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Sovereignty or Sustainability in the Anthropocene

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Abstract

Sovereignty is generally understood to comprise the bundle of powers of nation-states but legal theory is rarely captures the complexities of a unique and exceptional power. Historically, the exercise of sovereign prerogatives has resulted in sovereign exceptionalism that prioritises national interests over those of other states and the environment. The governance of tropical forests illustrates the tension between permanent sovereignty over national resources and the need to treat forests as global commons in the interests of all peoples. We can bequeath a habitable planet to future generations or we can choose to perpetuate national interest through sovereignty, but we cannot have both so long as sovereign prerogative trumps common good.

Keywords Sovereignty, sustainability, no-harm rule, global commons, permanent sovereignty over natural resources

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1. Introduction

This chapter examines the tension between sovereignty and sustainability in the Anthropocene. Collective action by sovereign states through multilateral environmental agreements is a precondition for ecological sustainability the exercise of sovereign prerogative too often results in soft law that fails to halt unsustainable practices or the sovereign exceptionalism that underpins the Trump administration's withdrawal from the Paris Agreement. It seems we can have undiluted sovereignty or sustainability, but not both.

1 Westphalian Sovereignty

The contemporary sovereign-centric system emerged from the Peace of Westphalia in 1648. Three centuries later, sovereignty and cosmopolitanism provided contrasting bases for the international relations.[1] In 1945, the UN Charter reaffirmed sovereignty, commonly understood as supreme authority within a delineated territory, as the foundational organising principle of international law. In 1948, the non-binding Universal Declaration of Human Rights offered alternative cosmopolitan paradigm in which the protection of human rights could be the cardinal principle. Classical social contract theorists such as Thomas Hobbes sought to resolve this tension by arguing that individual liberty requires strong sovereigns to provide security-giving rise to the paradoxical situation in which states, historically the most egregious violators of human rights, are required to act as their guarantors. The right to a clean, safe or healthy environment appears in numerous national constitutions, but human rights have not played a central role in environmental governance.[2]

Kantorowicz described the existence of the king's two bodies, one mortal and subject to decay, the other eternal and transcendent, [3] and sovereignty's mystical and ethereal overtones have long facilitated sovereign exceptionalism. In modernity, sovereignty has become the autonomous and self-sufficient source of law. Koskenniemi argues that there is 'simply no fixed meaning, no natural extent to sovereignty at all'.[4] It is an object of desire and the stuff of nightmares, a unique power capable of deciding states of exception in which the law applies in its inapplicability.[5]

Sovereignty comprises independence (external sovereignty), self-determination (internal sovereignty), and the power to make law arising from exclusive jurisdiction over a territory and permanent population. In theory, sovereign states are formally equal, voluntarily assume obligations, and have a duty not to intervene in the affairs of other states. State practice reveals these to be tantamount to international legal myths and sovereignty to be condemned as organised hypocrisy.[6] Formal equality has been undermined by the substantive inequalities caused by colonialism and the structural power imbalances in the global political-economy. Weaker states have long understood that the principle of non-interference is honoured more in the breach than the observance and that binding obligations are not always voluntary

[1] Adelman (2011).
[2] 177 countries recognize such a right in their constitutions, environmental legislation, jurisprudence, or through ratification of international instruments (United Nations Environment Programme 2017: 32-3).
[3] Kantorowicz (1997).
[4] Koskenniemi (2006: 242).
[5] Agamben (1998, 2005).
[6] Krasner (1999).

assumed. Decolonisation led to hard-won rights such as permanent sovereignty over natural resources (PSNR) that now serve to undermine ecological sustainability in countries with large tropical forests under their jurisdiction. Sovereign states almost invariably favour economic growth over ecological sustainability.[7] Sustainable development, which is widely criticised as an oxymoron for this reason, cannot deliver environmental or climate justice for current or future generations so long as sovereign states seek to defy the reality that endless growth is not possible on a finite planet.

