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**A STUDY OF MODELS OF SOVEREIGNTY**

**MICHAEL J RODNEY**

**SUBMITTED TO THE UNIVERSITY OF WALES IN FULFILMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF  
PHILOSOPHY**

**SWANSEA UNIVERSITY**

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Candidate's Forenames                    MICHAEL J.

Candidate for the Degree of              PhD

Full title of thesis    A STUDY OF MODELS OF SOVEREIGNTY

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**Summary:** The thesis constitutes a study of a number of models of sovereignty as a means of gaining illumination on the nature of the use of sovereignty as an explanatory idea and the practices which it is used to represent. The models studied in detail are those of Augustinus Triumphus, who provided a pre-modern model of theocratically based global governance, and of Hobbes, Austin and Schmitt, who provided models of territorially based secular governance. In the analysis of these models, the features of sovereignty that will be explored are its symbolic character, its embeddedness, the role of routine in its operation and its potentiality for rupture. In relation to the last mentioned feature, which is particularly although not solely posed in Schmitt's model of sovereignty, a grammar of normalities is developed in response to the relationship between norm and exception lying at the centre of his model. In examining these features, a philosophical framework will be developed, drawing on the writings of Ernst Cassirer, with particular reference to his ideas concerning the structure and role of symbols. Further theoretical refinements are made by supplementing the above framework with insights taken from Ludwig Wittgenstein, Anthony Giddens and Charles Taylor, and the idea of rupture is investigated more rigorously by exploring its relationship to that of routine. At this point, a model of popular sovereignty developed by Hans Lindahl and influenced by Cassirer is critically examined and a response is made to its inadequacies. In the conclusion, the notion of a secularised chain of being is introduced as a general underlying feature of the discourse of sovereignty. It will be suggested that despite the differences between the models, they all represent particular instances of an approach dependent on this notion, which has implications for the general nature of the discourse of sovereignty.

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## Chapter 1: Introduction

1. To engage in an extensive literature survey of the word 'sovereign' or 'sovereignty' would result in a multi-volume work. It has been said that it is a term that has a long and troubled history.<sup>1</sup> The reasons for this are several-fold. First it is a term that finds itself located across the boundaries of a variety of disciplines, such as for example, those of law, both domestic and international, politics, international relations, philosophy, theology, sociology, history and economics. Various attempts have been made to classify it. For example Krasner claims to attribute four meanings to it.<sup>2</sup> Domestic sovereignty, the domain with which the intellectual history of sovereignty has been most clearly associated, suggests the existence of a final and absolute authority possessed with supreme power over a territorially based political community. International legal sovereignty on the other hand is captured by the idea of state sovereignty and suggests that each state has legal competence to participate on an equal footing with other states in an international community dominated by the existence of such states.<sup>3</sup> Interdependence sovereignty is a category introduced by Krasner to reflect the deepening of globalization and the varying abilities of states to effectively exercise control over movements which are trans-national in character including those of people, capital and pollutants. A loss of interdependence sovereignty does not in itself automatically lead to a loss of domestic sovereignty perceived as the existence of what is considered within the state to be the final and absolute political authority. However, it may well progressively weaken the position of that authority, as it increasingly comes to be seen as incapable of exercising effective control over certain entities within the state's borders.<sup>4</sup> The last category in Krasner's taxonomy is that of Westphalian sovereignty which embraces the principles of territoriality and the exclusion of external actors 'from domestic authority

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<sup>1</sup> Crawford, J 2006: 32.

<sup>2</sup> He classifies sovereignty as domestic, international, interdependence and Westphalian sovereignty.

<sup>3</sup> Steinberge, R.H 2004: 329.

<sup>4</sup> Krasner, S.D 1999: 12-13. Clearly it can be said that interdependence sovereignty is undermined by the growth of international phenomenon such as terrorism, climate change, the rise of aids and the growing fuel and water crisis. See also Sassen, S 1996 for a useful exploration of the ways in which internal sovereignty is being undermined by global developments which cover economic globalisation and the development of international global governance through the organisations such as the World Trade Organisation, the increased movements of populations and the emergence of an international human rights discourse reflected in a variety of international human rights' codes emanating in essence from the United Nations' Universal Declaration of Human Rights 1948.

structures.’<sup>5</sup> In other words domestic authorities are the sole arbiters of legitimate behaviour.<sup>6</sup> Rees identifies six uses of the term ‘sovereignty’.<sup>7</sup> Keohane distinguishes between formal and ‘operational’ sovereignty.<sup>8</sup> Steinberg, concentrating upon sovereignty from a non-domestic perspective, in effect highlights two approaches to sovereignty, namely from the perspective of international law, already mentioned above and from a behavioural perspective that seeks to evaluate the extent to which states in fact exercise the authority conferred by legal sovereignty.<sup>9</sup> Reflecting on the plethora of ways in which sovereignty has been identified, it has been complicated further by the fact that the use of the term has shifted over time. Capturing this, the 1911 edition of Encyclopaedia Britannica concluded that ‘the literature of the subject is immense: every book on political science from the Republic of Plato has dealt with or touched on sovereignty.’<sup>10</sup>

2. One can see from the above that the different approaches mentioned intersect and are interdependent. Internal or domestic sovereignty which provides the internal coherence of a state is clearly profoundly linked to its external manifestation marked by the inter-relationship between states. However, the existence of a supreme authority internally will have little meaning without a degree of operational effectiveness associated with what Steinberg described as behavioural sovereignty. Yet the seeming inter-dependence of internal with external sovereignty is not as simple as it first seems. The phenomenon of the failed state complicates the nature of this interdependence. In such states internal central governance is weak and significant swathes of the territory under their jurisdiction may in fact be beyond their operational control. Nevertheless from an international legal perspective such a state is accorded competence to engage in the international system ostensibly on an equal footing with other states.<sup>11</sup> This complication is facilitated because a conceptual gap has opened up from the perspective of international law between a change of

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<sup>5</sup> Krasner, S.D 1999: 20.

<sup>6</sup> Krasner, S.D 1999: 20.

<sup>7</sup> Rees, W.J 1969: 209-240.

<sup>8</sup> Keohane, R.O 1995: 177.

<sup>9</sup> Steinberg explicitly refers to three views but the last concerns the extent to which sovereignty from a behavioural point of view is being undermined by a series of non-state actors and global developments (Steinberg, R.H 2004: 329-330).

<sup>10</sup> Cited by Radon, J 2004:195 from <http://1911encyclopedia.org/S/SO/SOVEREIGNTY.htm>.

<sup>11</sup> The formality of state equality is not reflected in its reality. Not all states have the same rights in actuality although all states have the legal capacity to enjoy the rights they possess in legal settings (Simpson, G 2004: 44).

government and a change of sovereignty.<sup>12</sup> The requirements of state creation include the need for an effective government.<sup>13</sup> There is a strong presumption for example that the state continues to exist with its rights and obligations even though there may have been revolutionary changes in government. Similarly a state is presumed to exist even where there is no effective government.<sup>14</sup> Looking at this discrepancy from the perspective of an insurgent movement within the borders of a particular state, it may exercise sovereignty in an operational sense within the territory under its effective control but from the perspective of the central authority it will not possess legal sovereignty and will instead be an unlawful usurper. From an international perspective, the fact that operationally significant areas of a state's territory are beyond the operational control of the central government will not automatically cause any change to the continued treatment of the territory as coming under the jurisdiction of one state and being represented by one government.<sup>15</sup> If an insurgent movement ousts the existing regime, the fact of the change will not be regarded as lawful by the previous regime but its advent to power is unlikely to cause the state to cease to exist from an international perspective. As far as the position of government is concerned,

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<sup>12</sup> Until the middle of the nineteenth century there was a close connection between concepts of state and government. However since then 'a conceptual chasm' has opened up between change of sovereignty and change of government (Crawford, J 2006: 34). This gap needs to be treated with care as one can see from below that one of the requirements for the creation of a state is the existence of a government.

<sup>13</sup> The law relating to the existence of states and international legal sovereignty is complex and has attached to it an enormous literature. However it is worth pointing out that there are two basic approaches to the question of whether a state exists, one being declaratory in nature and the other being constitutive in nature, the existence of a state being dependent upon being recognised by other states. Recognition of course chimes with *real politique*. The principle of effectiveness, the application of which is relevant to whether states are considered to exist, is expressed in the Montevideo Convention of Rights and Duties of States 1933 and includes the requirement of a permanent population, a defined territory, government and a capacity to enter into relations with other states. See; Kelsen, H 1960; Brownlie, I 2003; Fassbender, B 2003; Crawford, J 2006.

<sup>14</sup> One can cite here most obviously Iraq where the government remains heavily dependent on external forces, particularly those of the United States to bolster its position and at least until recently, it was doubtful that the removal of such forces would not have been accompanied fairly rapidly by the fall of the government. The position in Afghanistan also has similarities as the central government's writ of control does not extend to significant swathes of the country.

<sup>15</sup> States where such conditions have existed include Angola from 1975 to 1995, Cambodia from 1970 to 1975, Nigeria from 1967 to 1970 and Eritrea and Ethiopia from the late 1970s to the early 1990s. The law relating to conditions for the creation of states that involve insurgency is complex and will not be examined in detail. However it is worth noting that Article 2 paragraph 4 of the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations provides that 'Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their rights, to self-determination and freedom and independence'. Whether or not a territory will be characterised as a self-determination territory and the implications of such characterisation is a matter of some complexity and need not be pursued here. See Crawford, J 2006: 107-148.

historically its recognition has been a unilateral act by each state and has been dominated by the effective control test. This chimes with Kelsen's basic proposition that legitimacy derived from an existing legal order is the final analysis trumped by its effectiveness.<sup>16</sup> This doctrine remains central to whether governments that had come to power unconstitutionally are recognised even though the practice of recognition has recently been weakened as a pivotal position defining the relationship between many states and newly emerging regimes. This reflects a re-emphasis on the fundamental point that the pivotal question to any government's relationship with any other government is the recognition or not of the state to which the latter corresponds.<sup>17</sup>

The idea of effectiveness which pervades both the recognition of states and of governments is however capable of being multifaceted, as indicated in criteria used to assess their existence, for example those contained in the Montevideo Convention of Rights and Duties of States 1933. These criteria are contestable in that all the criteria embodied in the declaration have an indeterminate quality.

3. The practice of sovereignty therefore appears to have both an internal and external dimension and at least from an operational point of view it is difficult to see how one can operate without the other.<sup>18</sup> To put it in the language of Searle, it is part of the objective background against which its internal expression operates.<sup>19</sup> To put it in the language of Taylor, for whom the idea of background as will be later explained more fully concerns the subjective awareness of individuals as they engage with the world, it is also capable of forming part of both the subjective background and foreground of individuals engaged in the practice of internal sovereignty.<sup>20</sup> And it is internal sovereignty that will form the central concern of this thesis.

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<sup>16</sup> Kelsen, H 1999: 213. This reflects Jennings's observation that '[a]ll revolutions are legal when they have succeeded and it is the success denoted by acquiescence which makes their constitutions *law*' (Jennings, I 1959: 117-118).

<sup>17</sup> The British Foreign Office makes this point in a policy statement in 1980. See 408 *HL Debs cols* 1121-2; Crawford, J 2006: 151; Petersen, MJ 1996: 35,149,255.

<sup>18</sup> Kant, for example, made it explicit that internal governance depends upon and is subordinated to the need to establish 'a law governed external relationship with other states' (Kant, I 1991: 47).

<sup>19</sup> See Chapter 6 below at para 26 for an exploration of the Searle's idea of the background as compared to Taylor's.

<sup>20</sup> See Chapter 6 at para 25 for an explanation of Taylor, C's idea of background and foreground.

### *From Bodin to Schmitt*

4. Sovereignty has been conceptualised in a multitude of ways not just in terms of its origins but also in terms of its location and qualities.<sup>21</sup> Furthermore, irrespective of which author is engaged in formulating its character, one can see that its configuration is intimately linked in to a range of other concerns, including relevant metaphysical assumptions about the place of man in the cosmos, the nature of man, his propensities, his relationship with society, the role of individualism and historical laws in fuelling the development of society, the purpose of governance and the kinds of structure best fitted to give rise to those purposes.<sup>22</sup> It is also inevitably affected by political events and other experiences that might have shaped the author's perception of life. What follows below is a brief sketch of the idea of sovereignty as it developed in Western thought to provide an initial sense of how the idea of sovereignty evolved.<sup>23</sup> This is provided to allow the reader to place within some context the models of sovereignty which will, from the next chapter, be explored in greater depth and provides a brief overview of what is to come. While a chronological approach has been adopted below, it is as well to bear in mind that the development of sovereignty can be conceptualised as concerning a series of themes.

