

Re-envisioning Sovereignty

The End of Westphalia?

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Chapter 16

Trust, Legitimacy and the Sharing of Sovereignty

William Maley

The 1990s was a decade of striking turmoil, marked by the unravelling of two major autocratic federations, namely the Soviet Union and Yugoslavia, and by an early upsurge of mass ethnic conflict in the aftermath of the substantial abandonment by the superpowers of the Third World states on which much of their competitive energy had been focused in the 1970s and 1980s.¹ It was also a decade in which forces of globalisation – political, economic, cultural – unsettled some of the understandings upon which the character of world politics had depended. And it was a decade in which the unprecedented prosperity of developed countries in Europe, North America and Australasia, and the surging economies of China and India, contrasted sharply with the wretched experiences of peoples condemned to eke out a miserable existence in disaster areas such as Afghanistan, Somalia and Rwanda. It is hardly surprising that the events of the decade prompted renewed debate over both the concept of sovereignty and the future of the ‘sovereign state’.² One of the most fruitful elements of this debate was fresh attention to the various dimensions of ‘sovereignty’, and this led Robert H. Jackson in a penetrating study to deploy a new term, ‘quasi-states’, to refer to those territories with a high degree of ‘juridical sovereignty’, and a low degree of ‘empirical sovereignty’.³ This insight – that a high level of acceptance as a state within a system of states could go hand in hand with an erosion of what might be seen as key functions of ‘the state’ as an administrative structure – was not on close examination especially surprising, but it did serve to focus attention on the very real problems which disrupted states could confront. It is with such problems and their management that this chapter is concerned.

¹ See Daniel S. Papp (1986) *Soviet Perceptions of the Developing World in the 1980s: The Ideological Basis* (Lexington KY: Lexington Books); Jerry F. Hough (1986) *The Struggle for the Third World: Soviet Debates and American Options* (Washington DC: The Brookings Institution).

² See, for example, Joseph A. Camilleri and Jim Falk (1992) *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Aldershot: Edward Elgar); Martin van Creveld (1999) *The Rise and Decline of the State* (Cambridge: Cambridge University Press).

³ Robert H. Jackson (1990) *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press). See also Michael Barnett (1995) ‘The

In severely disrupted states, two major problems present themselves. One is the problem of the erosion of trust. This can arise at the mass level, but is most corrosive when members of a political elite are so suspicious of each other that politics assumes a zero-sum form. Another is the problem of legitimacy, which occurs when no obvious mechanism exists for securing generalised normative support for new political arrangements. Scholars in the past have pointed to the value of neutral security forces in facilitating transitions in such circumstances. However, there may also be virtue in exploring new conceptions of sovereignty as a way of confronting these problems. These involve not short-term trusteeships, but rather a weaving together of institutions of local state and international society. This chapter examines some historical examples of rudimentary shared sovereignty in the legal sphere, and goes on to argue that this approach is compatible with the operational requirements of states in an increasingly globalised world, although not always easy to bring about. This is *not* to suggest that shared sovereignty models offer a panacea for the world's political ills, but simply that in certain circumstances, institutions of shared sovereignty should be added to the options of those concerned with creative institutional design.

This chapter is divided into five sections. The first section examines the ways in which state disruption can undermine or destroy the bases for cooperation amongst political actors, and shows why this is an obstacle to the reconstitution of political authority. The second identifies a range of measures that can be taken to advance this end, of both a general and a specific kind. The third section elaborates the sense in which I use the term 'shared sovereignty', and gives some historical examples of its rudimentary form, taking legal relations within the Commonwealth as a starting point. The fourth examines the ways in which the wider world has engaged with disrupted states, and makes the point that 'shared sovereignty' is distinct from colonial occupation, subordination within a sphere of influence, trusteeship under the UN Charter, short-term occupation pursuant to a Security Council enabling resolution with a UN Assistance mission in place, or regional integration through such mechanisms as the European Union. The fifth identifies a range of factors which can militate against the adoption of shared sovereignty models, and offers some brief conclusions.