Until the emergence of rapidly industrialising countries such as the BRICS states, the power of the global North led to historical injustices through unequal ecological exchange, the exploitation and appropriation of natural resources by transnational corporations who leached sovereignty away from developing countries without adequate compensation, and widespread environmental degradation.[8]

Neoliberal globalisation and the growing power of markets and financial institutions has prompted analyses of the relative decline of sovereign nation-states. Sovereignty has been described as floating, disaggregated, pooled, split or shared by states in international institutions such as the WTO and regional blocs such as the European Union.[9] Hardt and Negri famously argued that sovereignty has been decentred, deterritorialised, reconfigured and 'taken a new form, composed of a series of national and supranational organisms united under a single logic of rule. This new global form of sovereignty is what we call Empire'.[10]

Sovereignty is complex and contradictory, unique and exceptional. Historically, sovereign rulers have regarded themselves as tethered to the law-which provides legitimacy- within but beyond it and thereby entitled to act with immunity and impunity. Max Weber, a sociologist, came closer to penetrating its essence in arguing that the 'state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory', which 'is as essential to it as its character of compulsory jurisdiction and of continuous organization'.[11] Weber argued that sovereign power is inextricably linked to and dependent upon violence. In contrast, Michel Foucault insisted that treating sovereignty as hierarchy is a misconceived way of understanding modern power. What is needed instead is a 'political philosophy that isn't erected around the problem of sovereignty, nor therefore

[7] Adelman (2018).
[8] Miller (1998); Agarwal and Narain (1991).
[9] Sassen (1996).
[10] Hardt and Negri (2001: xii).
[11] Weber (2004: 33); Weber(1947: 156).

around the problems of law and prohibition. We need to cut off the King's head: in political theory that still has to be done'.[12] Foucault viewed sovereignty as an anachronism symbolised by absolute monarchy's capacity to 'take life or let live' whereas the aim of contemporary biopower is to 'make live or let die'.[13]

Carl Schmitt provided one of the most sophisticated analyses of sovereignty in legal theory, in arguing that sovereignty is exceptional: 'Sovereign is he who decides on the exception' and is thereby able to suspend the 'normal' legal order, for example in a state of emergency.[14] The true nature of the sovereign is revealed in the decision on the exception, which cannot be 'made to conform to a preformed law'[15] but is nonetheless rooted in a 'legal system itself [which] can anticipate the exception and can "suspend itself"'.[16] Reconceptualising Schmitt's thesis, Giorgio Agamben argues that sovereignty is an unrelenting and illimitable power whose uniqueness flows from its power of life and death. Agamben contends that Foucault's thesis must therefore be corrected or completed to reflect sovereignty's intrinsically biopolitical character, which manifests itself in the production of bare life through the ban,[17] the means by which individuals are included in the law in order to exclude them from it. Sovereignty's *raison d'etre* is the reproduction of its own existence. For Agamben, the refugee symbolises the *nomos* of political modernity in which the exception becomes generalised, normalised and unexceptional. Sovereignty reveals its nature in the gas chambers, the gulags, and Guantánamo Bay, in spaces of exception and *zones d'attente* in which people are included in the law through their exclusion from it.

The sovereign-centric international legal system promotes bordered, territorial thinking[18] at odds with the cooperation required to address transboundary problems such as climate change and the destruction of ecosystems. Sovereignty appears to be an indispensable precondition and an insurmountable impediment to achieving ecological sustainability. The Paris Agreement was heralded as an example of international collaboration reflecting the realisation that sovereignty must be circumscribed in the common interest; eighteen months later, in a manifestation of sovereign exceptionalism, Donald Trump declared his intention to withdraw from the accord, consistent with his nationalist-populist hostility to multilateralism.

[12] Foucault (1980: 121).
[13] Foucault (2003), 241.
[14] Schmitt (1985: 5). Schmitt was a Nazi, and much of thinking about sovereignty sought to rationalise Hitler's rule.
[15] Ibid, 6.
[16] Ibid, 14.
[17] Agamben (1998: 9).
[18] That Beck (2006) called the national outlook.