5. The idea of sovereignty in the sense of an institution that is decisive in terms of authority and/or power in the process of governance has been the subject matter of discussion since the times of Ancient Athens.<sup>24</sup> One could say that models of governance always have to tackle this issue. In the early fourteenth century

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<sup>21</sup> In terms of locations, one can identify monarchs for example as with Bodin, legislators as with Kant, the people as with Rousseau, the state as with a variety of authors including Hegel. Furthermore, reacting against the claim that sovereignty rested with any individual, institution, population it has been located with ideals as for example in the case of Constant with the idea of justice (Merriam, C.E 1968: 77).

<sup>22</sup> This of course means that to maximise one's understanding of sovereignty, as developed by a particular author, requires an appreciation of other ideas proposed by that author. (Taylor, C 1985: 22). Hence when this thesis seeks to explore particular models of sovereignty, it will endeavour to lay out the author's surrounding framework where considered relevant.

<sup>23</sup> Despite the usual association of the idea of sovereignty with Western thought, the term has been used in non-Western cultures. For example in the year 607 Prince Shotoku of Japan sent a note to the Sui emperor of China that has been translated as saying, '[f]rom the sovereign of the land of the rising sun to the sovereign of the land of the setting sun' (Varley, H.P 1977: 15). For a study of the sovereignty concept in Japan, see Tanaka, K 1965: 223-241.

<sup>24</sup> An exploration of the nature of popular sovereignty in Ancient Athens is usefully explored in Ostwald, M 1986. See also Berent, M 2000.



Augustinus Triumphus for example developed a theocratic model of governance centred around the decisive role of the pope in shaping it.<sup>25</sup> Dante's model of governance also seeks to elucidate a model of governance that possesses two poles of such decisiveness, namely emperor and pope. However, the great markers laid down in connection with the development of the idea of such sovereignty, and from which our current ideas of sovereignty are most closely related, can be located in those writings that emerged in the early modern period as the feudal era and its associated forms of governance were coming to a close and the territorially defined state was taking centre stage.<sup>26</sup> In a sense, any writer concerned with the governance of states will inevitably, if not explicitly, deal with the problems associated with sovereignty which pivot around the articulation of governmental power, its character, its limits and its justification. However, there are certain writers for whom the articulation and assertion of sovereignty was their central concern or at least a major concern.<sup>27</sup> These include Bodin followed by the social contract theorists, namely Hobbes, Locke and Rousseau, for whom the contract is the mechanism through which there is a simultaneous socialisation and establishment of domination which takes the place of the hitherto dominance of teleological and theological justifications for society.<sup>28</sup> Sovereignty in Hobbes rests in effect with the monarch. For the latter two, sovereignty lies with the people whose will for Locke is expressed through a legislature while for Rousseau, no such representation can legitimately occur and sovereignty of the people is expressed directly through its general will.<sup>29</sup> Kant differentiated between the idea of the social contract and its reality, pivoted his account around the idea of practical reason and explored further the idea of the state which emerged as a matter of necessity.<sup>30</sup> For him, the sovereign expression of the united will of the people was to be found in 'the ruling power' vested with the

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<sup>25</sup> Wilks, M.J: 1963; Dante:1996.

<sup>26</sup> It should be pointed out that the idea of sovereignty was not unknown prior to this.

<sup>27</sup> A useful, albeit dated survey of a range of models of sovereignty, in which their nature and circumstances are explored, is the account of Merriam, C.E 1968.

<sup>28</sup> Useful texts which explore the nature and development of the social contract include Gough, J.W 1957; Riley, P 1982; Hampton, J 1985.

<sup>29</sup> Rousseau, JJ 1993.

<sup>30</sup> Kant expressly denies the historical existence of the social contract and sees it more explicitly as a practical idea of reason which requires man to leave the state of nature and form civil society. One can look therefore at the practical idea of reason as substituting for the explicit contract shorn of the latter's voluntarism in order to demonstrate the necessity for the national state. Contractarianism is hypothetical and actual consent is not involved (Kant, I 1991: 75; Riley, P 1982: 18;).

legislator.<sup>31</sup> As with Rousseau and Hobbes, Kant's sovereign is absolutist in nature, the sovereign of the state having only rights in relation to the subject and no (coercive) duties.<sup>32</sup> Moving to the nineteenth century, Hegel in his *Philosophy of Right*, in an endeavour to identify the conditions necessary for humans to actualise freedom, located sovereignty as lying with the unity of the state with the constitutional monarch being the concrete expression of that unity.<sup>33</sup>

6. In England, in the nineteenth century, legal positivism developed in reaction to natural law theories. The two main exponents of this approach for our purposes were Bentham and Austin, both of whom developed a normative legal theory which embraced the idea of sovereignty. Bentham based his approach on utilitarianism, with its focus on the consequences of actions rather than prior reasoning.<sup>34</sup> He rejected social contract theory as providing the foundation of society. Men submitted to authority, so it was claimed, because in doing so their interests were better served than a contrary behaviour. A political society as opposed to a natural one is one where people habitually obeyed a common superior, namely a sovereign body.<sup>35</sup> The

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<sup>31</sup> Kant, I 1991: 138.

<sup>32</sup> Kant, I 1991: 143. Following on from this, the constitution of any state 'cannot contain any article which might make it possible for some power within the state to resist or hold in check the supreme executive in cases where he violates the constitutional law' (Kant, I 1991: 144). Here the term 'supreme executive' is a reference to the sovereign. When referring to the sovereign as absolutist in nature, this does not mean that Kant considered that there were no limitations upon his powers. However the breach of such limitations, for example, the prohibition against establishing a hereditary nobility or owning land privately were in effect advisory only and breach of them could not constitute an illegality.

<sup>33</sup> Hegel, G.W.F 1967: para 279. Hegel's idea of the state embodied the whole of civilly and politically organized society not simply the government which for him was the 'strictly political state' (para 273, 276). The location of sovereignty in the state was a conclusion reached by a number of authors using a variety of different operating assumptions and routes of reasoning and involving a variety of differing conceptions of the idea of state. There were also differences over whether the state was synonymous with sovereignty or whether the latter was simply an attribute of the former as for example suggested by Gerber. For him the state did not have 'absolute power to will' but was free in effect only to operate within the limits of the ends it pursued that in part would be defined by the constitutional principles of the state (Emmerson, R 1928: 51-66). See Merriam, C.E 1968: 85-129 for an overview of the relationship between state and sovereignty and Emmerson, R 1928 for a detailed exploration of the place of 'the state' in the conceptualising of sovereignty within German jurisprudence. For a general discussion of the way that the 'state' idea has developed in Western political thought see Dyson, K 1980; Skinner, Q 1978; Bartelson, J 2001; Bosanquet, B 2001; Skinner, Q 1989: 90-131.

<sup>34</sup> Bentham coined the term utilitarian under the influence of Hume's advocacy of 'utility' as the justifying ground of both the social virtues and rules of equity and justice. Hume had claimed that no principle of actions or habits were praiseworthy unless they gave rise to 'happiness and welfare' either of the individual or society (Scarre, G 1996: 3). At its core, utilitarianism calibrated what was good by reference to what produced pleasure and avoided pain. Hence what was good for the community was calculated according to that which 'produce[d] the greatest happiness for the greatest number'.

<sup>35</sup> Bentham, J 1988: 40. This sovereign body consists of an individual or 'assemblage of individuals of a known or certain description.'

relationship between sovereign and subjects would be structured through the law emanating from the former.<sup>36</sup> Austin's position on sovereignty was similar to that of Bentham. Like Bentham, he rejected the idea of the social contract as forming the foundation of society and like him, utility was the founding principle of a political community. The idea of law for both is framed in terms of superiority and inferiority. Sovereignty's relational aspect as suggested by the idea of habitual obedience in effect provided the limit point for the sovereign's existence. Unlike Bentham, Austin's sovereign is illimitable and indivisible in character while Bentham accepted the possibility of divided and partial sovereignty.<sup>37</sup>

7. Just as Bentham's and Austin's positivism was a reaction against the perceived inadequacies of natural law theories to identify and explain the fundamental nature of law, as for example espoused by Blackstone, Schmitt's theory of sovereignty which emerged in the early twentieth century was developed at least in part, in counter-position to Kelsen's positivism in particular which had been associated with neo-Kantian thought.<sup>38</sup> Through the latter, Kelsen sought to construct a 'pure science' of law from which sovereignty was excluded as a relevant category of analysis. Schmitt's re-centering of sovereignty arose out of his rejection of the machine-like quality of Kelsen's hierarchy of norms reflecting Schmitt's wider rejection of what he perceived to be the false distinction between *is* and *ought*, and his view that there had been a failure to appreciate the limits of rationality in the application of the law. Reflecting this, he considered that there had been a wrongful elimination of the personal element in the application of norms and following on from this, a failure by Kelsen and others to appreciate that legal orders rest on decisions and not norms.<sup>39</sup> Schmitt's conception of sovereignty, captured by the evocative phrase that it is possessed by 'who decides upon the exception' proved highly controversial for a

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<sup>36</sup> 'Habit' and 'utility' sit uneasily together as an unreflective habit of obedience might not accord with the interests of the individual. See Ben-Dor 2000 for an exploration of the normative quality of law as conceptualised by Bentham.

<sup>37</sup> There are a number of differences between Bentham and Austin in relation to their conceptualising of law which are not central to the exploration of sovereignty in this thesis which will concentrate, *inter alia*, upon Austin's model of sovereignty. See Freeman, M.D.A 2001: 203-207.

<sup>38</sup> See Chapter 5 below for a fuller explanation. Kelsen's concern was to study the character of law itself rather than its effects and substituted for the idea of causation associated with the natural science, that of imputation. In so doing, he adopted an analytical approach that chimed with the idea of individual responsibility whereas causality connotes the idea of determinism.

<sup>39</sup> Schmitt, C 1988: 10. Yet of course that then poses the question of how the person or institution making such decisions is determined other than through some kind of norm or practice.

number of reasons.<sup>40</sup> These included the profoundly anti-liberal democratic critique upon which it was predicated and Schmitt's support for the Nazi project.<sup>41</sup> The growth of interest in the ideas of Schmitt in the English speaking world were slow to develop for a variety of reasons not least because the translation of many of his works did not appear for some time and some have still not been undertaken.<sup>42</sup> His ideas about liberalism and sovereignty received growing interest beginning at around the time of the failings and then demise of the Eastern Bloc and the subsequent energising of the globalisation process, both of which, against the backdrop of the passage of time from the Second World War, allowed for a growth in the re-examination of the basic structure and qualities of the liberal democratic project and the role of the state.<sup>43</sup>

### *And Beyond...*

8. Schmitt's ideas about sovereignty and particularly the state of exception found themselves being taken up later in the century most notably by Agamben who seeks to explore the state-citizen relationship and considered that the nature of sovereignty is central to understanding.<sup>44</sup> Influencing Agamben are a range of thinkers including Benjamin and Foucault, with particularly the latter being reflected in his conceptualisation of society as a biopolitical body. However in contrast to Foucault who had marginalised judicial institutional models in his explanation of power, Agamben seeks to restore their centrality, by arguing that the 'production of the biopolitical body, is the original production of sovereign power.'<sup>45</sup> Sovereignty is

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<sup>40</sup> Schmitt, C 1988: 5.

<sup>41</sup> Schmitt's support for the seizure of power by Hitler and his relationship with the Nazi regime is usefully explored in Balakrishnan, G 2000: 176-189.

<sup>42</sup> A variety of reasons can be cited including the freshness of the memory of the Second World War and Schmitt's disfavoured status because of his association with the Nazi regime (Balakrishnan, G 2000: 261).

<sup>43</sup> Schmitt's ideas particularly that of *the political* had influence upon Arendt and Strauss with the latter's writings playing an important role in the development of the neo-conservative movement. See Norton, A 2004 for a useful discussion of the influence of Schmitt on the aforementioned.

<sup>44</sup> It has also been taken up by Negri and Hardt in *Empire*. They seek to argue that due to globalisation, nation-state sovereignty has declined. However this does not mean the demise of sovereignty but its rescaling to the level of the global where ultimately governance will be characterised by self-organising democracy by the newly formed constituent power, namely the multitude, in what has been characterised as post-modern republicanism (Hardt and Negri, 2000; Passavant, P.A 2004). *Empire* does not form part of this thesis which is concerned with sovereignty as associated with the nation state.