State disruption and co-operation

Order and stability in a well-functioning country are not the only political values worth pursuing, but other things being equal, they have much to commend them. To see the virtues of a well-functioning and properly-accountable state,⁴ it is necessary only to spend some time in a country where the capacities of a well-functioning state have been degraded, where military capacity, rational bureaucratic organisation and

4 The adjectival qualifications here are important, because tremendous sorrow has been caused by efficient totalitarian states (such as Nazi Germany and the USSR under Stalin),

territorial control have been compromised.⁵ The Hobbesian argument for a common power to keep others in awe can carry a certain weight when the erosion of the state creates space for a range of unappetising actors to occupy. In a range of territories where the instrumentalities of the state cannot be properly resourced, have fractured on geographical lines, or have lost their legitimacy, new forces have emerged which can differ markedly in terms of their local legitimacy and distributive capacity. On occasions local institutions of governance provide a degree of local order, but very often predatory warlords embark on a path of extraction of resources from vulnerable ordinary people which are then redistributed to sustain armed groups which accord prudential and sometimes normative loyalty to their leader. The reconstitution of an effective state is from the point of view of such actors a dangerous threat. This is not simply a little local difficulty. One of the dangers of warlords is that they may have little understanding of the norms of international society which the occupants of the commanding heights of well-functioning states can scarcely avoid encountering as they interact with the wider world. As a result, all sorts of actors may flourish under their patronage: a classic and very sobering example is the nurturing of Al-Qaeda by the Taliban in Afghanistan.⁶ However, terrorist groups are not the only kinds of actors that can thrive under such circumstances, and it is no surprise that opium production boomed in Afghanistan as well, creating a problem which is now proving dangerously intractable. In such circumstances, constructive engagement across state boundaries can prove extremely difficult to orchestrate. The kaleidoscope of actors makes political outcomes highly unpredictable, and the temptation for neighbouring regimes to protect their own interests by supporting particular clients may be very strong. Pakistan did this in Afghanistan, first with the Hezb-e Islami of Gulbuddin Hekmatyar and then with the Taliban, and the long-run consequences proved disastrous.⁷ Thus, while states are capable of treating their own citizens brutally, and conflict between states has spilt oceans of blood, anarchy is not a happy solution.

One possible consequence of the erosion of state capacity and the liberation of new political forces is a breakdown of trust. Trust is a property of social relations, and is integrally related to predictability: 'to trust means to hold some expectations about something future or contingent or to have some belief as to how another person will perform on some future occasion. To trust is to believe that the results of somebody's intended action will be appropriate from our point of view'.⁸ The consequences of a breakdown in trust can be wide-ranging. While a healthy scepticism about government may be no bad thing,⁹ rebuilding political legitimacy once it has broken down is extremely difficult, since there may be no single strategy of legitimation

5 See Ann Hironaka (2005) *Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War* (Cambridge MA: Harvard University Press), 70–76.

6 See William Maley (2000) *The Foreign Policy of the Taliban* (New York NY: Council on Foreign Relations).

7 See Rizwan Husain (2005) *Pakistan and the Emergence of Islamic Militancy in Afghanistan* (Aldershot: Ashgate).

8 Barbara A. Misztal (1996) *Trust in Modern Societies* (Oxford: Polity Press) 24

which works for all salient forces within a society. Rousseau's comment in 1762 that the 'strongest is never strong enough to be always master, unless he transforms strength into right, and obedience into duty' provides a chastening reminder of the virtues of power exercised on legitimate rather than non-legitimate grounds.¹⁰ Two forms of interpersonal trust are particularly important. One is 'face to face' trust, and refers to trust between persons who actually know each other. Another form is 'anonymous' trust, which refers to trust which arises not because persons know each other, but simply because they are members of some community, be it social or political. Interpersonal trust is a core element of 'social capital', a term popularised by Robert D. Putnam as a label for a propensity to act cooperatively in the pursuit of jointly held goals.¹¹ 'Social capital', Fukuyama has argued, 'pervades organizations and is critical to their proper functioning'.¹² A well-functioning state that can enforce general rules of justice increases the predictability of political life and serves to reduce the possible costs of misplaced trust. The breakdown of the state tends to narrow the bounds of 'community' within which trust is accorded, so that anonymous trust on civic grounds is succeeded by anonymous trust within social communities such as the ethnic group. The consequences of such an accentuation of ethnic identifications can be devastating, as the Rwandan genocide and the Srebrenica massacre demonstrated.

A breakdown in face-to-face trust can also be grossly detrimental to political stability. This is because of the role of elites in political life. As Gaetano Mosca famously put it:

In all societies ... two classes of people appear – a class that rules and a class that is ruled. The first class, always the less numerous, performs all political functions, monopolizes power and enjoys the advantages that power brings, whereas the second, the more numerous class, is directed and controlled by the first, in a manner that is now more or less legal, now more or less arbitrary and violent.¹³

While this is in some respects a significant oversimplification, it contains a solid core of truth. One need not venerate political elites in order to recognise that elite disharmony can be a major source of instability. Elite disunity makes cooperative politics very difficult, as the following description of disunified elites suggests.¹⁴

¹⁰ See Jean-Jacques Rousseau (1973) *The Social Contract and Discourses* (London: J.M. Dent), 168. For further discussion of this issue, see Rodney Barker (1990) *Political Legitimacy and the State* (Oxford: Oxford University Press).