Reducing greenhouse gas emissions may be regarded as a common but differentiated responsibility of all states but, as under George W. Bush, the United States exercised its sovereign prerogative to exempt itself from international law. The text of the Agreement, which is legally binding but unenforceable, reflects the brittleness of the sovereign sensibilities of adherents to undiluted Westphalian sovereignty such as China and the United States. For example, article 13.3 declares that the transparency framework must be 'implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties'.

Capra and Mattei describe the shift from commons to capital and the emergence of private and sovereign property as defining characteristics of modern mechanistic jurisprudence: 'private ownership—individual dominion over land—became the most important legal concept, dividing the whole into individualistic components. The mechanism governing the relationship between these parts was found in what became the sovereign state.'[19]

In the Westphalian system, the Earth is divided into areas under sovereign jurisdiction and global commons. States are entitled to exploit the natural resources under their control without external interference. In principle, the exploitation of natural resources such as tropical forest carbon sinks is subject to international environmental law principles such as the no-harm rule, the polluter pays principle and the precautionary approach, but this body of law is deeply anthropocentric and replete with soft law. Fossil-fuelled industrialisation has led to the breaching of planetary boundaries and the rupture to the Earth system.[20] Apart from exceptions such as Bolivia and Ecuador whose constitutions protect the rights of Mother Earth (*Pachamama*), nature itself has no legal personality and no rights, making it difficult to rectify environmental harms through normal legal channels.[21] Although it is unlikely such a right could withstand sovereignty's depredations.

3. No-harm Rule

The no-harm principle, according to which states must ensure that activities within their jurisdiction do not cause significant cross-boundary environmental damage, was enunciated in the *Trail Smelter* arbitral award of 1941[22] and reaffirmed in Principle 21 of the Stockholm

[19] Capra and Mattei (2015: 45).
[20] Rockström et al (2009).
[21] Nature has been accorded legal personality in some countries, for example the Whanganui River in New Zealand, but these are exceptions that prove the rule. In July 2017, the Indian Supreme Court overturned a ruling by the High Court in Uttarakhand giving the Ganges and Yamuna rivers the same legal status as human beings: http://www.bbc.co.uk/news/world-asia-india-40537701 (accessed 30 November 2017).
[22] *United States v Canada* (1941) 3 UNRIAA 1905 at 1965.

Declaration, which recognises the sovereign right of states to exploit their natural resources pursuant and to their own environmental policies, and their responsibility not to cause damage to the environment of other countries.[23] This formulation is repeated in the preamble to the UN Framework Convention on Climate Change (UNFCCC) and the Sustainable Development Goals. The principle is widely regarded as a customary rule of international law and the cornerstone of international environmental law, but it has not played a significant role in climate change regime, in which sustainable development and the principle of common but differentiated responsibility and respective capabilities in the light of different national circumstances is more prominent.

The presence of conflicting principles is common in multilateral environmental agreements. The UNFCCC notes the sovereign right of states to exploit their natural resources and their duty to ensure that activities within their jurisdiction do not harm the environment of other countries. PSNR originated in the 1950s as a manifestation of the right to self-determination because developing countries were concerned that foreign transnational corporations were the main beneficiaries of their natural resources.[24] In 1966, the UN General Assembly recognised 'the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development.'[25]

Natural resources may be designated as the common heritage of humankind under international environmental law and obligations imposed on states to protect common resources. Some natural resources are fully under exclusive sovereign jurisdiction, others are shared between two or more states, e.g. tropical forests and rivers, and some are completely outside national jurisdiction such as global commons: the high seas, the deep seabed, outer space, the Moon and other celestial bodies, and Antarctica. Governing the atmosphere as a common resource is essential to prevent greenhouse gas emissions from causing irreversible anthropogenic warming, but neo-extractive, neoliberal policies are facilitating an unprecedented global land grab that threatens commons throughout the global South and undermines the food and water security of millions.[26]

4. Global Commons

[23] Declaration of the United Nations Conference on the Human Environment, United Nations Conference on the Human Environment (1972). Duncan French (2001: 381) views the Stockholm Declaration's no harm rule as the 'most fundamental rule of modern international environmental law'.
[24] Schrijver (1997).
[25] G.A. Res. 2158 (XXI), UN GAOR, Twenty-First Session (1966).
[26] Dell'Angelo et al (2017).