<sup>45</sup> Agamben, G 1998: 6. The 'biopolitical body' is a term derived from Foucault's assertion that in modernity natural life is included in mechanisms and calculations of state power. For Foucault,

located 'at the point of indistinction between constituting and constituted power'.<sup>46</sup> Agamben highlights a paradox associated with sovereignty, namely that a sovereign institution in whatever form it happens to take, is both inside and outside the law.<sup>47</sup> This manifests itself in the existence of the exception, created by the sovereign's suspension of the law ushering in what Agamben refers to as 'bare life'. This domain, which Agamben refers to as the sovereign sphere, is a sphere where the sovereign is 'permitted to kill without committing homicide and without celebrating a sacrifice and sacred life, that is life that may be killed and not sacrificed'.<sup>48</sup> Whereas for Hobbes, the state of nature is a pre-political state and the advent of sovereignty brings about the political, for Agamben conditions akin to the state of nature are profoundly political associated with the existence of the sovereign. Whereas for Hobbes a population was rescued from the state of nature by the existence of the sovereign, for Agamben, the advent of the sovereign plunges society into conditions associated with the state of nature which are expressed most starkly in the manifestation of the concentration camp.<sup>49</sup> This amounts to a deeply pessimistic account of sovereignty. In contrast to Hobbes, Agamben considers that the conditions associated with the state of nature are a product of the political and of sovereignty, rather than the pre-political. The operation of sovereignty is the cause of these difficulties rather than the solution. As a result for Agamben '[u]ntil a completely new politics is at hand...every theory and every practice will remain imprisoned and

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sovereignty, was characterised by the transcendence of the sovereign and the relationship of obedience of subject to sovereign structured chiefly by law. Biopower, for Foucault, reflects the central concern and techniques used by modern government to manage and foster the growth and health of the population under its jurisdiction and so brings life into the realm of explicit calculation and makes knowledge/power an agent of transformation of human life. Fundamental concerns about territory associated with sovereignty hence become replaced by fundamental concerns for the population associated with 'governability' in whose era we are now situated. (Foucault, M 1991:102-103; Foucault, M 1980:143; Dreyfus, H and Rabinow, P 1982: 134). Hence for Foucault, sovereignty while it continues to operate as a feature of governance, does not exhaust the latter's activities. For Agamben, the production of the biopolitical body involves the entry of bare life (*zoe*) (which classical political theory considered to exist in the realm of the private household only), into the sphere of the polis-that is the politicisation of bare life (Agamben, G 1998:6). Hannah Arendt makes an extensive study of the relationship between the private, social and the public, political domains (Arendt, H: 1958).

<sup>46</sup> Agamben, G 1998: 41.

<sup>47</sup> This paradox is captured in Schmitt's formulation used when endeavouring to describe the sovereign in the state of exception as existing outside the law but nevertheless belonging to it (Schmitt, C 1988/1922: 7).

<sup>48</sup> Agamben, G 1998: 83.

<sup>49</sup> For Agamben, the sovereign space where sovereign meets *homo sacer*, is the first properly political space' (Agamben, G 1998: 84).

immobile...'<sup>50</sup> To overcome this impasse, no mere reconsideration of the political is sufficient but the rethinking of Being itself is required.<sup>51</sup>

9. Just as Agamben presents a bleak picture of sovereignty's potentiality, Loughlin presents a picture seemingly inspired by an understandable desire to locate it at the centre of the project of good governance.<sup>52</sup> This is captured by his admission that sovereignty is absolute, though it incorporates certain intrinsic constraints which derive from what he considers to be the basic tenets of sovereignty. These express themselves through an institutional framework established for the purpose of maintaining and promoting the peace, security and welfare of citizens.'<sup>53</sup> Yet the very idea of peace, security and welfare of citizens raises a multitude of possibilities that ultimately do not always fit in easily with the liberal democratic framework which is most obviously suggested by Loughlin's approach to sovereignty. The Hitlerian project for example with a view to enhancing the welfare of its 'citizens' engaged in a large-scale house building programme aimed at the construction of six million units to be constructed at the rate of three hundred thousand a year, a rate of construction that casts in the shade current aspirations by the British government with regard to the facilitation of house construction to meet the current housing crisis.<sup>54</sup> On the same theme, the United States of America, a liberal democracy has a health delivery system which effectively leaves some forty-five million citizens without any effective health care other than emergency coverage.<sup>55</sup> At the same time, the idea of security and peace were matters that concerned Hitler just as they concern the United States or any other government. For Hitler, such security required war and expansion with a view to achieving peace upon what was perceived to be German terms, while for the United State, the ideas of security and peace also require measures to ensure that they are maintained on American terms by the imposition of *Pax Americana* through, inter

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<sup>50</sup> Agamben, G 1998: 11.

<sup>51</sup> Agamben, G 1998: 59. For useful commentaries on Agamben's sovereignty see Rasch, W 2004 ; 89-102; Fitzpatrick, P 2005: 49-73; Hussain, M and Ptacek, M 2000.

<sup>52</sup> Loughlin characterises sovereignty as an expression of official power emanating from 'the nation' residing between an institutionally created system of government and its citizenry (Loughlin, M 2003: 70).

<sup>53</sup> Loughlin, M 2003a: 72-98; Loughlin, M 2003b: 55-86.

<sup>54</sup> Overy, R 2004: 225.

<sup>55</sup> San Fransiscan Chronicle October 11 2004.

alia, the doctrine of pre-emption.<sup>56</sup> More recently the phenomenon of ‘Guantanamo Bay’ has emerged which provides a modern day example of the state of exception in operation.<sup>57</sup> The difficulty with Loughlin’s account of sovereignty is not so much the tenets he associates with its existence.<sup>58</sup> These are facets which one would desire and seek to accommodate in any equitable political settlement. However the difficulty is that sovereignty as it has been historically conceptualised has frequently not possessed many of these qualities and neither have a significant number of political settlements which have borne an uncanny resemblance to the state of exception as proposed by Schmitt and developed by Agamben.<sup>59</sup> This is apparent from the brief explorations above of Schmitt’s and Agamben’s models both of which are *inter alia* characterised by the extinguishment of rights, the suspension of law through law and the degradation of the boundary between public and private that remains possible. Indeed in accepting that the people or nation as the repository of the office of the sovereign, Loughlin opens up the possibility of a Schmittian outcome and the bleak conclusion posed by Agamben. Loughlin in his desire to construct an acceptable civic settlement which chimes with what he perceives to be the qualities of Western liberal democracy has sought to develop a narrative of sovereignty which seeks to avoid its bleaker and more disturbing potentialities. In so doing he has nothing to say about the phenomenon of the exception opened up by Schmitt. Loughlin’s sovereignty is that of normality whereas Schmitt’s and Agamben’s sovereignty is that of the exception.

### *Aspects of Sovereignty*

10. We thus arrive at the aspects of sovereignty that will feature in this thesis. These flow from the above discussion and concern pervasive features of the models briefly mentioned. Firstly, the idea of sovereignty is expressed through language as exhibited in the models referred to above. In fact one will see that the term is capable

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<sup>56</sup> As explicitly explored in Kagan, D, Schmitt, G and Donnelly, T (2000). This publication comes out of the Project for the New American Century and constituted a statement of position by what was essentially a neo-conservative organisation. See Stelzer, I 2004. The doctrine of pre-emption is clearly expressed by Rice, C 2004: 81-87. It has a number of precursors historically, in British foreign policy including Britain’s containment of Napoleon. See Gove, M 2004: 271-274.

<sup>57</sup> Steyn, J characterised Guantanamo Bay as a ‘legal black hole’(Steyn, J 2003). For a detailed analysis of the legal position of the detainees at Guantanamo Bay see Duffy, H 2006.

<sup>58</sup> These include that it is a facet of the modern state; a political relationship not derived from property relationships, that it is an expression of public power; that public power is a product of a political relationship; that public power is not private but official; that sovereignty is relational; that rights are a product of its expression; that it is not solely a matter of positive law.

<sup>59</sup> One only has to cite the Third Reich in Germany and the Pol Pot regime in Cambodia.

of possessing different meanings and can be applied in a variety of different circumstances as elucidated by the models briefly referred to and to be explored more fully below. In exploring sovereignty, symbolic forms developed by Cassirer will be used to reveal the nature of sovereignty as a site of contested meaning. Secondly, that sovereignty's existence is diachronic in nature. There is an expectation that the activities attributed to the institutions associated with sovereignty will have a repetitive quality. Thirdly that the diachronic existence of an institution and the social nature of its activities suggest that what characterises sovereignty is the relational. However it is posed in different ways. There is the relationship between the institutions to which central governmental decisions are attributed and the population or elements of it that are affected by such decision. There is perceived to be a relationship between such institutions and the source of their authority, commonly expressed in the idea of the 'people', 'nation' or more generically 'constituent power.' It will be suggested that the relational aspect of sovereignty to be fully understood has to be seen in symbolic terms.<sup>60</sup> Moving on, fourthly, a further feature, linked to diachronicity and the repetitive and the relational character of sovereign activity is that concerned with habit posed by Austin, explored for example by Hart and McCormick and sociologically considered by Anthony Giddens.<sup>61</sup> The sense of routine, expressed through the relational existing over time also points to the emdedded nature of sovereignty and this will emerge in the ensuing discussion. The relational also points to the potentiality of rapid change and ultimately rupture.

### ***Structure***

11. The structure of this thesis is primarily arranged around four models of sovereignty, the exploration of which will reveal the above themes, with particular reference to the routine associated with its operation, its embeddedness and the potential for rupture. These four models will be those of Augustinus Triumphus who constructed a pre-modern system of governance around the papal office which possesses a key attribute associated with modern sovereignty, namely supreme legislative power. The second model that will be explored in some detail is that of Hobbes. The next models will be that of Austin and Schmitt. In so doing, the themes

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<sup>60</sup> There is another relational aspect that will emerge in the discussion that follows and that is the relationship between instances of activities and practices of such activities.

<sup>61</sup> Hart, H,L, A 1962; Giddens, A 1979 and Giddens, A 1984; and McCormick, N 2007.



above mentioned will be explored. Observations made will be brought together particularly concerning embeddedness, routine, rupture and the symbolic with a view to revealing the pervasive features associated with the articulation of sovereignty and providing a framework, described as the 'secularised chain of being', within which the models of sovereignty under examination can be located.

12. The contents of the thesis can be divided into four parts covering thirteen chapters. The first part will provide a historical introduction to sovereignty going back to Athens and it will focus in particular on the above-mentioned models of sovereignty, providing a general introduction to each. This will be followed by a chapter providing a tentative theoretical approach which will be chiefly but not exclusively concerned with the writings of Cassirer. The third part will comprise a further set of chapters in which the four models will be revisited to and re-examined in the light of the theoretical insights provided by the tentative theoretical approach. The fourth part will open with a chapter, the contents of which are the outcome of the insights gained in the second reading of the sovereign models with particular reference to the Austin's model, and will involve a further exploration of the nature of routine drawing out its relationship to rupture. This will then be followed by a chapter in which the pervasive themes explored in the previous chapters are brought together. These include the symbolic, transcendence, embeddedness and routine, which comprise the metaphysical fabric of sovereignty's articulation which occurs within a framework described as the secularised chain of being. They will be applied by way of illustration to the Anglo-Irish conflict of 1919-1921. The concluding chapter will examine the place of the secularised chain of being in providing a referential framework for the seemingly divergent models of sovereignty explored within the main body of the thesis.

## PART 1

### Chapter 2: A Sketch of the Historical Process

1. Explanations of history frequently privilege one or a small number of features over others which are effectively excluded from the explanatory narrative or given marginal importance. Thus Christian historiography was based on the idea that Providence determined the change experienced by man as though historical development was an expression of a play written by God.<sup>1</sup> Medieval historiography had much in common with this approach. The human agent's role was to further the grand design of God's plan and even when the agent believed he was working against the realization of these plans, he was unwittingly contributing to them.<sup>2</sup> Renaissance history in reaction to what was perceived as *a priori* history in which overall pre-ordained plan excluded the need for detailed factual research in the previous period, reintroduced the idea that held sway within the Greco-Roman period, that historical development was as a result of man's self-willed actions and not a result of some divine plan. However unlike the Greco-Romans, man's actions were not the product of his intellect but that of passion and impulse.<sup>3</sup> Moving ahead, in reaction to the Cartesian claim that historical inquiry had little value because unlike philosophy, history narrative was not trustworthy and fanciful,<sup>4</sup> Vico considered that history was capable of being scientifically studied as it like science was a product of the human mind and could be seen to be comprised of a cycle of development with distinct phases that repeated themselves albeit through different concrete manifestations and which were empowered by class struggle.<sup>5</sup> Enlightenment historians tended to regard the fixed entity around which human history developed as the content of human nature.<sup>6</sup> History's movement for example, in the case of Kant, was subject to an unchangeable plan of nature which existed in parallel to the laws of nature and was characterised by progress whose outcome would be the development of human

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<sup>1</sup> Collingwood, R.G 1993, 50.

<sup>2</sup> Collingwood, R.G 1993: 53.

<sup>3</sup> Collingwood, R.G, 1993: 57.

<sup>4</sup> Collingwood, R.G 1993 59-60.

