THE CHANGING NOTIONS OF SOVEREIGNTY UNDER INTERNATIONAL LAW: A CRITICAL ANALYSIS

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Abstract

Sovereignty is one of the basic principles of state arrangement at global level and also one of the most poorly understood concepts in international law. Sovereignty was understood as a separate identity of a nation from others. It was often used interchangeably with statehood. The interpretation of this principle is open to change across time and space in the backdrop of historical and political contexts, offering full array of analysis. The strict construct of sovereignty, as in its earlier form, has been debated and has also been revisited, rethought and re-conceptualized as per the changes in the global legal and political order.

Keywords: State sovereignty, International law, Treaty of Westphalia, Basket theory, Chunk theory, Humanitarian intervention, popular sovereignty, Responsibility to protect

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INTRODUCTION

"The time of absolute sovereignty and exclusive sovereignty…has passed; its theory was never matched by reality"

- Boutros-Ghali 1992[1]

Sovereignty, one of the basic principles of state arrangement in the world, is one of the most poorly understood concepts in international law. The interpretation of this principle is open to change in spatial and temporal dimensions in the backdrop of historical and political contexts, offering full array of analysis.

A considerable increase has been witnessed in the interest shown to the concept of sovereignty by scholars from the fields of international relations, political science and international law. This can be explained at least in part by the end of the cold war as well as the emergence of "new world order" that challenged many established traditional concepts including that of 'state sovereignty.'

The concept of sovereignty has long been seen as a "*fundamental pillar of the international system*"[2] and even a *"grundnorm of international society*"[3]. Sovereignty is defined by Weber and Biersteker as: *"a political entity's externally recognized right to exercise final authority over its affairs"*[4]. Their definition lays stress on the external aspect of one's sovereignty. On the other hand, Ruggie, explains it as *"the institutionalization of public authority within mutually exclusive jurisdictional domains"*[5], thereby highlighting its territorial context.

BACKGROUND

The word, 'Sovereignty', derived from Latin through French *souveraineté*, is one of the most discussed concepts throughout history. It has changed considerably in its definition, form and

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[1] Bhoutros Ghali B., (1992) An Agenda for Peace, dated 17/6/1992, available at http://www.unrol.org/files/A_47_277.pdf, accessed on 5/1/2016

[2] Badescu C.G., *Humanitarian Intervention and the Responsibility to Protect: Security and Human rights*, Oxon: Routledge, at 20, 2011.

[3] Reus-Smit, C., *Human Rights and the Social Construction of Sovereignty*, Review of International Studies, Vol 27, at 519, 2001.

[4] Biersteker T., & Weber C., *The Social Construction of State Sovereignty*, In: Biersteker T., & Weber C., State Sovereignty as Social Construct, Cambridge: Cambridge University Press, at 2, 1996.

[5] Ruggie J. G., *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, World Politics, Vol 35:2, pp. 261-28, 1983.

concept since its early inception. Initially, it was understood as a political construct. It was taken to be a modern notion of 'political authority' and was conceived by the scholars as the fundamental organizing principle of the system of States in the international regime. Its idea essentially emerged as an idea of 'impossibility of destroying'. It usually started to be taken to mean absolute independence. The idea of sovereign power of the supreme authority can be traced in the works of the thinkers of early modern times like Nicolò Machiavelli, Jean Bodin, and Thomas Hobbes.

Jean Bodin is considered to have pioneered this theory of sovereignty in his celebrated work '*De Republica*' in 1576. In his famous work, he has tried to find out the secret of stability in an unstable world. And being a Frenchman as well as a patriot, he decided in favour of the monarchy. He concluded that a state, in order to be a state, must have one and not more, supreme authority from which laws derive their force.

Strikingly, the middle age did not know anything about the national sovereignty. That time was marked with the political superiority of the two: Pope and the emperor. It is remarked that the jurists shaped up the concept of sovereignty as a weapon of defence and a justification of this royal supremacy.

The early interpretations of sovereignty thereby made it identifiable with the concept of 'nation-state', and often the term 'Sovereignty' and 'statehood' could be used interchangeably. Moreover, the quest for power and struggle for stability in the authority, political philosophers have put under test the meanings and forms of sovereignty of a state. It is often argued by the philosophers that interpreted the concept of 'sovereignty' in a manner so as to establish the unquestionable and absolute authority of the state. It has been given varied meanings and roles by different thinkers. 'Basket theory' and 'Chunk theory' are such examples.

