose political cultures, organizational principles, and conceptions of justice and legitimacy are diverse and at times in conflict with one another.

Superimposed on this segmentally differentiated, pluralistic international society of sovereign states are the legal and political regimes of the functionally differentiated global subsystems of world society, whose institutional structures, decision-making bodies, and binding rules have acquired impressive autonomy with respect to their member states and one another. These "regimes" or "subsystems," of which the global political system is one, engage in new forms of global governance and law-making that reach beyond and penetrate within states. Individuals are increasingly ascribed rights and responsibilities under globalizing international law. This expanding individuation of international law seems to mark an important difference from the pre-World War Two international

legal system and from stereotypes of "Westphalian" sovereignty. Although states remain the main subjects that make international law, they no longer have the monopoly of the production of that law. Indeed the international organizations they have spawned seem to be transforming into global governance institutions, which, like the sorcerer's apprentice, tend to invert the principal–agent relationship extant at the time of their creation. These GGIs now regulate states and individuals, including the treatment by states of their own citizens, in the name of the "international community," importantly redefining (some would say abolishing) state sovereignty. As a result, states are bound by rules and regulations that make the old images of international society and the consent-based production of international law appear anachronistic.

Aspects of sovereignty:

There are two aspects of sovereignty traditionally conceived - (1) Internal and (2) External. Internally, states are considered to have supreme authority within their borders. That is, there are no higher authorities or entities with the authority to take action within the territorial limits of the state. The link between 'internal' and 'external' aspects of sovereignty is non-intervention. External Sovereignty establishes the quality of independence of the state from the control or interference of any other state in the conduct of its international relations.

Robert Keohane distinguishes between two aspects of sovereignty - 'formal sovereignty' and 'operational sovereignty'. Ruth Lapidoth, makes a distinction between these two types of sovereignty, but does note that 'sovereignty' which includes Keohane's 'formal' sovereignty - can indeed be shared or divided. She argued that there are three elements of state sovereignty (1) the sovereign state is subject to international law, (2) it is not under any other states control, and (3) it is able to exert power.

Lapidoth notes, further, that there are a number of implications for the relations between states of this construction of state sovereignty. (1) all states possess 'sovereign equality', (2) states, cannot intervene in the affairs of another state, (3) states have exclusive territorial jurisdiction, (4) states are presumed competent, (5) states can only be bound by adjudication with their consent, (6) states have almost unlimited right to wage war, (7) Positivist international law is the source of binding rules between states, rather than natural law, which is beyond the free will of states.

Globalisation and sovereignty of nation-state :

'Sovereignty' has a spatial dimension in that it is premised on the occupation and possession of territory. This spatial dimension manifests itself most clearly in the drawing of territorial boundaries that separate the 'inside' from the 'outside'. State Sovereignty is an old concept. In its classical form, it is absolute and without limits. It is a tool of state power and authority, in view of all these, the principles of state sovereignty remained relevant until the current socio-political and economic development which challenges the functional and practical relevance in the new world order.

David Held, identified five gaps with regard to the concept of sovereignty in the global context. In the economic realm there are forces that actually undermine the power and scope of national states. In the global context markets, role of multinational corporations, (MNCs), increased workforce, mobility and the decisive role of technology and communications, internationalization of production has eroded the state's capacity to control its own economic future. Economically weak states are under great pressure than before, both from outside and inside.

The modern world was primarily organised around nation-states as its primary units. Nation-states claimed supreme jurisdiction or sovereignty over a territorial area. In the era of globalisation

there are profound changes in all these conceptions. The sovereign power of the nation-state has come to be deeply contested; the conception of the political community remains highly fluid and the notions of territories and borders have radically altered. Globalists think that nation-state has become an anachronism today.

The classical regime of sovereignty has been recast by changing processes and structures of regional and global order. The quality of state sovereignty in the contemporary world, both in internal and external relations have fundamentally changed: state sovereignty is no longer absolute.