<sup>5</sup> Adams, H.P 1935. The three repeated phases of the cycle comprised "the age of the gods", the "age of heroes" and "the age of man". He saw for example that there was a resemblance between the Homeric period of Greek history and the European Middle Ages, both of which he classified as expressions of the heroic age and hence history did not repeat itself but developed in a spiral rather than in a circular manner.

<sup>6</sup> Collingwood, R.G 1993: 82.

freedom. History's movement was thus teleological in character leading to the full realisation of man's abilities to reason, the application of which would realise such individual autonomy being acknowledged and respected.<sup>7</sup>

2. Like Kant, and those before him, Hegel considered that history's development was the expression of a plan, revealed by the idea that history moved towards the realisation of freedom but unlike his predecessors, this was not God's plan or that of nature but that of the unfolding of human reason<sup>8</sup> which guided human thought and consequential action.<sup>9</sup> Human passion in the sense of self-interest drove this process forward and its ultimate destination was the realisation of this outcome in the form of man's moral reason and autonomy. The development of reason was the development of human consciousness which itself was a process of thought. Such development was ultimately expressed through the emergence of the perfect state and hence the latter was the primary subject of history.<sup>10</sup> Marx's conception of history again held onto an overall plan. However, instead of privileging thought and its expression in the form of developing reason and the emergence of the state as the pervasive fabric of the historical process, Marx privileged economics and more particularly the development of productive forces and the modes of production through which such forces developed. History was characterised by changes in modes of production and growth of productive forces. The former were progressively undermined, ultimately giving way to new modes of production because they could no longer contain the ongoing growth of productive forces. Whereas for Hegel logic manifested by thought in the form of ideas came before such variables<sup>11</sup> in the development of history, Marx privileged them over ideas, the former being the ultimate cause for the latter. Changes in the modes of production did not simply constitute the environment within which history took place but also constituted the source that defined its pattern.<sup>12</sup>

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<sup>7</sup> Schneewind, J.B 1992, 332, Collingwood R.G 1993: 103.

<sup>8</sup> Unlike Kant's understanding of reason which is superhistorical and is realised through the overcoming of ignorance and superstition, Hegel's reason is not a fixed entity but develops in the very course of history itself through the collective actions of man.

<sup>9</sup> Kaufman, W 1966: 254-294.

<sup>10</sup> Beiser, F 1993 : 289.

<sup>11</sup> Collingwood, R.G 1993:124.

<sup>12</sup> Collingwood, RG 1993: 124-5.

3. More recently, reflections upon the nature of history, in addition to raising ontological issues about its nature, have also raised epistemological issues concerning its gathering which impact upon perceptions of the historical process. Toynbee considered that history was driven forward by the creation, existence and ultimate decay of civilizations.<sup>13</sup> Collingwood, for example, considered that historical events have both an outside being the expression of the event while the inside comprises the rational thought behind the event. The idea of progress remains a valid, although not unproblematic descriptor, to assist in the illumination of the historical process.<sup>14</sup> Perceptions of historical events and the thought of those engaged in them however are not simply the outcome of historical data collected but require interpretation of that data which inevitably involves the historian in injecting his own experience into the process of developing historical thought.<sup>15</sup> In this way the historian re-enacts past experience. McNeill pays particular attention to the relationship between man and disease in exploring the historical process which he viewed as a spiral development with civilizations' growth and decay being linked to the relationship between man and his biological environment.<sup>16</sup>

4. All these ideas<sup>17</sup> about the historical process whether they are idealistic in content, namely whether they tend to focus on the motivations and choices made as expressed by human action or concentrate on laws external to human will to explain historical development all hang on human decision and consequential action.<sup>18</sup> And it is such decisions that form the fabric out of which sovereignty is constructed both conceptually and in terms of its actually perceived practice.

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<sup>13</sup> Collingwood, R.G 1993: 159-165; Toynbee, A 1947.

<sup>14</sup> Collingwood, R.G 1993: 324-32.

<sup>15</sup> Collingwood, R.G 1993: 302-4.

<sup>16</sup> McNeill, W.H 1976.

<sup>17</sup> The description of the different conceptions of histories mentioned are not exhaustive and have mainly concentrated on ontological issues concerning the nature of the historical process.

<sup>18</sup> Collingwood, R.G 1993: 302.

## *Supreme Binding Decisions*

5. If one looks at various models of sovereignty, however they may differ, central to them all is the idea of an institution or institutions out of which emerges a flow of supreme decisions binding upon the communities over which such institutions have jurisdiction.<sup>19</sup> The institution's desired form varies ranging from that of an individual in the case of Hobbes and Schmitt, or a collective in the case of Locke or Austin, or the state in the case of Weber. Each model points to an institution or complex of institutions that are empowered to make supreme decisions which cannot be overruled by any other institution operating within the same functional and jurisdictional domain and in so doing maintain the separate identity and status of the political order of which they are part.<sup>20</sup> The idea of the supreme decision is locatable within the historical development of human social organisation.

6. The creation of man is a social process and his development requires the existence of social order. The latter is the outcome of human interaction and therefore in order to exist needs to be continually reproduced.<sup>21</sup> This manifests itself in part through the habitualization of many activities through which decision making is facilitated by the narrowing of choice.<sup>22</sup> Human activity therefore in large measure becomes repeated and predictable, giving rise ultimately to institutionalisation, through which human behaviour is controlled along preset pathways ensuring its predictability.<sup>23</sup>

Underlying this there remains the potential for alternative behaviour which might be

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<sup>19</sup> The idea of 'binding' suggests not just that they possess a normative quality that creates obligations of compliance upon those to whom they are addressed but also that there is a perceived actuality of such compliance.

<sup>20</sup> The term 'functional and jurisdictional' domain is used here to denote the possibility of functional separation between for example the legislature, executive and judicial and also to denote separation between jurisdictions most commonly but not exhaustively associated with the territorial state.

<sup>21</sup> Berger, P and Luckmann, T: 1966: 70.

<sup>22</sup> Berger, P and Luckmann, T: 1966: 71. This idea associated with routine will be explored later on in the thesis, triggered in part by Austin's conception of sovereignty which embraces the idea of 'habit'. See chapters 4 and 9 below.

<sup>23</sup> Giddens within the context of his idea of structuration considers that social systems manifest structure in the form of the reproduction of social practices and therefore exhibit 'structural properties'. The properties which comprise the more enduring features of social life comprise institutions. These are made up of features which are experienced by participants in the social system as having solidity in terms of time and space (Giddens, A, 1984: 17,24.). This ties into Berger and Luckmann's idea that institutions take on an objectified form when they are transmitted beyond those that created them and hence tend to appear to participants as unchangeable realities beyond the possibility of change by human action (Berger, P and Luckmann, T 1966: 76).

disruptive and hence if necessary must be suppressed failing which institutions themselves might be undermined leading possibly to their replacement by alternative ones.<sup>24</sup> Controlling mechanisms therefore exist which are designed to prevent such disruption and in essence comprise of rules, which may benefit some members of society as opposed to others, thus giving rise to the phenomenon of domination. Gellner suggests that domination in the sense of an impersonal and social stratification of power does not become apparent until the development of agrarian society.<sup>25</sup> Structural disequilibrium arises in the sense that food surpluses now have to be distributed according to some set of predictable rules which define ownership of such surpluses and mechanisms for their distribution. Such rules are not self-evident or ultimately self-implementing and hence intertwined with their development lies the development of normative orders to ensure compliance.<sup>26</sup> The motor for the development of stratification as an expression of domination appears frequently to have involved war, motivated by a range of factors, whereby one society's wealth through violence was expropriated by another with the conquered population being turned into serfs or slaves.<sup>27</sup>

7. According to Gellner, the ability to dominate is grounded in the possession of power, the latter manifesting itself by what he describes as 'primary' and 'secondary' power. The former consists of the exercise of direct force and is comparatively rare. In fact the frequent use of such power suggests that the institution being attacked may be undergoing disintegration.<sup>28</sup> Secondary power according to Gellner is exercised through the use of rules<sup>29</sup> with the possibility of sanction which may itself involve the application of violence in the event of breach. However this idea of stratification and the institution of permanent authority arose slowly and incrementally. For considerable periods the authority was not permanent but may have only applied

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<sup>24</sup> Berger and Luckmann do not extensively address the issue of conflict. They are 'society-centric' in the sense that their penetrating comments on society take place within a framework where there is no other society which might compete and ultimately threaten the one under consideration. The society they examine is a paradigmatic one which is successful and ongoing. The way in which they construct social reality does not explore the existence of conflict and its implications for the continuation of that society.

<sup>25</sup> Gellner, E 1990, 145.

<sup>26</sup> Gellner, E 1990, 146.

<sup>27</sup> Mann, M 1986: 53-4. An extensive analysis of the motivations for violent conflict can be found in Gat, A 2006.

<sup>28</sup> Berger, P and Luckmann, T give the example of the frequent breach of the incest taboo.

<sup>29</sup> Rules of course used in the narrower legal sense of the word.

during times of war with little power outside war to issue and enforce commands.<sup>30</sup>

Once war ceased it was possible for the power an individual acquired during war to evaporate and it was frequently the case that leadership in war and peace was assumed by different people.<sup>31</sup> One sees here the possibility of the emergence albeit on a temporary basis of a chain of a simple hierarchy whose integrity requires the making of what one might call the 'final binding decision'. That is the decision against which there is no pre-determined and identifiable pathway which could lead to its overturning which would be socially recognised and accepted.

8. The idea of the supreme binding decision manifests itself in the development of city-states followed by empires particularly the Roman Empire which was arguably the first substantially territorialized<sup>32</sup> form of governance which displayed unity and resistance to fragmentation that outstripped earlier empires. Hence here there was a comparatively stable hierarchy of governance at the apex of which lay the emperor whose decisions were regarded as supreme. The Emperor's position as supreme ruler, in executive, legislative and judicial terms was regarded as unlimited.<sup>33</sup> The demise of the Roman Empire resulted in the fragmentation of governance as expressed in the feudal period but the organisation of decision making remained a central issue around which cooperation, conflict and war continually developed and out of which the modern state system emerged.<sup>34</sup> However one conceives the

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<sup>30</sup> Gledhill, J 2000: 28.

<sup>31</sup> Gledhill, J 2000: 28. Clastres refers to attempts of chiefs to perpetuate their power by extending hostilities beyond what their communities thought were acceptable. Once past the point of acceptability, virtually no one within the community was prepared to follow them (Clastres, 1977: 177-180).

<sup>32</sup> By this is meant that domination for the first time was territorialized in that through economic and infra-structural integration, cultural and administrative integration of local elites, one could for the first time point meaningfully to territories 'inside' the empire which in contrast to those 'outside' the empire were pacified, economically integrated and protected from inward hostile incursion.

<sup>33</sup> Nicholas, B: 1962: 12,18. This did not mean of course that in practice the Emperor's writ was consistently applied throughout the Empire. Ultimately of course the Empire fragmented and Rome was sacked and the emperor deposed in AD 410 (Davies, N 1997:213).

<sup>34</sup> Different approaches have been adopted which prioritise different variables as being most determinant in the development of statehood. Adopting Tilly's framework one line of investigation is statist in character, including those that prioritise the internal as opposed to external international developments including the role of warfare in the development of the state as in the case of McNeill, W.H 1982 and Bobbitt, P 2002. Other lines of approach according to Tilly include the geopolitical approach which looks at the relationship between states as being the prime determinant of their development such as in the case of Rosenau, J.N. 1970. A third line of approach is that which looks for an explanation of state-formation from changing modes of production such as that of Anderson, P: 1974 and the last general approach is similar to the economically orientated approach but taking greater cognisance of the position of a given state within the world economy as a whole such as in Wallerstein, I. 1974-1988 (Tilly, C 1992: 6-16).

development of this phenomenon, the location and character of political control remained central to the process of social change that Europe underwent. From the city states concentrated around the Mediterranean to the territorial states that initially emerged along the Atlantic,<sup>35</sup> social conflict was geared to establishing and /or maintaining political control and the centre of that process was the ability of popes, emperors, kings, aristocracies and even democracies to define and dominate the social relationships that comprised the societies within which they were located. Such domination was most starkly tested by rulers' abilities to raise monies from those populating their territories and armies to wage war in order to protect and extend their domains and interests.<sup>36</sup> The existence of different sorts of interests with their concomitant rights, obligations and immunities frequently over overlapping territories all expressed shifting configurations of contingent cooperation which were expressions of the prevailing balances of power between different individuals and sectors of the population in what was frequently in essence a chronically conflictual situation.