WESTPHALIAN SOVEREIGNTY

The concept of Sovereignty, which formally was widely accepted to be the resultant of the Peace Treaty of Westphalia in 1648, has undergone profound changes. The Treaty of Westphalia earns its fame as the first formal world charter of sovereign nations as it is viewed as a triumph of sovereignty over empire. The treaty contains 128 clauses and no clause mentions 'sovereignty', but it is by way of interpretation that most of the thinkers owe the Westphalian model the basis of sovereignty. And this is, probably, why the Westphalian

sovereignty was adopted by most of the nations in strict sense and it has had a lasting effect on international politics as well as international law. Many contemporary thinkers have argued that the Westphalia is an *aetiological myth* (i.e., a myth of origin), created by the international community.

In its earliest form, the concept was a purely political construct as it developed with the emergence of the theory of 'nation-state' as the primary unit of political Organisation. 'Sovereignty' played an important role in defining the status and rights of the nation-states. In its strict sense, sovereignty was viewed as having an absolute character. In that sense, 'sovereignty' also implies a right against any interference or intervention by a foreign body.

At its core, sovereignty is traditionally taken to mean the possession of 'absolute authority' within a specified territorial limit. With the passage of time, sovereignty came to be identified as an absolute power above the law. As the 'independence' of a political entity gained importance, this 'absolutist' sovereignty was widely accepted as an international norm.

Earlier, sovereignty was taken to be an internal i.e. authority of superiors over inferiors. But as the nation-state theory gained importance in international affairs, sovereignty manifested itself in an internal and external dimension. Internally, a sovereign government is considered as a permanent and supreme authority with population that possesses a monopoly on the use of force. Internal sovereignty is marked by the supremacy of the authority within its territory. Externally, sovereignty implied that the authority of a state is independent and has a separate entity against other states of the world. Sovereignty has been earlier interpreted strictly in the sense that a state is internally as well as externally supreme within its territory and its existence is independent of other states. It was taken as a concept that would ensure a state of its supremacy and independence and at the same time could guard a state against aggression or intervention by other states in an international order.

'Sovereignty', as understood of scholars at its inception stage, has encountered a fade because of the multi-lateral treaties signed after the World War II that laid down prescriptions for the signatories. This resulted in a paradigm shift in the conception of sovereignty, where the international obligations of a state were now conceived to be prior to the sovereignty of the states. The view of scholars about the 'indivisibility' of 'sovereignty' has been discredited in the recent times. Also, the Westphalian sovereignty has in part eroded as a result of certain

phenomena in the international regime, such as 'globalisation' and emergence of international organisations.

With the changing nature of human societies as well as the emergence of new international legal order, many contemporary issues placed increasing limits on the construct of the concept of sovereignty. Three main issues: the rise of human rights, globalisation and the emergence of supranational bodies (like international organisations) forced the researchers to interpret 'sovereignty' in a liberal and subjective manner.

As the international organisations emerged, the nation-states voluntary gave up the 'external aspect' of their sovereignties to become a member-state of these organisations. Thus, the notion that the states are sovereign and they cannot be subjected to law was refuted Acceptance of the terms of the provisions of an international convention or an international treaty, by way of ratification by a state demands a liberal connotation of the concept of sovereignty.

An international legal order could only be established when the states' sovereignty was interpreted in a subjective manner. The old idea of 'omnipotent' state could not let the international law develop. Sovereignty creates international law. And it is the procedural weaknesses and loopholes in international law that allow the states to exaggerate their claims of sovereignty. It is even believed that sovereignty is a license to arbitrariness and it makes an effective international legal order unachievable. But also, on the other hand, International law functions only with the mutual restraints and some concessions of the absolute rights of the states.

The emergence of the concept of human rights has posed a threat to the so conceived traditional concept of sovereignty, or the sovereignty in its strict sense. Human rights and sovereignty are seen as competing and conflicting concepts. Their regimes are taken to be juxtaposed. Human rights give primacy to individuals and non-state actors, thereby undermining the traditionally notion of state sovereignty.

Further, on the basis of humanitarian grounds, the international community may take an action against a state in which such humanitarian crisis has occurred and where that state either fails or refrains from handling the situation. In such a scenario, where the international community can intervene in the internal affairs of a state on humanitarian grounds, the sovereignty of such a state, what we know in strict sense, is marginalized. Moreover, it is

important to note here that traditionally the ideals of international human rights may seem to be antithetical to the concept of state sovereignty; many thinkers argue that practically it is subordinate to it.

SOVEREIGNTY: A POSTULATE

It is a recently developed concept which essentially is relatable to the concept of statehood. Its origin is linked to the emergence of the nation-state theory. It used to be used interchangeably with 'statehood' as well. It was mainly a political construct at its inception. Sovereignty is so deeply embedded in the minds of the nations that it is no more a principle, which it used to be, but is a postulate.