¹¹ Robert D. Putnam (2001) *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton NJ: Princeton University Press). See also Francis Fukuyama (2001) 'Social Capital, Civil Society, and Development', *Third World Quarterly* 22(1), 7–20.

¹² Francis Fukuyama (2004) *State-Building: Governance and World Order in the 21st Century* (Ithaca NY: Cornell University Press), 63.

¹³ Gaetano Mosca (1939) *The Ruling Class* (New York: McGraw-Hill), 50. While Mosca refers to classes rather than elites, it is clear from the context of his observation that he uses the term to mean 'category', rather than class in a Marxian sense.

Communication and influence networks do not cross factional lines in any large way, and factions disagree on the rules of political conduct and the worth of existing political institutions. Accordingly, they distrust one another deeply; they perceive political outcomes in 'politics as war' or zero-sum terms; and they engage in unrestricted, often violent struggles for dominance. These features make regimes in countries with disunified elites fundamentally unstable, no matter whether they are authoritarian or formally democratic. Lacking the communication and influence networks that might give them a satisfactory amount of access to government decision making, and disagreeing on the rules of the game and the worth of existing institutions, most factions in a disunified elite see the existing regime as the vehicle by which a dominant faction promotes its interests. To protect and promote their own interests, therefore, they must destroy or cripple the regime and elites who operate it. Irregular and forcible power seizures, attempted seizures, or a widespread expectation that such seizures may occur are thus a by-product of elite disunity.

This vivid picture is striking in one other respect: it brings out the vicious circle which elite disharmony can trigger. Serious fracturing within a political elite can debilitate the states; this debilitation can then encourage further fracturing within the elite, and so on. In disrupted states, measures to facilitate the re-establishment of a consensually unified elite are very important, but also very difficult, because past experience may have given key political leaders very good grounds for rationally distrusting their fellows. For this reason, the reconstitution of trust is closely linked to the implementation of measures with the potential to minimise the harm which aspiring members of a new elite might be able to wreak upon each other.

Measures to advance trust

When dealing with severely disrupted states, one possible solution might be to encourage the emergence of an authoritarian or autocratic regime, charged with imposing order as rapidly as possible. However, this approach has a number of flaws. First, where the instrumentalities of the state have been severely compromised, even the most enthusiastic autocrat is likely to lack the tools necessary to impose order. Second, autocracies can be quite fragile, are likely to require costly ongoing support, and simply mask, rather than overcome, interpersonal distrust and elite disunity.¹⁵ Third, a favouring of autocracy would be at odds with any emerging right to democratic governance, and is hardly a viable strategy for international organisations or states whose soft power derives from their known commitment to ethical standards. For all these reasons, the principal focus of efforts at state rebuilding has been on mechanisms which can foster the re-establishment of trust and legitimacy within a broadly democratic framework – although sophisticated

Elites and Democratic Consolidation in Latin America and Southern Europe (Cambridge: Cambridge University Press), 1–37 at 10.

variants of this approach warn against a hasty rush to the polls and to the market,¹⁶ since elections and markets depend for their efficacy on an overarching framework of norms, rules and understandings to ensure that they operate as intended.

When state disruption has led to internal armed conflict or wholesale civil war, there may be a very large gap between, on the one hand, the ground realities at a point where exhaustion brings fighting to a halt, and on the other, some kind of stable, institutionalised political order. Some 'peace mechanisms' that have been mooted as devices for ensuring the durability of cease-fires in interstate conflicts may potentially be of use, such as various sorts of third-party involvement,¹⁷ confidence-building measures, short-term dispute-resolution procedures, and formal agreements to address political concerns¹⁸ (of a kind which some scholars have labelled 'pacts' or 'elite settlements').¹⁹ But more generally, there are at least three broad strategies to consolidate a process of transition towards a legitimate polity marked by high levels of trust: socialisation, the supply of neutral security and institutional development.²⁰

Socialisation is a long-term strategy of considerable importance. Anonymous trust is a product of environmental factors, and if people are encouraged through a range of social influences – families, educational institutions, religious networks and media of communication – to act cooperatively as a way of earning approval, they may feel obliged to do so even though there is some risk associated with trusting others. When enough people share this orientation, we can speak of the emergence of a 'democratic political culture'. This is always an important development, for as Larry Diamond puts it:

[T]he development of a pattern, and ultimately a culture, of *moderation, accommodation, cooperation*, and *bargaining* among political elites has emerged as a major theme of the dynamic, process-oriented theories of democratic transition and consolidation.²¹

16 *Ibid.*; also Jack Snyder (2000) *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W.W. Norton).