Global commons are not owned by individuals or corporations and are not subject to sovereign jurisdiction. Access is theoretically free and unlimited. Garrett Hardin erroneously argued that the 'tragedy of the commons' is caused by unregulated overuse that leads to exhaustion of the resource.[27] Effective commons governance involves controlling access and creating long-term incentives to conserve and protect rather than over exploit natural resources such as forests.[28] Hardin's contention that preservation of commons is economically irrational has been discredited by Elinor Ostrom and her collaborators, amongst others.[29] Ostrom identified eight principles that underpin successful self-governance of commons and showed how rules and structures emerge from the bottom up for the governance of common pool resources based upon collective, participatory decision-making and regulation of access and exclusion. Rules are enforced by accountable monitors, violations punished through graduated sanctions, and conflicts resolved through cheap and accessible dispute resolution mechanisms. She showed how nested governance structures using a wide variety of rules, norms, principles, institutions, decision-making procedures, and enforcement mechanisms offer viable alternatives to centralised sovereign-centric regulation. Ostrom and her collaborators differentiate non-cooperative, self-interested commons users, those unwilling to cooperate with others unless they are protected against free riders, those willing to cooperate in principal in the hope that their trust will be reciprocated, and genuine altruists willing to work for the common good.

Translating terrestrial commons governance into effective regulation of the atmosphere requires cooperative collective action through the pooling of sovereignty rather than treating it as a zero-sum power game. Time will reveal whether the incentive and transparency mechanisms in the Paris Agreement designed to promote cooperation and increase collective ambition are effective, but these are clearly undermined when significant actors such as the United States place narrow, short-term self-interest above collaboration.

Burns Weston and David Bollier's paradigm of green governance is based upon commons governance in which the state moves 'from serving as the sovereign master of a closed, hierarchical system to the light-touch host of an open, diverse network'.[30] They seek to overcome the regulatory failures of the 'State/Market' by exploiting the possibilities offered by decentralised, rights-based Vernacular Law that privileges local governance and

[27] Hardin (1968).
[28] Ostrom, et al (1999).
[29] Ostrom (1990).
[30] Weston and Bollier (2013: 257).

subsidiarity—'the "unofficial" norms, institutions, and procedures that a peer community devises to manage its resources on its own, and typically democratically'. [31] The state may set the parameters within which Vernacular Law operates, but it does not directly control how commons are organised and managed.[32] They argue that this New Commons paradigm provides an 'intellectual scaffolding that can be used to develop innovative legal and policy norms, institutions, and procedures relative to a given resource or set of resources' that will operate in a quasi-sovereign manner that 'enacts new forms of governance without becoming government'.[33] They acknowledge that substantial legal changes are required such as a reconceptualization of contract and property law, the creation of trusts to manage and lease common ecological resources, the expansion of the public trust doctrine, and the use of digital technology to make governance transparent, participatory and accountable. This is challenging, but drastic change is the only way to rescue humanity from the totalising, dystopian neoliberal fantasy of endless growth and consumption.

The contradictions of sovereignty are illustrated by governance of tropical forests, which have variously been treated as natural resources under sovereign control, local commons, or global commons.[34] As carbon sinks, forest conservation is crucial in addressing climate change. Governance of the Amazon is under the jurisdiction and permanent sovereignty of host states which collectively permit an area the size of Wales to disappear every year, leading to violations of the rights indigenous peoples and other forest dwellers whose livelihoods depend upon forest conservation. Tropical forests are increasingly regulated under the 2013 Warsaw Framework on Reducing Emissions from Deforestation and Degradation (REDD+), which aims to reduce emissions from deforestation and forest degradation in developing countries, conserve and promote sustainable management of forests, and enhance of carbon stocks in developing countries. The regime provides results-based finance from the Green Climate Fund if host countries comply with a range of measuring, reporting and verification mechanisms that attenuate the sovereignty of host countries.

