Principles of Constitutional Design

Donald S. Lutz

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521857789

3

Popular Sovereignty

The Relationship of Popular Sovereignty to Sovereignty

It must be made clear at the outset of this chapter if we are to make sense of the term "popular sovereignty" that a "popular" sovereign is still a sovereign and therefore a supreme power. Popular sovereignty is sometimes treated as a "God word" – one that seems to be immediately clear and descriptive of an unqualified good. If analysis of the term is to proceed fruitfully, however, one must remember that popular sovereignty is by definition both a supreme power and one that is limited. An analysis of popular sovereignty is therefore a logical extension of an analysis of sovereignty, because any theory of popular sovereignty first requires a clear and useful concept of sovereignty. By the same token, rejecting the notion of sovereignty as somehow time-bound, no longer relevant, or merely mythical entails conferring the same status on popular sovereignty as well. This in turn implies the rejection of constitutional democracy and constitutional republicanism and brings into question constitutionalism of any sort. If one does not like the term "sovereignty" and prefers to use a different vocabulary to describe a limited supreme power, the shift in language will not alter the fact that we are still talking about the same thing. Like the green, leafy thing outside my window, the limited supreme power will continue to exist and function. Those who would like to change the language need to show the advantages that will result. Otherwise, using historically grounded terminology has the decided advantage of allowing us to tap

into and understand the various analyses used by sovereignty theorists who first identified and struggled with the problem, and we can stand on their shoulders accepting and rejecting what we wish.

To recapitulate a bit, a sovereign is a supreme power that is limited in some way in the extent of its powers or by the means available for the exercise of that power. The primary means of limiting a supreme power is to tie it to a regular, publicly sanctioned process of law making, law enforcement, and adjudication. It is still, however, a supreme power. In principle, a sovereign can assign penalties of death, dismemberment, and all lesser penalties unless specifically excluded by the limits that make it a sovereign rather than a simple supreme power. A sovereign, as a supreme power, may be prohibited from using a death penalty, but in principle and in fact this is a penalty available to the sovereign, and one that will be used, unless excluded by the original covenant that makes the supreme power a sovereign. Those opposed to the death penalty may do so on many grounds, and there are good ones, except to argue that a sovereign has no inherent ability to do so as a sovereign. A sovereign may do, and in fact will do, whatever is not excluded by the limits established by the original covenant, or later excluded by the amendment process established by the original covenant.

An amendment process, by using a decision-making procedure equivalent to that used for adopting the original covenant, is essentially a recovenanting. Changes in a political system that do not use the formal amendment process – for example, through a court decision – do not limit the sovereign, popular or otherwise, and a court's decision may be discarded through a "normal" (i.e., noncovenantal) process. One of the greatest temptations in a constitutional system is to "constitutionalize" everything in an attempt to render the matter settled and beyond further change. Another temptation is to avoid or finesse the amendment process in order to achieve changes without the requisite level of consent. Both of these constitutional pathologies have long-term consequences for system stability, a matter to be discussed at length in a later chapter.

The original covenant can be amended to alter the prohibitions on the sovereign if, and only if, the decision-making process that leads to the alteration returns to the same level of consent that was used to establish the original limits on the sovereign. The need to return to the original covenant results from a peculiar but obvious aspect of

sovereignty – all limits on a sovereign are self-limits. Bodin, like the sovereignty theorists before him in medieval Europe, used as his model the Judeo-Christian God as described in the Torah or Old Testament. In this view, God is by definition omnipotent, which means unlimited in power. The omnipotent God creates a universe bound completely and in detail by his will. However, God chooses to create a corner of freedom in the universe when he creates humans with the ability to say yes or no to his will. This voluntary self-limiting of his power makes God a sovereign rather than a simple supreme power, and he becomes the model for a voluntarily self-limiting sovereign on Earth.

God limits himself for his own reasons, which need not concern us here, but earthly sovereigns limit themselves for reasons that are understandably human. A man who conquers a people can rule as a simple supreme power, or even a tyrant, but then faces the inevitable fact that those over whom he rules will use their natural inclinations for liberty, self-preservation, sociability, and beneficial innovation as the grounding for opposing the operation of the supreme power. As a result, the ruler's life is made difficult, dangerous, and unpleasant. His position depends on the continued cooperation of a number of men who will enforce his will through violence; however, the continued support of these violent men is itself a problem, because they will continue to do so only to the extent they regard the ruler's orders as legitimate. Rulers learn that they can, by extending the sense of legitimacy to the broader population, make their own lives more secure, more pleasant, and less arduous. Almost all rulers by conquest, and certainly the rational ones, inevitably seek to create broadly accepted legitimacy for their rule.