Sovereignty, in its earlier form, was taken to mean an absolute and supreme authority. In that sense, it was unquestionable too. It has basically two manifestations: external and internal. A state is internally sovereign so that so it has complete authority over its subjects and is free to make its political, social or economic decisions as well as policies within its territory. Externally, a state is independent and has a free will. It cannot be forced by other countries in matters of foreign relations.

It has been interpreted by various authors across the world. In middle ages, it emerged as a concept although we do not find the origin of the word 'Sovereignty'. Sovereignty finds a mention in the work of thinkers like Machiavelli, Jean Bodin, Thomas Hobbes, Rousseau, Austin and others.

The Treaty of Westphalia is regarded as the first formal source which established 'sovereignty' as a concept in the international arena. The Westphalian model of sovereignty was adopted widely by the states and was accepted as a norm an international level. It gave the states an inviolable right of non- interference, non- intervention and self-governance. The states were independent in their own spheres and other members of the international community were prohibited from snatching away these rights. This also later gave rise to the principle of non-intervention, of which we find mention in the Charter of the United Nations.

DOCTRINE OF SOVEREIGN EQUALITY

Moreover, the concept of "equality of states" is, in essence, connected with the concept of sovereignty as 'sovereignty' has fostered the idea that no other body is superior to the state.

'Sovereign equality' is a concept that is a result of amalgamation of two basic principles of international law: 'sovereignty' and 'equality': sides of the same coin. These two fundamental norms have been strongly established as unquestionable in modern international law.

Being the subjects of the international law, the states are equal to each other. By nature, states are unequal in terms of political or military strength, economic structure, geographical area, etc. but they are all on the equal platform under the eyes of international law. Thus, international legal order consists of separate independent entities that are sovereign and have absolute authority within their territorial borders. These sovereign entities have a relationship of parallel equality amongst themselves regardless of the inequalities in terms of geographical area or political strength. And this essentially is the basis of 'Sovereign equality' which is the foundational principle of the United Nations. Enshrined in Article 2.1 of the UN Charter, it embodies the principle that all states are equal under international law in spite of asymmetries of inequality. In the absence of any supranational body, the states claim to be sovereign externally and from within. It is noteworthy, that this sovereign equality is not political in nature but is juridical, i.e., equality of the states before law.

As per the principle, a sovereign state shall not act in manner that the 'sovereign equality' of the other states of the world community is violated or marginalized. So, in a way, this principle imposes a restraint on the uncontrolled authority of a state.

States are, by nature, unequal in terms of political strength, geographical limits, or financial status. But 'sovereign equality' gives an idea of the states equality before the law. Despite the inequalities amongst the states, they are treated as being on the same platform. In the absence of any supranational control, every state is sovereign internally as well as externally. Moreover, sovereignty is an internal concept: a concept within the state, i.e., a state can, in no case, exert its sovereignty on the other states. And no state is sovereign in relation to other state. A state is sovereign in itself. This creates a need for a formula that enables to establish a relation between the sovereign states of the world. This is done by the principle of 'sovereign equality.'

In an international order, the states voluntarily submit their external dimensions of sovereignty so that the international regime may smoothly function. This explains that the law of nations is not superimposed on the nations but it derives its validity from the consent

of the nation's itself. Rather, it is the submission of the external aspect of sovereignty of the states that gives strength to the international legal order.

Where there is constant interaction amongst the nations of the world, the scenario calls for the doctrine of sovereign equality, where the states remain sovereign in their own internal spheres but when they interact with each other at a global level, they are regarded as being on the same platform. It is noteworthy that this sovereign equality does not relate to political equality but a juridical equality.

RECONCEPTUALISATION OF THE CONCEPT UNDER 'RESPONSIBILITY TO PROTECT'

The interpretation of the concept of sovereignty has been done differently across time and space. In present times, it is being shaped as a responsibility of the state at an international platform, meaning thereby that sovereignty is now conditional. The states that fulfil their responsibilities have the right to enjoy their sovereignty. This philosophy has developed in the backdrop of the doctrine of 'Responsibility to Protect'.

'Sovereignty' that was earlier viewed as a 'control' is now regarded as a 'responsibility'. The interpretation of 'sovereignty' in terms of responsibility is constantly gaining strength due to the ever increasing limits of international human rights as well as the expanding dimensions of the concept of human security. It is the new backdrop for the change in our understanding of the concept of sovereignty.