9. The "drift" that was traced out by such conflict was one of progressive centralisation of governance. This initially expressed itself most clearly in the centralisation of the governance of the church. For example in the tenth and early eleventh century a centralised system of monastic governance emerged whereby all Cluniac monasteries were ruled by priors under the jurisdiction of the Abbot of Cluny.<sup>37</sup> This came to serve as a model for the entire Roman Catholic Church and accompanied claims by popes such as Pope Leo IX of power over all bishops and clergy even those situated outside the empire.<sup>38</sup> This process of centralisation ultimately led the clergy to be described as the first 'translocal, transtribal, transnational class in Europe to achieve political and legal unity.'<sup>39</sup> The Pope in effect became a universal legislator over the church, only limited by natural and positive divine law, that is law laid out in the bible.<sup>40</sup> He was also a supreme judge

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<sup>35</sup> Tilly, C 1992: 189.

<sup>36</sup> In reality Europe was politically dominated by regionally based kings and princes as opposed to the Roman or Holy Roman Emperors who proclaimed authority over such regions but who were reliant on such leaders for the raising of armies to protect the empire from inward incursion.

<sup>37</sup> Berman, H 1983: 107.

<sup>38</sup> Berman, H 1983: 94; Tierney, B 1988: 27.

<sup>39</sup> Berman, H 1983: 108.

<sup>40</sup> Le Bras, G 1926.



and administrator and did not consider that his judicial authority was limited to spiritual matters or members of the church. His central role within the church however was not totally mirrored in his involvement in civil matters where his position was less clear.<sup>41</sup>

10. The centralisation process also expressed itself in the relationship between the Pope and Emperor most particularly in the Investiture Clashes where the former, notably Gregory VII, attempted to claim jurisdiction over the latter claiming to have the power, *inter alia*, to depose emperors as temporal power was inferior to spiritual power.<sup>42</sup> The conflict between pope and emperor resulted in a separation between the secular and spiritual realms both of which claimed to be universal and hence each was perceived to exist as a rival to the other. The result of this clash was contradictory. On the one hand as emperor and pope each supported local forces which opposed their rival, Germany and Italy underwent further fragmentation. However papal alliances with French kings, for example, facilitated the consolidation of the latter's kingdom.<sup>43</sup>

11. These moves towards centralisation however took place against a general backdrop of the feudal mode of governance that was characterised by a heterogeneous system of political authorities whose relations were shifting and ambiguous and where the jurisdictional limits of responsibilities could and did easily conflict. Territories were subject to overlapping and continually shifting rulerships.<sup>44</sup> These ranged from dynastic monarchies to religious foundations, commercial organisations, and the communal property of cities, towns and guilds.<sup>45</sup> Hierarchies

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<sup>41</sup> With regard to civil matters his rule over some matters was absolute, while in respect of others, he shared his rule with the secular authorities (Berman, H 1983: 99).

<sup>42</sup> Tierney, B 1988: 56.

<sup>43</sup> Spruyt, H 1994: 96. The papacy supported the build up of centralised kingdoms in territories surrounding the German Empire to provide a counter-weight to the latter. Ultimately however, the transterritorial jurisdiction of the church and principle of royal supremacy clashed resulting in a victory for the French kings.

<sup>44</sup> Jackson, R 1999: 435. This overlapping patchwork effect is graphically exemplified by the Count of Luxembourg, a prince of the Holy Roman Empire and hence subject at least nominally to the emperor. At the same time, he held a money fief (a pension) from the French King and was therefore subject to his jurisdiction. The result of this uncoordinated network of relationships was the emergence of cross-cutting obligations, for example John Toul, who was forced to attempt to balance rival obligations to four lords namely Lord John of Arcis, Lord Enguerran of Coucy, the Count of Champagne and the Count of Grandpre with the latter two having equivalent status but precedence over the first two (Spruyt, H 1996: 39).

<sup>45</sup> Jackson, R 1999: 435.

were frequently diffuse and the relationship between superior and inferior interests within the context of such hierarchies did not always reflect the material balance of power.<sup>46</sup>

12. Explanatory discourses for the emergence of a dominating system of sovereign state are various. Claims are made for example that the first signs of sovereignty associated with the modern state are prefigured in the centralisation of the Church referred to above. Early signs of what came to be known as the sovereign state have been located as occurring in the 11<sup>th</sup> century, following the fragmentation of the Carolingian Empire with the dynasty of Capetians in what is now central France and what had been the West Frankish part of the former empire. By the thirteenth century Spruyt claims that certain features of the sovereign state were detectable, for example the practice of a central administration, the production of revenue, a curtailment of church power within the King's domain, the territorial demarcation of borders, the claim by King that he was the emperor in his own kingdom and the suppression of feudal rivals.<sup>47</sup> What the Capetian example posed albeit hesitatingly and partially was the idea of the absolutist state, that is the idea according to Vierhaus that rule resided 'in an undivided and unlimited authority of an individual, who as legislator was not bound by the laws, who was independent of all control, and who exercised sovereignty without consulting any groups or institutions except those created by himself.'<sup>48</sup> Explanations of the rise of the absolutist state, its fundamental qualities, the extent of its absoluteness together with that of its geographical spread, its relationship to the demise of feudalism and the rise of the modern nation state have been contested by various authors.<sup>49</sup> It is not the purpose of this work to engage with these debates, save to highlight the point that the idea of the absolutist state which suggests just that, namely that the king possessed unlimited political power, did not represent its actual practice. As Anderson has suggested, this kind of state was

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<sup>46</sup> For example, Henry II of England held land in France as a duke and was obliged to pay homage to the French king Louis VII which he did, even though the latter was in military and political terms much weaker (Spruyt, H 1996: 39).

<sup>47</sup> Spruyt, H 1996: 79. These features remained partially applied and were not embedded in a stable manner but were consistent with the rise of the absolutist state.

<sup>48</sup> Vierhaus, R 1988: 113 cited in Teschke, B, 2003: 155.

<sup>49</sup> These are usefully laid out by Teschke whose fundamental thesis in this regard is that within the literature of International Relations there has been an over identification of the modern state with the absolutist state and a misapprehension of the significance of the Treaties of Westphalia in the rise of the modern state.

‘exotic, hybrid, compositions whose surface “modernity” again and again betrays a subterranean archaism.’<sup>50</sup> It contained features associated with both a fragmented feudal mode of governance and with those of the modern state-to-come. A comparatively centralised civilian bureaucracy in keeping with Weber’s rational legal administration existed side by side with the practice of treating the offices which it comprised as saleable pieces of property. Purchasers could then grant privileges in what amounted to a form of monetarised fiefdom.<sup>51</sup> In relation to France, royal and non-royal political institutions competed with one another for domination although the former endeavoured to penetrate the latter by the placement of royal agents.<sup>52</sup>

13. The absolutist state was therefore not absolutist in practice and although it contained sites of centralisation, these existed against a backcloth of contests between centres of power. This formation was therefore unresolved in its content and ultimately uncertain in its trajectory of development. Its existence emerged in a Europe characterised by military conflict and arguably its very development was borne out of the necessity to construct an efficient military response to repulse invaders and consolidate and enlarge political power. The emergence of the absolutist state was but the latest phase in an ongoing process where the issue of political power and authority was being negotiated peacefully or otherwise. The essence of that struggle which clearly continues is the scope of decision making, the identity of the decision maker, those who are affected by such decisions and the relationship between the different authorities which are empowered to make such decisions, that is to say the mapping of the hierarchical relationships between the decision made by such authorities. At bottom, one could say that one essential dynamic of the development of civilisation has been the drive by competing power centres to maximise the extent of their decision making abilities, in terms of scope and the extent to which they are complied with at the expense of their competitors. The structure of such power centres, the division of labour between them, the domains over which their decisions are applicable, and the extent to which such centres

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<sup>50</sup> Anderson, P 1974: 29.

<sup>51</sup> Anderson, P 1974: 33.

<sup>52</sup> Teschke, B 2003: 177-8.

cooperate and co-ordinate their activities can be seen as moments in a dynamic and conflictual process which has continuously unfolded.<sup>53</sup>

14. Conflict has therefore been related to clashes between authorities that consider that they possess decision making powers over the same matters concerning the creation and maintenance of political control as described above. The successful imposition of decisions with binding force in the face of resistance by other authorities has denoted one of the essential elements associated with sovereignty, namely that of supremacy. Sovereignty requires that the decision of the authority claiming it will prevail in the event of a clash with other authorities. This requirement has been described as ‘threshold concept.’<sup>54</sup> However a single event will not mark the authority making the decision with the quality of supremacy associated with sovereignty. If there is no further event or if there are further events of the same kind which do not involve an authority’s decisions prevailing, then the quality of supremacy associated with sovereignty is less likely to be successfully claimed or sustained.

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<sup>53</sup> This process is characterised by manifestations of rulership ranging from consent and cooperation through to those which express conflict and physical coercion, whether by law or ultimately by military confrontation. Theories which embrace conflict as the main or a significant element in the analysis of the techniques required to maintain social stability are included in the writings for example of Machiavelli, N: 1988, Weber, M 1978, Habermas, J:1976 and Gramsci A 1971. .

<sup>54</sup> Lee, S 1997: 245.

## Chapter 3: A Preliminary Sketch of Early Models of Sovereignty.

### *General Introduction*

1. In this chapter I will seek to provide a detailed overview of two pre-modern and one early modern models of sovereignty. The pre-modern ones will comprise of those of Augustinus Triumphus and Dante while the early modern ones will include those of Bodin and Hobbes with an emphasis upon the latter. It should be pointed out that there will be a considerable development of a number of these models in the chapters following the development of a tentative theoretical approach platform.<sup>1</sup> The main purpose of these initial surveys is to provide a general overview of each model with a concentration upon appropriate primary and secondary literature.

2. Before doing this however, it is worthwhile providing a short account of early manifestations of ideas associated with sovereignty. These together with the material covered in the previous chapter will provide a contextual background for the models of sovereignty that will then discussed in detail together with others mentioned in summary form.

### *Early Stirrings of the Ingredients of the Idea of Sovereignty*

3. The rise of a number of components associated with absolutist sovereignty can be traced back to the Greek city-states.<sup>2</sup> The Greeks were the first to distinguish between the laws of nature (*physis*) and the law of the community (*nomos*) and acknowledged that the latter were made by men.<sup>3</sup> However they did not put the community or ruler above the *nomoi* and hence a conception of positive lawmaking had not yet been developed.<sup>4</sup> The Aristotelian idea of law rejected the notion of rulers or institutions

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<sup>1</sup> From this chapter, further explorations will be undertaken of the models of Augustinus Triumphus and Hobbes.

<sup>2</sup> There is some dispute about whether these entities were states in the Weberian sense. See Berent, M 2000.

<sup>3</sup> Popper, K 1966: 57-85.

<sup>4</sup> Berent, M 2000: 11.

being above the law. The community was placed under the law and indeed the latter would appear to have existed prior to the former. Thus for example Aristotle stated:

‘If a *polis* is a form of association, and if this form of association is an association of citizens... it would seem to follow inevitably that when the constitution suffers a change in kind and becomes a different constitution, the polis will cease to be the same *polis*, and will change its identity.’<sup>5</sup>

He concludes:

‘It is obvious that the criterion to which we must chiefly look in determining the identity of the *polis* was the criterion of the constitution. The criterion of stock is irrelevant: whether the same group of persons inhabit a *polis* or a totally different group, we are free to call the same *polis* or a different *polis* in the light of the other and final criterion.’<sup>6</sup>

4. The construction and existence of the first city chronologically and logically follows the constitution. The nature and composition of the city was made to fit the constitution that is used in the wider sense of design.<sup>7</sup> Consistent with this, was the observation that the Greeks had a static view of the law and were reluctant to change it.<sup>8</sup> The modern idea of law being made by legislatures and hence being able to be unmade by the same body had not yet emerged. Law had a fixity about it that was closely connected to the idea of law as habit. Law-inspired change was obeyed not so much from enforcement, the systematic means of which were lacking but as a result of change of habit.<sup>9</sup> Rapid change of the law was perceived to be a threat to the ‘general power of the law’ as a result of being a disruption to habit which could only change gradually suggesting that the power of law lay in its longevity and near-permanency.<sup>10</sup> Consistent with this, it has been claimed that the Athenian assembly

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<sup>5</sup> Aristotle, *Politics* III 3 1276a35.

<sup>6</sup> Aristotle, *Politics* III 3 1276b 10-14.

<sup>7</sup> Berent, M 2000.

<sup>8</sup> Sealey, R 1987: 52.

<sup>9</sup> For example it was generally agreed that there was no proper police system and that centralised systems of coercion had not been developed. For example the ancient city-state army was generally a citizens militia which was constituted as an army only in response to external threat (Finley M.I 1983: 18).

<sup>10</sup> Aristotle, *Politics* II 8 1269a 20-3.

was not a legislature in the modern sense.<sup>11</sup> A change of law by the legislature in view of the lack of coercive state-based enforcement procedures could only be effective if reflective of the custom or consensus of the community.<sup>12</sup> Enforcement was achieved by moral pressure by the populace upon those that broke the law. Consequently the assembly was limited to passing laws for which there was substantial agreement or *homonoia* in the populace.<sup>13</sup> This would suggest that the ability of the assembly to impose its will was a limited one.