Machiavelli was the first to realistically codify the process of legitimation. He advised the prince to engage in violence at the very beginning of his rule in order to eliminate any competitors around which contending counterpower might organize. He advised killing off competitors from the indigenous aristocracy immediately along with their families. He then advised the prince to be ready to use any force necessary to maintain his position, but to also avoid interfering unnecessarily in the lives of the people. Among other things, he advised the prince to keep and enforce existing laws and not to interfere with the property or women of his subjects. After a while, he argued, by maintaining peace, order, and lawfulness without harming the people needlessly, the

prince's rule will come to be accepted as legitimate. A successful prince would be one who could walk among the people rather than remain walled up in some fortress. Thus did Machiavelli at great length and in considerable detail lay out the kinds of self-limits a supreme power needed in order to become legitimate, and thereby a sovereign, as well as the benefits of such self-limits – not the least of which was enduring fame.[1]

As an effective political theorist of the modern school, Machiavelli was codifying what a conqueror would empirically tend to do anyway. His admonitions amounted to a systematic analysis of what would result in an effective process of legitimation as opposed to one that would fail. That his advice would lead to a prince acting in accord with the limits set out by Bodin for a sovereign acting in accord with natural law is not an accident. Nor is it an accident that the remaining powers available to a legitimate Machiavellian prince, after limiting himself out of self-interest, resemble those Bodin outlines as available to a sovereign. Using history and experience as the basis of empirical analysis, both men tended to bring the social coordination by a supreme power in line with the brute facts of human existence. Also, Bodin was greatly influenced by Machiavelli.

Machiavelli's ultimate goal was the creation of a stable sovereign that rested on the consent of the people – what he termed a republic. Bodin and Hobbes also sought the creation of a stable sovereign grounded in popular consent. Together they were engaged in the project of creating government that would be effective in maintaining order as well as be in accord with fundamental human nature. Part of this human nature was the ability and tendency for extending beneficial innovation. By implication, the modern project in political theory involved the development of a more systematic, empirical basis for grounding political stability in order to enhance material "progress." All three theorists seemed to understand that this required matching

[1] The more compact, more famous, and sometimes misunderstood version of Niccolò Machiavelli's advice is contained in his book *The Prince* written in 1513. The more developed, detailed, and complete version is contained in *The Discourses on the First Ten Books of Titus Livius*, which Machiavelli finished writing in 1519. Any references to Machiavelli are based on the Modern Library Edition, which contains both works in the same volume and was first printed in 1950.

the government to the people, and that the most effective means of matching involved some form of popular consent. Popular consent implied what we now call popular sovereignty, and sovereignty of any sort implied a set of attitudes that we now call constitutionalism. What constituted popular consent, and what this consent actually entailed, thus became the key theoretical problem for political theory in general, and constitutional theory in particular.

Toward a Definition and Typology of Popular Sovereignty

Consider the following definitions of "popular" from the *Oxford English Dictionary*.[2]

Generic definition: Affecting, concerning, or open to all of the people; as opposed to a particular class
Definition 1: Devoted to the cause of the people
Definition 2: Prevalent or current among, or accepted by the people generally
Definition 3: Studious of, or designed to gain, the favor of the common people
Definition 4: Approved by the people; based on the consent of the people

The generic definition, in the context of sovereignty, tells us that a political system characterized by popular sovereignty is one where sovereignty affects, concerns, and includes everyone. However, the next four definitions together lay out a typology that helps us understand the major contending positions on popular sovereignty. It makes a great deal of difference whether something is devoted to the cause of the people, in accord with popular opinion, designed to gain the favor of the people, or specifically approved by the people.

Definition 1 implies the weakest form of popular sovereignty and seems to be close to what Hobbes had in mind. Once established, the sovereign is assumed to be performing the job intended for it in the manner intended, but there is no way for the people to certify that this

[2] These definitions are taken from the *Oxford English Dictionary*, but they have been arranged and numbered to assist the analysis.