[31] Ibid, xx.
[32] Vernacular refers to the informal, quotidian methods by which people negotiate rules and devise governance norms and practices.
[33] Weston and Bollier (2013: 124, 125.
[34] Adelman (2015, 2017).

Evidence suggests that forests should ideally be treated as the common heritage of mankind and governed as global commons.[35] As Schrijver argues, the common heritage principle is incompatible with PSNR,[36] and Boyd writes that attempts to construct 'a comprehensive international legal instrument on forests have floundered on the fundamental conflict between the conception of tropical forests as the "common heritage of mankind" and forests as sovereign national resources'.[37]

5. Permanent Sovereignty over Natural Resources

The PSNR principle 'allows states within limits established by international law to conduct or authorise such activities as they choose within their territories, including activities which may have adverse effects on their own environment'.[38] Takacs points out that 'sovereignty over natural resources is not "permanent"—or even temporary—if forests degrade or disappear due to changing ecological conditions'.[39] Tarlock calls for a modified conception of sovereignty based upon:

> *erga omnes* duties to require more sustainable use of national territories such as tropical rainforests and wetland systems. The legal rationale is that the potential adverse global impacts of ecosystem modification may make them part of the common heritage of mankind or a matter of common concern or common interest.[40]

Similarly, Scholtz argues for custodial sovereignty that respects the right of states to exploit their natural resources while creating the expectation that these resources will be protected on behalf of humanity.[41] Other states would be obliged to assist the custodian state to fulfil its obligations consistent with the principle of common but differentiated responsibilities and respective capacities.

In 2007, in the Yasuní—Ishpingo Tambococha Tiputini (ITT) Initiative, Ecuador proposed keeping 846 million barrels of crude oil in the ground in one of the most biodiverse regions of the Amazon if other countries were willing to reimburse the country by $3.6 billion—

[35] Sands (2003: 546-47) argues that 'Attempts by developed countries to "internationalise" forest issues have so far been unsuccessful in legal terms, and the tropical forest resources of developing countries are carefully guarded as part of the national patrimony of these countries'. Mgbeoji (2003: 828) views the notion of common heritage as 'a barely disguised ideological tool in the politics of and struggle for control of plant genetic resources across the globe'.
[36] Schrijver (1997:229).
[37] Boyd (2010: 865).
[38] Sands (2003: 236).
[39] Takacs (2013: 710).
[40] Tarlock (2007: 587).
[41] Scholtz (2008).

roughly half the value of the oil. The aims of the initiative included the protection of biodiversity, respect for the territory and rights of indigenous peoples, combatting climate change, and ecologically sustainable development, and the funds would have been used for social and environmental development programmes and the promotion of domestic renewable energy. By 2013, the ITT had failed due to a lack of donors and financing, political pressure to exploit the oil reserves, Ecuador's commitment to oil exploitation elsewhere in the country, Ecuador, the risk of leakage through carbon offsets, and suspicions about the government's motives.[42]

6. Conclusion

The Anthropocene exposes the limitations of the sovereign-centric system in which transboundary environmental problems cannot be solved through territorially-bounded regulatory responses. Sovereignty, the cardinal organising principle of international (environmental) law is often incompatible with the ecological sustainability, confronting us with the conundrum of how to circumscribe sovereign power in an international legal system in which sovereignty is the foundation stone. Sovereignty is inextricably linked to unsustainable business as usual in the form of sustainable development. Fredric Jameson observed that 'it is easier to imagine the end of the world than to imagine the end of capitalism.'[43] It also seems easier to imagine the end of the world than to imagine the end of state sovereignty. We can bequeath a habitable planet to future generations or we can choose to perpetuate national interest through sovereignty, but we cannot have both so long as sovereign prerogative trumps common good. The dilemma becomes more acute with the realisation that the path to commons governance and ecological sustainability lies through sovereignty and that global natural resources such as the climate system, water, the air and the atmosphere are the common heritage of humankind and vital to the common weal.

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[42] Sovacool and Scarpaci (2016:165).
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