5. Sovereignty therefore in its modern sense, where it is fundamentally associated with the existence of an independently existing territorially-based state which possesses identifiable and separate centralised regulatory and enforcement mechanisms through which the community is regulated in accordance with a framework of law unlimited by natural law has not yet emerged. Ideas of absolute rule and the problems associated with it had however been raised for example in *Antigone*, the third of the Theban plays by Sophocles written in the 5<sup>th</sup> century BC. The play was set in Thebes following the banishment of its king, Oedipus. His two sons, Eteocles and Polynices, having come of age agreed to each rule Thebes in alternate years. Eteocles, at the end of his first year of rule, reneged on the agreement and refused to step down. As a result, war ensued between the brothers in which both were killed. Their uncle, Creon, the brother of their mother, Jocasta, assumed power. He ordered that Polynices, in contrast to Eteocles should not receive an honourable burial, justifying the difference in treatment between the brothers on the basis that while Eteocles' engagement in military conflict was necessary to defend the city, it had been provoked by Polynices' unwarranted attack. The penalty of death was to be applied to anybody that did not comply with that order. Antigone, the daughter of Oedipus, refused to obey it, feeling bound by the laws of Heaven to bury her brother. She unsuccessfully attempted to resolve this irreconcilable conflict by adhering to the requirement of honouring her brother and giving him an honourable burial in breach of Creon's law. Creon was reluctant to implement the sentence as he was Antigone's official guardian and she was engaged to his son. Despite this, he remained firm in his commitment to implement the punishment of death upon her.

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<sup>11</sup> Barker, E 1959: 323-324.

<sup>12</sup> Ostwald, M 1986: 89-93.

<sup>13</sup> Ober, J 1989: 297.

6. He justified the necessity of punishment by stating that : ‘he who the state appoints must be obeyed to the smallest matter, be it right or wrong and he that rules his household, without a doubt, will make the wisest king, or for that matter the staunchest subject. ... There was no deadlier peril than disobedience, states were devoured by it, homes laid in ruins, armies defeated, victory turned to rout while simple obedience saves lives of hundreds of honest folks. Therefore I hold to the law and will never betray it.’<sup>14</sup>

7. This quote is consistent with the contention that rule by men ultimately cannot be bounded by higher law, a position historically associated with Plato and ultimately with Hobbes.<sup>15</sup> Also present was the notion of limitless power possessed by such a ruler which was expressed as positive law freed from the constraints of natural law and justified by the requirement of obedience to achieve social stability. Again the idea of social stability and obedience to law formed a central tenet of Hobbes’ justification of sovereignty. But through *Antigone* was exhibited the tension created between the simultaneous and conflicting demands of natural and positive law. Obedience to both at the same time was impossible, presenting an intractable existential problem from which there was no obvious escape. This dilemma was present within Greek society although the clear separation of natural from positive law had not yet occurred and a hierarchical structure of law had yet to clearly emerge in which positive law was not bound either by natural law or largely freed from it.<sup>16</sup>

8. The dilemma between the rule by law espoused, for example, by Aristotle and rule by men advocated by Plato is a theme that of course runs through debates about legal authority to this day. For Aristotle, the rule of law was legitimised on the basis of rule by consent for the public good. He stressed that it was more proper that the law should govern than any citizen and that the persons who hold power should "be appointed as guardians of the laws and as their servants."<sup>17</sup> He goes on, ‘ ... he who asks law to rule was asking God and intelligence and no others to rule; while he who

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<sup>14</sup> Sophocles 1947.

<sup>15</sup> The relationship between Hobbes’ sovereign and natural law is commented upon below and in chapter 8.

<sup>16</sup> Ostwald 1986; Berent, M 2000.

<sup>17</sup> Aristotle (1992) 1287a.



asks for the rule of a human being was importing a wild beast too; for desire was like a wild beast and anger perverts rulers and the very best of men...'.<sup>18</sup> Thus rule by men could amount in the extreme to tyranny since such rulers would rule according to their own personal interests not necessarily in the interests of the community.<sup>19</sup> Right in such circumstances could become equated with the ruler, the stronger party. This had previously appeared albeit transparently in a debate about whether justice was equated with strength. It was conceded by Thrasymachus in his debate with Socrates in the Republic that rulers were capable of making mistakes about what was in their interest. When doing so, according to Thrasymachus, they were not acting as rulers and therefore as rulers they made no mistakes.<sup>20</sup> This artificial position immediately raised the question as to by whom and by what values the interests of those considered to be rulers would be determined. Such standards were potentially beyond the ruler's control and hence suggested the placing of value-based limits upon the ruler's capacity to govern that were universally recognised as such. This position was in contrast to that of Cleitophon who considered that justice was equated with what the stronger party believed to be in his own interests. The two positions were an expression yet again of the seemingly intractable problem of whether in the articulation of order, laws rule through men or men through laws.

9. Plato's Republic was arguably the first theoretical attempt to distinguish 'state' from "society" and it has been argued that he introduced a principle of sovereignty that had similarities with the Hobbesian model.<sup>21</sup> At first sight it might appear that the philosopher-rulers were in a sovereign position to rule without external limits. However as part of the city, they were not in a position to change the constitution which was laid down by Glaucon and Socrates. Sovereignty therefore did not exist in the sense of a distinct, supreme and governmental body with unlimited law-making powers, forming part of the community over which it ruled.<sup>22</sup> There was no room for amendment and therefore the philosopher-rulers had no opportunity to alter the settlement that had been bequeathed them. The position of the philosopher-rulers was justified through a foundation myth that provided a seemingly external source of

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<sup>18</sup> Aristotle (1992) 1287a.

<sup>19</sup> Aristotle 1992: 1295a1-1295a24.

<sup>20</sup> Plato 1955 340a-341 c (p.18-21).

<sup>21</sup> Crossman 1959.

<sup>22</sup> M.B. Foster in Berent, M 2000.

legitimation that appeared to be independent of the political configuration which spawned it. The central feature of this myth whose aim was to deceive the population over which the philosopher rulers govern was that God created the three strata of society, namely the Rulers, the Auxiliaries and the farmers and other workers.<sup>23</sup> This foundation myth after two generations or so was expected by Plato to be accepted by the population as truth, thus providing them with reasons to adhere to such social arrangements that characterised Plato's utopia, whose purpose was the creation of a just society.

10. Sovereignty as a matter of practice therefore did not occur within the city states of Greece although the emergence of law of the community was an important pre-condition for the later development of sovereignty. However another pre-condition namely a distinct separation between government and population had not yet occurred.<sup>24</sup>

11. Regarding the development of the Roman Empire, the emergence and development of the office of princeps became increasingly associated with traits associated with monarchical absolutism<sup>25</sup> as evidence by the general principle that the prince was above the law and Ulpian was able to lay down in the third century as a legal doctrine that 'what has pleased the prince has the force of law'.<sup>26</sup> The significance of his position developed through him becoming differentiated and superior in respect of other magistrates with whom he initially shared power, by way of combining his office with other offices and extending his authority into a system of supreme rule over the growing territory under Rome's domination. The symbol of majesty began to play an increasing role in the depiction of the emperor as supreme ruler as divine in character.<sup>27</sup> Emperor worship gained increased centrality over the worship of traditional deities and this was accompanied by the rise of monotheistic movements. The idea of a supreme god displaced a multiplicity of gods as the

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<sup>23</sup> Plato 1955, 415 a-c. This myth was to be distinguished with the Hellenistic conception of God or The One as Plato described it. The idea of a god in the myth which could combine "perfect right with awesome power" may have added to its potency.

<sup>24</sup> Hinsley, F.H 1986: 29.

<sup>25</sup> Buijs, G 2003: 241.

<sup>26</sup> Hinsley, F.H 1986: 43. 'Quod principi placuit legis habet vigorem'

<sup>27</sup> Buijs, G 2003: 241.

central focus for worship with the other deities becoming considered to be the manifestations of the former.<sup>28</sup>

12. The emergence of the idea of the unitary transcendent god was an important conceptual development which was to be reflected in the unitary and transcendent quality of sovereignty. The monotheistic religious practice most relevant to this process was that constituted by Christianity. This reflected the emergence of the idea of a universally applicable transcendent god, which itself had in part grown out of the idea associated with the Jewish religion, of a supreme god which was separated from the cosmic order,<sup>29</sup> but whose primary concerns were considered to relate to the circumstances of the 'chosen people' in the form of the Israelites. The localism of the Jewish idea of God was replaced by the universality of the Christian variant with its transcendent quality associated with the latter's idea of God being increasingly emphasised. This was achieved by a number of developments: God's abstract quality and God's continuing separation from the cosmos and his role as the creator of universe *ex nihilo*.<sup>30</sup> Under Greco-Roman influences, the idea of God increasingly included His universality and unknowability reflecting the unknowability<sup>31</sup> of the One together with Him being considered to be unchanging and of limitless power.<sup>32</sup> The idea was also intermittently expressed in early Christianity that the creation of the Universe was an expression of God's free will which suggested that the universe was inherently fragile and was utterly dependent upon God for its continued existence.<sup>33</sup> The existence of Jesus was considered to be demonstration of the alienation and

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<sup>28</sup> Brent, Allen 1999: 251-109 in Buijs, G 2003: 242.

<sup>29</sup> Non-identification with the cosmic order was in contrast to the Greco-Roman idea of God being immanent within it.

<sup>30</sup> This had been confirmed by the Council of Nicaea and was clearly inconsistent with the Platonic view of the relation of the One to the universe and also in fact went beyond the claims made in Genesis which had implied that the universe was created by God out of a primordial chaos and not out of nothing which was a new claim. The idea of chaos which is relevant to a narrative associated with sovereignty's creation is explored in chapter 8 below. A useful general summary of the qualities associated with the Christian idea of God can be found in Ferguson, E 1998: 470-475.

<sup>31</sup> This unknowability and associated transcendence was captured by the claim of Athenagoras that God was impassable, incomprehensible, infinite, uncreated and eternal (Ferguson, E 1998:471).

<sup>32</sup> For example Justin in the second century expressly denied that God had feet, fingers, hands or a soul as he was not a composite being and that he did not exist in space at all.

<sup>33</sup> This idea was an intermittent one particularly in early Christianity and competed with another that was more akin to that within the Greco-Roman conception of God whereby the universe's creation was the result of the overflowing of 'the One' most clearly expressed in the writings of Plotinus (Lovejoy, A 1964: 62). The idea of the universe created by God's free will ultimately gave rise to a sense of fragility later expressing itself, for example, in Hobbes' assertion that civilised society was utterly dependant upon the continuing existence and effectiveness of a sovereign described by him, *inter alia*, as a 'Mortal God'. See below.

distance of man from God but also of the possibility of the former being united with the latter. The construction of Jesus's image could be seen to reflect the idea of the *logos* developed within the Graeco-Roman tradition but moving beyond that in its personified manifestation.<sup>34</sup>

13. To summarise at this point if we conceptualise sovereignty as before as comprising the qualities of unification, agency, voluntarism embracing the idea of free will, supremacy and lastly external limitation one can see in the above developments some although not all these qualities emerging in the development of the idea of God.<sup>35</sup> Unification of many gods into one is central to this development. Voluntarism emerges albeit uncertainly in the idea of the universe being the product of the Creator's free will. The God's supremacy associated with this voluntarism is manifested in the increasing demarcation of God's existence from that of the physical world through the mechanism of transcendence accompanied by the requirement of closure whereby there is no higher authority. This in turn emphasises the separation that is central to the idea of sovereignty between the body considered to possess it and the rest of the community over which governance takes place. The consequences of the operation of free will were to become more accentuated with the development of nominalist thinking with Scotus and Occam with regards to the centrality of free will in the construction of social relationships including those of governance as most classically seen with Hobbes' model of sovereignty which is centred around a clash of wills.<sup>36</sup> External limitations as expressed through the social practice of territorial limitations associated with internal governance were also to develop with the break-up of the Roman Empire. However at this stage it is worthwhile undertaking a preliminary examination of a proposed model of pre-modern governance that

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<sup>34</sup> Ferguson, E 1998: 687-691.. The 'Word' otherwise known as the *Logos* has had a variety of meanings attributed to it and has been equated with God and/or with divine status. *Logos* has both Hellenic and Judaic roots which renders it particularly problematic to identify. It has been considered to pre-exist creation and operate as the intermediary between God and the created universe participating in that creative process. It has been equated particularly in the Hellenic tradition with reason or rational principle as manifested in the universe being arranged according to natural or divine law. The 'Word' has also been equated with Christ who has been considered to be its personified manifestation.

<sup>35</sup> For purposes of modern popular sovereignty, agency is possessed by government which rules in the name of the people.