17 See Fen Osler Hampson (1996) *Nurturing Peace: Why Peace Settlements Succeed or Fail* (Washington DC: United States Institute of Peace Press), 205–234.

18 Virginia Page Fortna (2004) *Peace Time: Cease-Fire Agreements and the Durability of Peace* (Princeton NJ: Princeton University Press), 10–38.

19 On pacts, see Guillermo O'Donnell and Philippe C. Schmitter (1986) *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: The Johns Hopkins University Press), 37–39; Giuseppe DiPalma (1990) *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley & Los Angeles: University of California Press), 86–90. On elite settlements, see Michael Burton and John Higley (1987) 'Elite Settlements', *American Sociological Review* 52(3), 295–307.

20 See William Maley (2003) 'Institutional Design and the Rebuilding of Trust', in William Maley, Charles Sampford and Ramesh Thakur (eds) *From Civil Strife to Civil Society: Civil and Military Responsibilities in Disrupted States* (Tokyo and New York: United Nations University Press), 163–179 at 165–167.

However, resocialisation is not and cannot be a short-term palliative, for after trust has broken down, any process of resocialisation is likely to be fighting an uphill battle against very negative discourses, myths, and truths arising from the period in which relations between different parties were at their nadir. This is especially the case in the wake of serious ethnic conflict. As Brian Barry has reminded us: 'once ethnic feeling has been whipped up, it has a terrifying life of its own'.²²

The supply of neutral security is a much more important short-term strategy. In the aftermath of severe state disruption, the hostilities between different internal actors, and the fears which they entertain of each other, may be considerable. Where a civil war has occurred, the path to internal order may involve not just negotiation between parties to reach an agreement, but also the implementation of the agreement. It is during the implementation phase that the perils for any agreement are likely to be highest: armed groups may be expected to relinquish their arms, thereby exposing themselves to the risk of attack by perfidious opponents.²³ The same applies to some degree even where internal actors have not been involved in direct armed conflict with each other; an international security force can disincline actors to attempt an extra-constitutional seizure of power, since they cannot be certain that the force would not move to thwart their objectives. However, in the long run such deployments do not of themselves provide the foundation for political order; this can come only with the development of consolidated institutions which channel political tensions into forums in which they can be managed peacefully.

Institutional development has been a central focus of virtually every 'managed' political transition. The lengthy post-war occupations of Germany and Japan led to the establishment of democratic institutions of a kind which neither country had known before. Decolonisation in the 1950s and 1960s for the most part involved the design of new constitutions to shape politics once independence was achieved; sometimes the United Nations was involved in organising popular votes to judge proposals for political change.²⁴ And more recently, the United Nations in places as diverse as Namibia, Cambodia, East Timor, Afghanistan and Iraq has been involved in the organisation of electoral processes to choose new leaders or to set up popular assemblies c'ty of Jerusalem to be a *corpus separatum* under United Nations administration. Jerusalem's status was of unique concern because it housed notable religious sites such as the Western Wall (of significance to Jews), the Dome of the Rock (of significance to Muslims) and the Church of the Holy Sepulchre (of significance to Christians). The April 1948 draft Statute of Jerusalem provided for a governor appointed by the UN Trusteeship Council with wide-ranging powers.²⁵ The events of 1948 saw Jerusalem instead being divided between Israel and Jordan,

22 Brian Barry (1990) *Democracy, Power and Justice: Essays in Political Theory* (Oxford: Oxford University Press), 135.

23 See Barbara F. Walter (2002) *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton NJ: Princeton University Press).

24 See Lawrence T. Farley (1986) *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Boulder CO: Westview Press).

and following the 1967 Six-Day War, Israel secured physical control of all the city and subsequently declared it to be its eternal and indivisible capital. The 1948 draft statute nevertheless represents a further example of what a shared sovereignty model might resemble.