Responsibility to Protect is a global political commitment to check the war crimes, genocides, ethnic cleansing and other cruelties against humanity. The member states of the United Nations have committed to this responsibility. This doctrine has placed limits on the traditional approach to the national sovereignty and has refined its meaning. This doctrine has effectively given a solution to the issue of the competing claims of 'intervention' and 'state sovereignty' that was debated during the 1990's.

In the last decade, the importance of national security faded away and the security of individuals gained its ground. This shift was evident in the thinking of the international community as well. International human rights norms and national accountability towards its citizens was scrutinized internationally. As a result, 'popular sovereignty' was re-conceptualized in the background of the responsibility of a state that it has towards its

individuals. And so, sovereignty in the form of a responsibility has gained the status of an international legal norm.

This doctrine has made the concept of sovereignty conditional. The members of the international community are reposed with certain responsibilities, as towards their subjects, and it is only after the fulfilment of these responsibilities that they can enjoy their sovereignty. It is a new international security and human rights norm which has indirectly altered the conception of sovereignty and it is still yet to influence it even more in the coming years. The key to this dilution of the concept of traditional sovereignty is to rethink sovereignty as responsibility. The responsibility of the states, in this sense, is three fold: firstly, the states are responsible for the safety and well-being of their subjects; secondly, the state authorities are responsible to their citizens internally, and to the international community through the United Nations and thirdly, the agents of the states are responsible for their actions.

The notion of sovereignty as responsibility recognizes that *"sovereignty carries with it responsibilities for the population"*[6] and that *"a government that allows its citizens to suffer… cannot claim sovereignty in an effort to keep the outside world from stepping in"*[7].

The responsibility of the states has gained importance as an international norm primarily due to the ever increasing dimensions of the human rights and increasing importance of human security. This has also been established as a state practice. The Universal Declaration on Human Rights, Covenant on Civil and Political Rights and Covenant on Social, Economic and Cultural Rights are few examples. This is so, partly, because the last decade witnessed changes in the international thinking in respect of the concept of security: in earlier decades the emphasis was laid on the security of a nation-state and so we find principles of non-intervention and thus, the strict connotation of sovereignty. But the last decade shifted its thinking on security to people where states were reposed with the responsibilities of physical, mental, social and financial security of its citizens. Thus, the security concern has clearly shifted from states to the people. This has definitely catalysed the liberal construction of the concept of sovereignty in the present international regime.

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[6] Deng. F.M., Kimaro S., Lyons T., Rothchild D., & Zartman D., Sovereignty as Responsibility: Conflict Management in Africa. Washington: Brookings Institution Press, at 32, 1996.
[7] *Ibid.*

Such facets of international law have placed clear limits on sovereignty as it puts the so-conceived 'sovereign states' under some obligations to be followed.

CONCLUSION

Sovereignty is the basic organizing principle for states under international law, yet it remains the most debatable concept. Sovereignty was understood as an absolute and unquestionable authority of the state, which could not even be subjected to law.

The Westphalian system of sovereignty that ruled the international order since 17th century has been altered and adjusted in today's global regime.

It has travelled a long distance since its inception, in terms of various connotations to have arrived at its present interpretation. It has been interpreted by the thinkers in ways to suit and justify their political set ups. Earlier it was interpreted in a strict sense when it used to be relatable to the concept of statehood. However, Sovereignty is no more taken as an objective concept. The 'absolutist' conception of sovereignty now became inconsistent with the international society. It emerged as a political concept and transformed into a legal one. As the global regime was infused with globalisation and emergence of international organisations, the concept of sovereignty was relaxed or in a way, moulded to suit the present international legal order. It was only because of the liberal approach given to the concept of sovereignty that the modern international law could develop.

The principle of sovereign equality kept the sovereignty of the state's intact but kept it at an equal platform with the sovereignty of others. In a way, it preserved sovereignty as a concept but infused a liberal approach in its spirit.

Today, it is made comparable to a responsibility which the states are reposed with. The doctrine of 'Responsibility to protect' has trimmed 'sovereignty' to mean a responsibility. In an era where the importance has shifted from the nation-states to the individuals, the importance of fulfilling one's responsibilities towards its citizens comes on the centre stage and so, has the interpretation of the 'sovereignty' being done in the respect of that responsibility.

Accompanying all such reasons, there has been a gradual transition from the era of absolute and traditional form of sovereignty to the culture of national and international accountability,

transparency and international human rights jurisprudence that lay a burden of responsibility on the states. And probably, in present global scenario, sovereignty in terms of responsibility is the most comprehensive and suitable interpretation to the age old concept of sovereignty.