<sup>36</sup> Buijs provides a useful summary of the relevant ingredients of nominalism as it developed in the medieval period and its implications for conceptualising governance. More will be said below about the implications of nominalism for the development of sovereignty. See Buijs, G 2003: 229-260.

possesses the key ingredients of unification, supremacy with associated closure and voluntarism.

### *Augustinus Triumphus*

14. Perhaps the most powerful formulation of sovereignty prefiguring Hobbes by more than three hundred years was that of a cleric, Augustinus Triumphus, an ardent advocate of absolute papal power. Together with others, he developed his ideas within the context of the clash between church and empire over whether secular rulers or the pope had supremacy over matters of temporal governance.<sup>37</sup> The sovereignty he ascribed to the pope essentially amounted to a set of propositions logically deduced from a god who was universal, all embracing, transcending time and space without limit whose earthly manifestation came in the form of Christ and whose existence to humans was explained by the trinity.

15. The pope's earthly sovereignty was at least in terms of its claim absolute in terms of power, territorial scope and temporal duration. It existed in perpetuity and ultimately was justified by the assertion that the pope was Christ's vicar and was in fact a human manifestation of God. The sovereignty expressed by the pope was therefore a human manifestation of God's cosmic sovereignty. To accept restrictions upon the pope's powers was to tolerate limitations upon God's powers, which within a monotheistic paradigm was impossible. The pope's will was God's will and it manifested itself in the form of positive law that was the earthly expression of divine law. As there could be no conflict between the two, given the unity between pope and God, such laws were right and had to be obeyed by man not primarily because of their contents but because they were an expression of God's will.<sup>38</sup> Authorship of these commands therefore was the trigger for mandatory obedience underpinned by the assertion that the pope's pronouncements had the quality of divine law itself. His was the only channel through which divine law could become known on earth and given this, the pope was not subject to any higher earthly authority. All law could be amended and changed by him and he was the sole judge of what could be regarded as

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<sup>37</sup> The specific struggle which gave rise to his major work *Summa de potestate ecclesiastica* concerned that between Pope John XXII and Louis of Bavaria.

<sup>38</sup> There was one important exception to this that is explored below.

an illegal act. As he was God's manifestation on earth, there was nothing to prevent him from changing the law in order to safeguard his own position, reflecting Triumphus' position that "the law cannot be greater than the legislator."<sup>39</sup> For Triumphus and others who subscribed to the idea of a universal papal emperor, the pope's power was the power to do anything- *Papa omnia potest*.<sup>40</sup>

16. The corollary of an authority with absolute power was that individuals could assert no rights against the pope for to do so would be to assert rights against God. The fundamental duty of all individuals was to obey the pope. This amounted to an absolute ethical norm. The justification for the pope's autonomy of will combined with the individual's absolute duty to obey, derived from the claim that ultimately as Christ's vicar, it was only he who could guarantee the preservation of society and ensure the salvation of its members. Disobedience to a papal order in effect amounted to heresy, a rejection of God and an acceptance of anti-papal idolatry. Claims that the pope could in his pronouncements fall foul of divine law were countered by that of papal infallibility which was a logical and necessary extension of papal sovereignty.<sup>41</sup>

17. The priorities of political power under this arrangement were subsumed by the requirement of spiritual salvation. This reflected the Augustinian proposition that secular government was the product of sin and the Fall of Man and in so far as it existed, it would have to be exercised in accordance with the requirements of the spiritual domain. Fallen Man, within this medieval construct, was characterised by sin and therefore, to quote a modern phrase was one-dimensional.<sup>42</sup> His redemption could only occur by way of spiritual salvation for which he was totally reliant upon God and his earthly manifestation namely the pope. His physical presence was counterposed by a constitutional absence. Constitutionally, he was nothing, as the pope was under no obligation to take any notice of or respond to the demands of his sinful nature apart from those required by divine law of which the pope was the sole source. The community in which he lived, the *Ecclesia* <sup>43</sup> was in essence a vehicle to

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<sup>39</sup> Quoted in Wilks, M.J, 1963: 173.

<sup>40</sup> Wilks, M.J, 1963: 169.

<sup>41</sup> The relationship between papal sovereignty and infallibility was a highly problematic one perhaps explaining Augustinus Triumphus' vagueness as to the nature of the latter.

<sup>42</sup> Herbert Marcuse's *One Dimensional Man*.

<sup>43</sup> It was referred to by Augustinus Triumphus as the *Ecclesia* whose core lay in the realm of the divine but which also had an earthly presence and therefore existed in both the spiritual and temporal planes

enable him to become incorporated into the divine being and obtain eternal life. It was therefore utterly dependent upon papal will for its construction. As stated by Augustinus Triumphus, it was through the pope 'that we live, move and have our beings as good citizens.'<sup>44</sup> There was thus considered to be a total identification between the pope's will and that of the community, regarded as the congregation of the faithful. The pope therefore embodied the community which could have no other manifestation than that expressed by papal will.<sup>45</sup> The two became merged into one reflecting the spiritual project of incorporating all members of the community into the body of the divine.<sup>46</sup> Juridically, reflecting the influence of Roman law, the community in its corporate nature, as embodied by the pope, was regarded as a corporation sole.<sup>47</sup> All the community's powers were possessed by the pope himself and no other. Papal legislation was that of the community which had no separate existence from him. Papal governance, even if practically carried out by others, was done so through his body of which they were considered to be part.<sup>48</sup> The source of his power was the divine traced through St Peter and Christ. Fallen Man's requirements had no expression separate from those of the community which itself had no separate existence apart from that of the divine as manifested by the pope who was regarded as a human god.<sup>49</sup>

18. Here one can see the manifestation of a sovereignty that does not depend for its legitimacy on an ascending origin of political authority in contrast to that of Hobbes and those who followed him. It is a totalising sovereignty in which Man has no independent secular presence. His existence has not yet been recognised as legitimately involving different realms of activity generating independently existing

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simultaneously. In this sense, it reflected the existential character of Jesus as both divine and human and was perceived to comprise the mystical body of Christ. The purpose of the earthly element of this society was to enable its members to come into contact with true reality and hence to attain supreme good, to be incorporated into the divine being and obtain eternal life. The task of rulership which was considered to be embodied in the person of the pope was to translate the requirements of the divine into positive law.

<sup>44</sup> Augustinus Triumphus, *Summa* xxxvi, 6, p.217 cited in Wilks, M.J 1963: 37.

<sup>45</sup> The identification of the ruler with the ruled is the basis of the modern theory of the state.

<sup>46</sup> 1 Corinthians, 12: 13-28.

<sup>47</sup> Wilks, M.J 1963: 32.

<sup>48</sup> Wilks, M.J 1963.

<sup>49</sup> The idea of a human god has a certain resonance with the Hobbes' description of sovereignty as a 'mortal God'. The pope as the earthly manifestation of God is considered to be divine and therefore immortal. The temporally finite presence of his body is therefore overcome by considering that all popes, including both predecessors and successors, amount to a continuous earthly presence of the divine in perpetuity.

secular norms in the economic, political and moral domains and therefore his presence bears no similarity to citizenship in its modern sense. All earthly activity is subordinated to the all-embracing requirements of spiritual salvation. His one-dimensional state and the negation of his individuality in its own right are paralleled by a pervasive sovereignty which depends for its existence on the claim that God's presence is absolute. Whereas the Old Testament God made his earthly presence felt, in the eyes of his believers, through episodic interventions,<sup>50</sup> Triumphus' idea of God has developed to include a continuous human presence in the form of the pope. The whole of society is regarded as being subservient to God's requirements and earthly governance is constructed accordingly. Within Triumphus' model, the idea of God has reached its zenith in the sense that the temporal is completely absorbed by the needs of the spiritual. The fabric of Triumphus' powerful model of sovereignty is built around these assertions.

19. Yet at the same time there is an ambiguity about the pope's presence. The maintenance of papal sovereignty necessitates that he alone can experience authoritative revelation. His claim to be the human manifestation of God rests in part upon a monopoly of such access. Yet his ambiguity of form has the potential for undermining his claim to be the earthly manifestation of God. His claim to be a manifestation of God or the vicar of Christ rests in essence upon faith supported by scriptural interpretation and deductive logic from some of the tenets of faith, namely the existence of God, his all powerful nature and his resultant ability to transcend physical existence whilst at the same time having the ability to assume any physical forms he so chooses. The pope's claim to be something other than what is constituted by his physical presence is not supported by the physical senses. The only aspect of his presence that is so supported is his physical mortality which equates with that of any other individual over which it is claimed he is entitled to rule in an absolute manner. This dual claim namely to exist simultaneously in the domain of the spiritual and physical is at one and the same time the strength and the potential weakness of Triumphus' model. If his two manifestations are perceived to be detached from one another then the whole construct is fatally undermined. The most obvious point at which this unravelling process can begin to occur is in the perceived

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<sup>50</sup> For example, the divine initiation of covenants such as those between God and Noah (Gen.vi.18; ix 9-17) God and Abraham. (Gen. xvii).



relationship between positive and divine law. For Triumphus the pope simply declares and executes already-existing higher or divine law.<sup>51</sup> Positive law therefore ultimately has no independent existence from that of divine law which is a logical outcome of the pope's position as the human form of God. However if it is perceived that the two manifestation of law are not synonymous then the very identity of the pope with God is put under potentially fatal strain. These are matters which will be further explored below upon the completion of preliminary explorations of other models of sovereignty and the development of an explanatory framework through which an investigation will take place.

### ***Dante***

20. What we see above in the model of sovereignty presented, is an attempt at closure, by way of the identification of the occupant of the papal office with God and by the occupant being supreme in terms of governance. Closure in terms of exclusion of states was not part of this model because in its own terms, the sovereign body's reach was global.<sup>52</sup> However the idea of universal governance was also posed by Dante whose model also raises the issue of sovereignty and its character.<sup>53</sup> As with Augustinus Triumphus, this model is developed before the emergence of the territorially limited state as being the dominant mode of governance within Western Europe. It too is heavily dependent upon the existence of a ubiquitous god. It was influenced by a Christianised version of Aristotelian thought developed by Aquinas in the thirteenth century. It too was formulated in response to the ongoing jurisdictional disputes between pope and emperor from the eleventh to the fourteenth century.<sup>54</sup> It was based upon the idea of a universal ruler, dependent upon a universal god which was the causative agent of earthly society and sought its legitimacy by claiming to be an expression of God's will.<sup>55</sup> One ruler of mankind was perceived to mirror the belief that there was one ruler of the cosmos and thus since heaven was guided by a

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<sup>51</sup> Wilks, M 1963: 155.

<sup>52</sup> Wilks, M 1963: 419.

<sup>53</sup> Dante specifically claims that the emperor's jurisdiction is only bounded by the ocean which, in the period that Dante was writing, covered the known world.

<sup>54</sup> See Tierney, B 1988 for a useful account of these conflicts.

<sup>55</sup> This account of Dante's view of monarchy is based on *Monarchy* translated and edited by Shaw, P (Cambridge: Cambridge University Press, 1996).

single God, mankind in an ideal state was to be guided by a single ruler.<sup>56</sup> Drawing upon Aristotelian thought, the ideal state, characterised by unity, was the root of what was good in contrast to plurality which was considered to be the root of evil.<sup>57</sup> As God's will always corresponded to what was best, a universal emperor who could ensure such unity was in accordance with God's will.<sup>58</sup> Such arguments based on abstract principle were confirmed by historical fact. For example, it was considered that Christ's perfect existence was mirrored by a perfect system of unified governance at the time of Christ's birth under Augustus, the emperor of the unified Roman Empire.

21. In contrast to Triumphus, Dante concluded that temporal jurisdiction was vested in a world emperor not in the pope. This was again achieved by a series of arguments based upon reason derived from abstract principle, scriptural interpretation and claimed historical fact. Underlying them was the idea reflecting Aristotelian influences that man had two natures, respectively corresponding to his soul and body. In relation to the former he was considered to be incorruptible, while, with respect to the latter he was considered to be corruptible. Reflecting this duality, Man was considered to have two goals, namely that of temporal happiness, that is a moral and ethical goal and happiness in the eternal life, that is to say an ecclesiastical-spiritual goal.<sup>59</sup> Man therefore for Dante was no longer one dimensional in character and earthly governance reflected this assumption. There was both a temporal and spiritual aspect of Man that ran in parallel with each other. Whilst temporal jurisdiction was vested in the emperor, spiritual matters lay with the pope. This division of governance was also considered to be consistent with scriptural interpretation and in effect amounted to a divine separation of powers.<sup>60</sup> The hierocratic structure associated with Triumphus' model in which the temporal was subordinated to and effectively absorbed by the spiritual was replaced by a bifurcated hierarchy in which God was located at its pinnacle below which there were two hierarchies seemingly of equal status.<sup>61</sup> One represented the spiritual and the other the temporal and they were headed respectively by the emperor and the pope. In effect Dante appropriated the

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<sup>56</sup> Dante, 1996: 12.