Second, regimes have existed in which a single institution has performed constitutional functions in more than one state. The classic modern example is the arcane body known as the Judicial Committee of the Privy Council. The Privy Council, established in 1679, lies at the heart of the structure of executive government in the United Kingdom, and the Lord President of the Privy Council is a senior cabinet minister. However, Privy Council membership is not limited to citizens of the United Kingdom; for example, the present Prime Minister of Papua New Guinea is a Privy Councillor. Furthermore, its 'Judicial Committee' has historically consisted not just of Lords of Appeal in Ordinary (that is, the senior judges in the British House of Lords), but also distinguished jurists from Commonwealth countries. For most of the twentieth century, appeals (technically to the King or Queen 'in Council') could be taken from Australian courts to the Judicial Committee in London. It was only in 1973 that initial steps were taken in Australia to abolish general appeals from the High Court of Australia to the Judicial Committee, and it was only pursuant to section 11(1) of the *Australia Act 1986* that all appeals from Australian courts were finally abolished.²⁶ (This measure had become necessary because the 1973 abolition of High Court appeals had created the perverse consequence that an unsuccessful litigant before a state supreme court could choose which of *two* possible 'final' courts of appeal to approach – the High Court of Australia or the Judicial Committee – and in effect could approach the court which seemed to offer the more favourable jurisprudence on the issues in point.) The Judicial Committee remains a final court of appeal for some Commonwealth countries. This integration of judicial organs reflected a particular form of decolonisation.

However, such integration can also be produced by intergovernmental agreement. The Republic of Nauru provides one example. Once a UN trust territory, Nauru became independent on 31 January 1968; in Australia, the Nauru Independence Act 1967 had provided in section 4(2) that 'On and after Nauru Independence Day, Australia shall not exercise any powers of legislation, administration or jurisdiction in and over Nauru'. However, on 6 September 1976, an agreement was signed between Australia and Nauru that was subsequently incorporated as a schedule to the Nauru (High Court Appeals) Act 1976.²⁷ This gave effect, in the words of the agreement, to 'the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru'. The agreement could be terminated on ninety days' notice, and did not permit appeals

26 See Peter C. Oliver (2005) *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press), 243–248.

27 The constitutional validity of this act as an exercise of the legislative power of the

'in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court'. Further, an appeal is not to lie 'where the appeal involves the interpretation or effect of the Constitution of Nauru'. Nauru, unfortunately, is now a sadly debilitated state, and the scope of its effective independence is open to real doubt given its susceptibility to Australian pressure, which was ruthlessly applied in 2001 to secure the location on its soil of a refugee detention camp as part of Australia's so-called 'Pacific Solution'.²⁸ Nonetheless, as an example of how the formal sharing of sovereignty can be effected, this example is quite striking.

The lesson of these examples is straightforward. There are rarely legal obstacles which block creative formal integration of institutions across territorial boundaries. The consent of states is a powerful tool, and if states through their own processes agree to share sovereignty, sovereignty can be shared. Problems arise not at the conceptual level, but rather at the political level, where issues of desirability and viability remain potent.

Global engagement with disrupted states

In this section, I distinguish the shared sovereignty model from a range of other ways in which Westphalian sovereignty can be compromised. It is only very recently indeed that anything realistically approaching 'a world of sovereign states' has materialised, essentially in the period since the Second World War. When the United Nations organisation was founded in 1945, it had only 51 original members. With the admissions of Switzerland and Timor Leste in 2002, its membership reached 191 members. Before this, large tracts of the earth's surface and millions upon millions of people lived in territories which could not meaningfully claim to be 'sovereign states'.

A first point of distinction is between shared sovereignty and *colonial occupation*. Colonial occupation is both asymmetrical and substantially involuntary. In a case of colonial occupation, one does not witness structural integration of institutions from distinct states, but rather institutions in the colony which are an outgrowth of institutions in the colonising state. (Sometimes this can translate into a situation in which nationals of the former colonial power continue to serve as individuals within institutions of a post-colonial state.) While customary law of indigenous peoples may receive some recognition, this is by virtue of the law of the occupying power.²⁹ Shared sovereignty can, however, arise when an occupation has come to a peaceful conclusion, but territories remain linked in a formal sense to the former occupier. Of course, at this point, the extent to which sovereignty may be shared can vary. From Australia's point of view, the Statute of Westminster 1931 marked a significant stage in the diminution of shared sovereignty by providing in section 4 that:

28 See William Maley (2003) 'Asylum-Seekers in Australia's International Relations', *Australian Journal of International Affairs* 57(1), 187–202.

29 On this dimension of colonial occupation, see Paul Keal (2003) *European Conquest*

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

And as noted earlier, the Australia Act 1986 marked another shift, with a heavy air of finality about it. In formal terms, the much-discussed 'sovereignty' of the British Parliament³⁰ was undermined, as time passed, by a shift in the rule of recognition, existing, in H.L.A. Hart's famous formulation, 'only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria'.³¹