Until the second world war nation-state was considered as primarily military actor which, got undermined with the emergence of power blocks, led by US and USSR through their military alliances like NATO and Warsaw pact.

The disintegration of USSR and collapse of communism, which led to take dissolution of Warsaw Pact. The US is the world's only 'superpower'. Thus, the proliferation of international and regional organisations has also moderated the idea of Nation-state sovereignty. Nation-states were once the masters of markets, now it is the markets that on many crucial issues are the masters over the government of states. And the declining authority of states is reflected in a growing diffusion of authority over other institutions and associations.56 Thus, the impersonal forces of world markets, integrated over the post war period more by private enterprise in 'finance', industry, and trade than by co-operative decisions of governments, are now more powerful than the nation-states. According to John Ralston, Saul, The power of the nation state is waning, such states as we know them may even be dying in the future, power will lie with global markets'.

Thus globalisation has presented a fundamental challenge to Westphalian states-system and its central principles of state sovereignty. Though globalisation has brought the demise of sovereignty, it is by no means dissolving the state.

According to David Potter seven complications have been identified relating to the general idea of the relative autonomy of the state within the global economy. They are:
1. The word 'state' needs careful handling; states can take quite different forms.
2. State autonomy is not the same thing as state power.
3. State can be seen as more and less autonomous at the same time if no distinctions are made between different dimensions of autonomy.
4. An institution within a state may be more autonomous than another institution.
5. Amounts of state autonomy can vary through time.
6. Amounts of state autonomy at any one time can vary depending on the state's location in the global economy.

According to Camilleri and Falk sovereignty may not be the last word on the subject. Given far reaching transformation of the social and political landscape we have witnessed this century, and especially these past several decades, there is a pressing need to rethink the concept and practice of sovereignty.

Globalisation and sovereignty of India:
These developments are often referred to as a part of a process of 'globalization'. Globalisation in this context implies two distinct phenomena. First, it suggests that political, economic and social activity is becoming worldwide in scope. And secondly, it suggests that there has been an intensification of levels of interactions and interconnectedness among the states and societies which make up international society.

Broadly, state sovereignty in India is, affected by the waves of globalisation in different ways

they are:

1. With the increase in global interconnectedness, the number of political instruments available to government and the effectiveness of particular instruments shows a marked tendency to decline." This is because of the loss of wide range of border control, which formerly served to restriet transactions in goods and services, production factors and technology, ideas and cultural interchange.100 The result is a decrease in policy instruments.

2. India can experience a further diminution in options because of expansion in transnational forces and interactions, which reduce and restrict the influence. The flow of private capital across borders can threaten anti-inflation measures, exchange rates and governmental policies.

3. In the context of highly interconnected global order, many of the traditional domains of state activity and responsibility cannot be fulfilled without resorting to international forms of collaboration. The demands of the state, faced with a whole series of policy problems, have increased and these cannot be adequately resolved without the states and non-states co-operating with one another.

4. Accordingly state has to increase the level of political integration with other states or increase multilateral negotiations, arrangements and institutions to control the destabilizing effects that accompany interconnectedness.

Sovereignty in India is increasingly challenged by

1. Global market forces, which easily penetrate borders and affect national economies in number of ways. Like environment, global communication systems: nuclear weapons, terrorism, drug trade, etc.

2. The development of norms concerning international protection of human rights and humanitarian law are seen to infringe sovereignty because they challenge principle of non-intervention - *i.e.*, the right of states to govern their citizens free from outside interference.

3. There is the core area of warfare and control of the means of violence in their domestic jurisdiction.

Globalization therefore, purely rests on an ideology of American model of free market capitalism in which role of India is that of a 'facilitator' and 'regulator' of the rules of the game for managing efficient free market economy. India has to play the role of a good "host' for transnational capital.