A second point of distinction is between shared sovereignty and *spheres of influence*. Captured in notions such as the Brezhnev Doctrine, spheres of influence imply limited sovereignty in the face of political threats.³² As Paul Keal has put it, a sphere of influence 'is a determinate region within which a single external power exerts a predominant influence, which limits the independence or freedom of action of political entities within it'.³³ It is essentially influence, rather than structural integration, that limits the autonomy of the subordinate party, although through mechanisms such as the Warsaw Treaty Organisation and the Council for Mutual Economic Assistance (known as COMECON), the Soviet Union sought to position itself at the centre of a range of formal interstate organisations. What compromised the autonomy of states within the Soviet sphere of influence was fundamentally a fear that if they strayed from the path laid down by the Soviet leadership, they would be invaded and their local 'leaderships' overthrown: the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968 clearly established that this could happen,³⁴ and it was the credibility of the Soviet threat which long influenced East European opinion. The Eastern Bloc collapsed in 1989 because in the light of the changes in the USSR under Mikhail Gorbachev's leadership, and the quagmire which the Soviet leadership had entered with the invasion of Afghanistan in December 1979, the threat of a Soviet invasion of an Eastern European state had ceased to be credible.

A third distinction is between shared sovereignty and *trusteeship* under Chapters XII and XIII of the UN Charter. Trusteeship was a directed descendant of the mandate system established by Article 22 of the Covenant of the League of Nations

30 See Jeffrey Goldsworthy (1999) *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press).

31 H.L.A. Hart (1994) *The Concept of Law* (Oxford: Oxford University Press), 110. See also William Maley (1985) 'Laws and Conventions Revisited', *Modern Law Review* 48(2), 121–138.

32 See Robert A. Jones (1990) *The Soviet Concept of 'Limited Sovereignty' from Lenin to Gorbachev: The Brezhnev Doctrine* (London: Macmillan).

33 Paul Keal (1983) *Unspoken Rules and Superpower Dominance* (London: Macmillan), 15.

34 On Hungary, see Charles Gati (1986) *Hungary and the Soviet Bloc* (Durham NC:

to deal in the aftermath of the First World War specifically with former German and Turkish colonies.³⁵ The United Nations carried this burden for much longer than is often appreciated, with the new states emerging from trusteeship and securing admission to the United Nations well into the 1990s; but it is a phase which has now ended. Trusteeship differs from shared sovereignty in that trust territories were avowedly *not* sovereign; their subordinate status was inherent in the very nature of trusteeship.

A fourth distinction is between shared sovereignty and transitional control by UN missions acting with Security Council authorisation, such as UNTAC in Cambodia.³⁶ Here, the 'sovereignty' of the state may be symbolically embodied in a local institution (in Cambodia's case the 'Supreme National Council'), but the exercise of effective power is delegated to a greater or lesser degree to an international mission. Such control is typically a prerequisite to the restoration of full and *unshared* sovereignty. That said, confronted with the problems of weak states, some scholars have recently put forward a notion of 'neotrusteeship', to refer to 'the complicated mixes of international and domestic governance structures that are evolving in Bosnia, Kosovo, East Timor, Sierra Leone, Afghanistan and, possibly in the long run, Iraq'.³⁷ This may indeed lead to 'a state embedded in and monitored by international institutions',³⁸ which in practice would amount to shared sovereignty.

Finally, there are obvious similarities between shared sovereignty and supranational organisation. This is no more apparent than in Europe where the institutional developments arising from the 1957 Treaty of Rome and the 1992 Maastricht Treaty, associated initially with the formation of the European Economic Community (EEC) and the European Union (EU) have fundamentally altered the shape of the continent. Yet the 2005 debacle over a European Constitution, decisively blocked by French voters, highlights the ongoing significance of national policy and identity, and raises real questions about the depth of structural integration. As Richard Rose has pointed out, 'EU institutions appear similar in name to those of national governments, but they are very different in what they can and cannot do in relation to each other and to member states'.³⁹ It is notable that European integration has been a product of very specific historical factors,⁴⁰ and has not been closely replicated in other regions such

35 See P.J. Noel Baker (1928) *The League of Nations at Work* (London: Nisbet & Co.), 88–96.

36 See Michael W. Doyle (1995) *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (Boulder CO: Lynne Rienner); Trevor Findlay (1995) *Cambodia: The Legacy and Lessons of UNTAC* (Oxford: Oxford University Press); Sorpong Peou (1997) *Conflict Neutralization in the Cambodia War: From Battlefield to Ballot-Box* (Kuala Lumpur: Oxford University Press); MacAlister Brown and Joseph J. Zasloff (1998) *Cambodia Confronts the Peacemakers 1979–1998* (Ithaca NY: Cornell University Press).

37 James D. Fearon and David D. Laitin (2004) 'Neotrusteeship and the Problem of Weak States', *International Security* 28(4), 5–43 at 7.

38 *Ibid.*, at 42.

39 Richard Rose (1996) *What is Europe? A Dynamic Perspective* (New York: HarperCollins), 263.

as Africa, the Arab world, or South or Southeast Asia. Perhaps the most significant difference between this type of integration, and the 'shared sovereignty' model with which this chapter is concerned, is that regional integration is an organic outgrowth of accumulated interstate interactions which have led to high levels of trust between leaderships, whereas the 'shared sovereignty' model is a device for attempting to overcome a significant deficit of trust.

Factors against adoption of shared sovereignty

In this section, I identify some of the considerations that may militate against the use of shared sovereignty as a way of facilitating the rebuilding of trust and the re-legitimation of the state. All are potentially significant, but the scale of the challenge that they offer will vary from case to case.

First, *language* may be a significant problem, in two respects. Even within states, the choice of language of interaction can be controversial in multilingual polities, since those forced to operate in a language other than their mother tongue may feel significantly disadvantaged by the requirement.⁴¹ Tensions over language have fed political conflict in countries as diverse as Canada and Pakistan. In one case, that of India, the availability of an entirely foreign language – English – has arguably defused a potentially serious problem of official language choice and helped link a burgeoning new middle class to the wider world; this case, however, is a product of centuries of engagement, rather than the application of a particular model of structural integration. To those who feel linguistically disabled, the sharing of sovereignty across language groups could be a powerful affront. There is a further respect in which differences in language may be a barrier to the sharing of sovereignty. Cross-cultural communication is considerably more challenging than is often realised,⁴² particularly where high levels of subtlety are required, and the costs of confusion could be large.

Second, the *cost* of 'shared sovereignty' arrangements could be considerable, and it is not clear who would bear them. In an environment in which many potential donors are on hand, a perennial problem is that each may withhold an immediate contribution in the hope that some other will step in to fill the gap, allowing most 'donors' to be free riders. Furthermore, scarce resources have alternative uses, and in democracies, political leaders are understandably responsible to what they see as demands from voters for funds to address problems at home. Foreign aid is a poor cousin at this table. Securing funding even to address emergency requirements in a high-level crisis can be quite difficult, and there is every reason to fear that contributions to support a political framework for the long-term rebuilding of trust in faraway places could be even more difficult.

Third, availability of capacity may be a problem. Staffing agencies even in developed countries may be a problem. To position trained staff, appropriately

41 See Jonathan Pool (1991) 'The Official Language Problem', *American Political Science Review* 85(2), 495–514.

equipped, at points where they can directly help a disrupted state is likely to be difficult. Kabul and Phnom Penh have their charms, but they are markedly different from those of Paris, New York, or London. To induce the best and the brightest from the latter to work in the former may require substantial salaries, fuelling resentment on the part of gifted locals who can attract only a tiny fraction of what their international counterparts receive. This is already an intractable problem in short-term transitional administrations, and there is every reason to think that it would be equally troublesome in the management of at least some elements of a shared sovereignty model.

Fourth, spoilers can pose a significant challenge.⁴³ The Danzig and Jerusalem models unravelled because the structures that they ordained cut across the interests of uncompromising actors with interests of their own to pursue. Spoiling is not so serious a problem where institutions are safely located in remote places (such as the Judicial Committee of the Privy Council in London), but it is a distinct problem when they have a physical presence in a disrupted state, as the August 2003 attack on UN premises in Baghdad which killed the Special Representative of the Secretary-General and many other fine people made clear. Fortunately, not all disrupted states are equally supplied with spoilers, but the spoiler problem does highlight that a shared sovereignty model has its time as well as place, and there is not much use in promoting it when violent conflict is still a feature of the daily life in war-torn territory. On occasion it pays to sit and wait.

Fifth, policy differences between states may be severe and intractable. An interesting example involved the attitude of the Judicial Committee of the Privy Council to capital punishment. In a number of countries from which appeals can be made to the Judicial Committee, notably Commonwealth states in the Caribbean, capital punishment for certain crimes remains extremely popular with some elements of the broader population. Yet the Lords of Appeal in Ordinary who do the bulk of the Judicial Committee's work are now products of a legal culture shaped by the abolition of capital punishment in the United Kingdom, and in a number of cases they have declined to accept capital sentences imposed by lower Caribbean courts.⁴⁴ This divergence of perspective had prompted Caribbean leaders at a summit in 2001 to propose the abolition of Privy Council appeals, and the establishment of a Caribbean Court of Justice to take the Judicial Committee's place.⁴⁵ However, this move encountered stern and effective opposition from local abolitionists, and while the Caribbean Court of Justice has now been constituted, and held its first sitting on 8–9 August 2005, the Judicial Committee has so far retained its role as final arbiter in cases involving capital sentences.