India has abandoned its national project of self-reliant economy, both internally and externally in favour of a New Economic Policy based on globalisation, liberalisation and privatisation, firmly situated on the principle of sovereignty of the nation-state, but the project of New Economic policy of the 1990s is based on the doctrine of subordination of Indian state to global capitalist -cum imperialist countries. The whole programme of structural adjustment and control over fiscal deficit has been carried out by the Indian state at the behest of capital exporting countries and global institutions like IMF and World Bank. In the age of globalisation, 'state' and 'capital' get fully integrated and the corporate houses achieve free entry to the corridors of political and bureaucratic decision-makers. The Foreign Financial Institutional investors are full of liquidity and they have pumped Rs. 23,000 crore into Indian Equity market. Thus, India has moved from autonomy to dependence. The old is dead and precious ideas and policies have been discarded from 1990's and new path of dependent development has been adopted.

An important negative impact of the 'opening of national economy' to foreign capital has been the growth of speculative capitalism at the cost of productive capitalism because the Foreign Exchange Regulation Act of India has been debunked by the liberalisers without creating any capability of the

Indian state to control speculators.

Another consequence of the policies of liberalisation and free market economies has been emergence of regional disparities, income inequalities, disparities among social groups, widening of rural-urban gap and forced migration. According to Human Development Report "Stark differences are emerging between regions, some pulling ahead while others are left behind. Some countries are succeeding while others are falling behind.

Conclusion :

The international system has become less a state-centric, coordinative mechanism than a collectivity of specialized transnational regimes that penetrates into the political constitution of domestic polities. Technological advancements have accelerated the migration and transplantation of legal rules and practices. Non state actors like IGOs, INGOs, TNCs, and cross-border social movements have become significant actors in international governance. They have assumed the power to create transnational law that governs many dimensions of the political economy that was previously monopolized by the jurisdiction of the sovereign state.

Sovereignty is at the heart of both public international law and the legal constitution of the territorial state. Substantive changes in the international system unavoidably affect the shape of sovereignty and the future of state law. Indeed, in numerous cases, the state's effective monopoly on all legitimate coercive forces within its territory is no longer empirically defensible. The ability of state law to regulate transnationalized activities like cyber disputes and cross-border commercial transactions effectively is on the verge of decline. Nonetheless, the interplay between law and globalization is plagued by uncertainties. Global forces have brought about both intolerable inequality and new opportunities for exchange. The concept of global law is debatable precisely because it is both global and legal. In many respects, transnational norms assume regulatory powers at the expense of municipal legal systems. The relationship between nonstate and state law is further complicated by the deformalization of regulation. The legal norms originating from the less formal rule-making processes of non-state international actors (including IGOs and *lexmercatoria*) is altering perceptions about what the notion of "law" really means.

The modern state and its law are transforming. Undoubtedly, transnational actors have profoundly influenced the content and character of municipal legal systems. However, the globalization of international governance is not about the marginalization of one legal order by another. After all, the homogenization of law on a global scale is largely speculative. A unified constitutional order of mankind is not in the making, at least in the foreseeable future. However, the state may at times strategically choose to comply with international and transnational norms instead of its own traditional state law; the adaptive power of state law should not be underestimated. It may focus less on maintaining sovereign claims to territorial supremacy and more on the protection of local practices and regional diversity. In the end, the fundamental functions of state law, in structuring the institutional architecture of the state, channeling wide-ranging national social policies, and responding to localized needs and conflicts, are irreplaceable. The interplay between the global and the local is far more complex than mere conflict. People who enact and enforce state law frequently shape non state law at the same time. Importantly, legal elites whose outlook is both local and transnational possess the extraordinary power to decide whether state or nonstate law is to be followed in a particular policy or situation.

The public imagination of a global takeover of sovereign rights provides national political elites with a resource to strengthen their existing powers and extend the state's regulatory influence into

new areas. Domestic governments, which control the armed forces and important natural and economic resources, are unlikely to give up their vested interests unconditionally. In general, sovereign state law is strong and flexible enough to endure the many challenges ahead. Despite globalization, sovereign state law is likely to retain its political influence over the lives of the vast majority of peoples around the world.

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