Sixth, there may be significant tensions between local and global norms. In states such as Afghanistan and Somalia, the ways of life of ordinary people can

43 See Stephen John Stedman (1997) 'Spoiler Problems in Peace Processes', *International Security* 22(2), 5–53.

44 See, for example, *Patrick Reyes v. The Queen* [2002] UKPC 11 and *Berthill Fox v. The Queen* [2002] UKPC 13.

45 C. G. D. ... (2002) ...

differ significantly from those in more developed countries, and a key issue that can arise is the degree to which local norms should be respected, particularly if they appear to be at odds with programmatic normative texts relating to civil and political rights, economic, social and cultural rights, and gender rights. On the one hand, local norms may be little more than 'norms of partiality',⁴⁶ protecting and entrenching the positions of those who for reasons of no moral significance happen to have been dominant in the past. But on the other, it can be argued that a liberal order should be able to encompass a range of different social formations – not all of them liberal – as long as individuals have a right of exit from specific situations which they find intolerable.⁴⁷ In a situation of 'shared sovereignty', these tensions can give rise to significant political problems.

Finally, there may be tensions between the sharing of sovereignty and the perceived requirements of 'democracy'. Where demands for autonomy and self-government have been central to an internal struggle, the last thing that some actors may wish to see is the development of political institutions that locate some forms of state activity beyond the control of themselves and their supporters. This approach mirrors a deeper tension between democracy and constitutionalism with which political theorists have long been familiar, and there is no reason to expect that this will be comfortably confined to developed Western states.⁴⁸ It is perhaps no surprise that the most obvious examples of shared sovereignty have been in the judicial sphere, where the occupants of key offices are not usually selected by popular vote, and the sharing of sovereignty does not directly challenge democratic expectations.

In conclusion, therefore, it is important to recognise that shared sovereignty proposals are ultimately of modest scope, although at a conceptual level they might appear quite radical. The sharing of sovereignty, as Krasner has recently argued, is not a panacea and should not be seen as such.⁴⁹ The problems of severely disrupted states are complex, often intractable, and multidimensional. The erosion of trust is only one of these, and not necessarily the most significant in all cases. But where it is a pressing problem, sharing of sovereignty should certainly figure on the menu of devices that might be employed to address it.

46 See Edna Ullmann-Margalit (1977) *The Emergence of Norms* (Oxford: Oxford University Press), 134–197.

47 See Chandran Kukathas (2003) *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press).

48 See Chandran Kukathas, David W. Lovell and William Maley (1990) *The Theory of Politics: An Australian Perspective* (Melbourne: Longman Cheshire), 9–59.

49 See David Held (1993) *Democracy and Globalization: The Problem of Cosmopolitan Justice* (Cambridge: Cambridge University Press), 100–101.

Chapter 17

Sovereignty as Indirect Rule

Barry Hindess

Globalisation is often seen as a recent development which threatens to undermine state sovereignty, and thus the international order of which sovereignty is a fundamental component. This perception misleads. However, unlike many of those who resist it, I do not rely on the contrary view that its supporters have greatly exaggerated the extent and effects of globalisation.¹ My argument, rather, is that the perception itself displays a lack of historical perspective. The treatment of globalisation as a recent phenomenon is to misrepresent some of its most important and enduring characteristics. Far from being threatened by globalisation, the contemporary state system should be seen as one of its most important products.

I begin by arguing that the Westphalian states system is best seen as a specifically European arrangement which ended some considerable time ago. While the states system we have inherited bears some resemblance to its ancestor, it is also the outcome of a series of changes which have radically affected its character. The greater part of this chapter focuses on two of these changes. One relates to Western imperial expansion and the other to the emergence of independent states in territories which had once been subject imperial rule. The latter development coincides with what the English School of international relations scholarship calls the 'expansion of international society'.² Consideration of the manner in which this expansion took place, and especially of the many continuities between the order of European empires and the order of independent states which followed, suggests the need for a far less anodyne description.

Discussion of these issues allows me to return to the contemporary debate about globalisation. I argue that there are important respects in which state sovereignty (or, at least, state control over its own inhabitants) remains central to, and continues to be promoted by, the contemporary international order. While there are clearly important policy areas in which states' freedom of action is seriously curtailed by international developments, the significance of this constraint is often misunderstood. It should be seen, not as undermining the international order, but as one of its intended effects. It is well known, for example, that the freedom of action of national governments is often severely constrained by international financial markets. Yet it is not sufficiently

1 See Paul Hirst and Graham Thompson (1999) *Globalisation in Question* (Oxford: Polity) for an influential argument of this kind.