<sup>57</sup> Dante, 1996: 26.

<sup>58</sup> Dante, 1996: 25.

<sup>59</sup> Dante, 1996: 92-93.

<sup>60</sup> For example Luke xxii: 38.

<sup>61</sup> There was an unresolved uncertainty about the position. See below.

language of spiritual governance for the purposes of temporal governance through what has been described as an *humana civilitas* which paralleled the spiritually anchored Ecclesia, constituting the mystical body of the human race, the head of which was the emperor with the task of realising Man's earthly purpose of obtaining happiness, that is through the re-establishment of a terrestrial paradise.<sup>62</sup> However this heterogeneous structure together with Dante's methodology set up a series of seemingly unresolved difficulties.

22. For Dante as for Aquinas, reason became a tool through the use of Aristotelian teleology to discover the nature of truth which included God's will. This approach both justified and defined the nature of temporal sovereignty itself and the limits associated with it. Hence these limits were independent of it and defined its nature and its capacity for action. Reason thus remained an independent judge of the validity of the emperor's actions. This was reinforced by the absence of any claim by Dante that the emperor was God thus exposing the potential for the actions of the former to conflict with the perceived will of the latter. The ontological differentiation between God on the one hand and the emperor and pope on the other was an inevitable outcome of the separation of earthly governance into the two domains of the temporal and spiritual. A lack of such differentiation would have suggested such a limitation upon God's powers, a logical impossibility given the all-powerful nature of God as reflected in Aquinas' writings.<sup>63</sup>

23. The limits of the emperor's powers manifested themselves for example by Dante's assertion that the division of the empire would be against God's will and therefore invalid as 'nobody has the right to do things because of an office he holds which are in conflict with that office, otherwise one and the same thing would oppose itself in its own nature, which is impossible: but to divide the empire is in conflict with the office bestowed on the emperor, since his task is to hold mankind in obedience to a single will...therefore the emperor is not allowed to divide the empire.'<sup>64</sup> The consequence of this was that any emperor who endeavoured to do so would have been carrying out an invalid act of no effect as was claimed by Dante in

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<sup>62</sup> Kantorowicz, E.H 1997: 468.

<sup>63</sup> A useful summary of the conceptualising of God by Aquinas is to be found in Davies, B: 1992.

<sup>64</sup> Dante, 1996: 81.

relation to the alleged gift by Emperor Constantine of Rome to the pope. This transfer in Dante's view destroyed the indivisible unity of the world and led the Church on a path of territorial acquisition.<sup>65</sup> Another limitation suggested by Dante consistent with the principle of equity formulated by Aristotle was that there should be a jurisdictional differentiation within the temporal domain itself.<sup>66</sup> The different characteristics of different localities meant that each locality should have been allowed to formulate laws according to its own particular circumstances. However this was only permissible to the extent that they did not conflict with laws that concerned matters that were common to all men and which were the exclusive concern of the universal emperor.<sup>67</sup> Here an incipient federal arrangement was being suggested and the implication was that were the emperor to automatically veto any such legislation without justification, he could have been acting in breach of God's will and in that event his action as expressed in law would not have been valid.<sup>68</sup> The examples could be multiplied.

24. These limits were consistent with the definition of the universal emperor itself which Dante regarded as, 'a single sovereign authority set over all others in time, that is to say over all authorities which operate in those things and those which are measured by time.'<sup>69</sup> Reference to 'time' clearly referred to temporal authorities in contrast to spiritual ones which were unbounded by time. It was reinforced by the Aristotelian idea that social institutions existed for the sake of the citizen and not visa-versa.<sup>70</sup> Reflecting this, Dante proclaimed that the emperor was appointed for the sake of an already existing jurisdiction, namely that of the empire, 'for it is clear that the emperor precisely as emperor cannot change it, because he derives from it the fact that he is what he is.'<sup>71</sup> This again points to certain limits placed upon the emperor's powers, the breach of which could run foul of God's divine plan. The first limitation connected with the emperor's duty to maintain a unified empire has the quality of

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<sup>65</sup> Dante, 1996: 80 note 1.

<sup>66</sup> Ethics, 5, 10-1137a; 31-1138a.

<sup>67</sup> Dante, 1996: 24-5.

<sup>68</sup> It could be argued that the requirement of maintaining the unity of the empire was an overriding one, given its status as part of God's divine plan and therefore would take precedence over those underpinning local legislation. Hence where such legislation was considered to undermine the empire's unity, an emperor could be justified in vetoing it.

<sup>69</sup> Dante, 1996: 4.

<sup>70</sup> Shaw, P 1996: xiv.

<sup>71</sup> Dante, 1996: 82.

eternal law about it as formulated by Aquinas.<sup>72</sup> The second comprising the principle of equity, that of natural law and the third, that is its application, that of human law.<sup>73</sup> On this basis it would be only the third kind of law that was within the gift of the secular powers to change since the first two were immutable expressions of the rational will of God.<sup>74</sup> The emperor's function was to lead men to their human goal of temporal happiness by relying on philosophical teachings whilst the pope's task in reliance upon theological teachings was to lead men to divine salvation.<sup>75</sup> The laws made and executed by the emperor had to be aimed at promoting the common good otherwise they could not be regarded as laws.

25. The other major limitation concerned the relationship itself between the temporal and spiritual aspects of governance. The perceived differences between the purpose of the emperor and pope in general terms defined their respective domains but the precise location of the boundary between the two was left unclear by Dante. God was at the summit of the bifurcated hierarchical structure. Its branches corresponded to the distinct domains of the temporal and spiritual with their respective heads, namely the pope and emperor and their jurisdictionally equivalent status.<sup>76</sup> Within the temporal domain, conflict between local rulers of equal status required a supreme judge at the pinnacle of that branch of the hierarchy which for Dante had to be the universal emperor.<sup>77</sup> However, Dante did not address the potential problem of conflict between pope and universal emperor. The lacuna was consistent with the idea referred to by Aquinas that positive law, that is human law could only derive its coercive force from the ruler's power and hence the latter could not coerce himself.<sup>78</sup> As there was no superior earthly judge to that of pope and emperor, there could not be any earthly mechanism by which conflict could be settled.

26. However it also seemed that Dante was reluctantly cognisant of the above difficulty. On the one hand he appears to have accorded the two, equal status, within

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<sup>72</sup> Aquinas, T "The Summa of Theology" Qu. 91 and 93 in Sigmund P, 1988: 46,48.

<sup>73</sup> Aquinas T, "The Summa of Theology Qu 95 in Sigmund P, 1988: 53. Aquinas formulated the three categories of law used here.

<sup>74</sup> Aquinas T, "The Summa of Theology Qu. 97.3 in Sigmund P, 1988: 53.

<sup>75</sup> Davis, C.T, 1993: 68.

<sup>76</sup> Dante, 1996: 86.

<sup>77</sup> Dante, 1996: 14.

<sup>78</sup> Aquinas T, "The Summa of Theology Qu. 96.5 Sigmund P, 1988: 55.

the terms of his hierarchy. On the other, at the end of *Monarchy* he made the intriguing statement that, '[t]he Roman Prince is in some sense subject to the Roman Pontiff, since his earthly happiness is in some sense ordered towards immortal happiness.'<sup>79</sup> Does this suggest as Aquinas did, that papal intervention was justified where temporal governance amounted to a direct threat to the salvation of mens' souls?<sup>80</sup> The implications of this comment would appear to fundamentally undermine the bifurcated hierarchy of governance constructed by Dante since it would suggest that there was not equivalence between the supreme representatives of the spiritual and temporal spheres. The autonomy of the secular sphere would appear to be limited and in fact to be subordinate to that of the spiritual sphere. The seemingly unresolved jurisdictional relationship between the pope and emperor was provided with a solution which in effect placed the spiritual above the temporal in the event that the pope considered that laws passed by the emperor amounted to a spiritual threat. Dante appeared to be suggesting that the pope had a monopoly of interpretative and decision-making power in relation to which of such temporal laws would constitute such a threat. On this basis, the pope, in the name of the spiritual, possessed a veto power over all temporal laws and hence to dominate the temporal as well as spiritual domains with the ultimate possibility posed of the former being absorbed into the latter. This comprised an outcome that was fundamentally incompatible with the basic normative requirements of Dante's model, namely the requirement for two separate independent co-equal domains corresponding to the spiritual and temporal.

27. Any emperor wishing to contest papal rulings on such matters and who wished to proclaim equivalence with the pope could find himself in conflict on three levels. Firstly there would be the issue of the proclaimed equivalence itself given the ambiguity of Dante's constitutional prescription. Secondly and independently there could be a clash over the interpretation of the laws under examination. Thirdly even if there was acceptance over their meaning, there might be clash over whether such laws could in fact amount to a threat to man's salvation. The difficulty for the emperor would be that a concession in this regard could amount to him accepting that the secular reasons motivating the laws would be displaced by supposed spiritual ones

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<sup>79</sup> Dante, 1996: 94.

<sup>80</sup> Sigmund, P, 1988: xxii.

overruling them. Effectively therefore, he would be accepting that the character of the temporal domain was to be determined by spiritually determined limitations which were beyond his jurisdiction. The secular domain would be entirely contingent on the reaches of the spiritual one since a decision by the pope not to proclaim that a temporal law threatened man's redemption would be as significant as the exercise of any veto power over such a law. At a more abstract level, the difficulty with the bifurcated configuration was that it gave rise effectively to two normative orders, the secular and the spiritual ones. A clash between them could not be easily resolved since there was no provision of an earth-bound superior order that embraced them both.<sup>81</sup> Hence, ultimately conflict could only be fully resolved by one order being subsumed by the other and for the equivalence between the two to be extinguished. In that event, Dante's system would 'collapse' into one with similarities to that of Augustinus Triumphus in that there would be only one global chain of command which was spiritually orientated with the emergence of a hierocratic order with one chain of command which was spiritually orientated.<sup>82</sup>

28. As a result of the weaker claims for temporal sovereignty in Dante's model, it could suffer instability leading to its alteration or destruction. Firstly, in the name of purported spiritual domain, the pope could potentially absorb powers associated with the governance of temporal matters. This might not have amounted to an illegitimate action by the pope because of Dante's acceptance of the ultimate superiority of the spiritual over the temporal domains. Thus, hidden within Dante's model was the possibility of another model of sovereignty by implication, in which papal authority was rendered supreme both in the temporal and spiritual domain. This was suggested by a critic of Dante, namely Guido Vernani. He considered that the world emperor proposed by Dante was none other than the emperor of Christ and the emperor was in fact the pope.<sup>83</sup> Secondly there were the normative limitations attached to the powers of the emperor, the breach of which, leaving aside any papal intervention, could have

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<sup>81</sup> Dante by leaving the relationship between emperor and pope unresolved in this way therefore did not meet the requirements that he himself considered essential for effective governance, namely the avoidance of conflict between its institutions through the provision of a supreme decision-maker (in his case in the form of emperor) who would resolve such conflicts and hence secure closure and an effective system of decision-making and administration.

<sup>82</sup> Augustinus Triumphus was completely explicit about the inferiority of temporal rulers such as kings to spiritual ones such as bishops (Wilks, M. J, 1959: 337).

<sup>83</sup> Wilks, M.J, 1959: 417.

set up a crisis as to the legitimacy of his actions and resultant dispute.<sup>84</sup> Whereas in the first model, the claim was that the will of God was unfailingly expressed through its earthly manifestation, the pope, in the second there was room for the emperor's will to conflict with that of God's and hence to be rendered illegitimate and ineffectual.<sup>85</sup>

29. Both Augustinus Triumphus and Dante were writing at times when governance was very different to now. The state had yet to become the dominant unit of governance around which rules of international law were constructed. Instead the organisation of governance across Europe was characterised by a plethora of arrangements whereby the European region was not divided up into exclusive sovereignties, but was covered by overlapping and shifting lordships within a framework of shifting rights and obligations so that sub-continental governance was neither completely supreme or independent. The configuration of territory subject to a given ruler was not normally continuous in character but more resembled the arrangement of an archipelago. The central political idea was that of *Respublica Christiana*, a loosely formed empire through which governance was split into a spiritual and a temporal domain with the former headed by the pope and the latter headed by an emperor. Religious governance was based on a *universitas*, that is a hierarchical organisation with the occupant of the papal office at its summit legitimated through being perceived as compliant with the requirement of the great chain of being which was geared towards the overall purpose of Christian redemption and salvation.<sup>86</sup> The period of this empire was characterised by jurisdictional and territorial dispute between three centres of power namely that of the papal office, that of the emperor and that of the emerging regional monarchies. One can see in the

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<sup>84</sup> Papal intervention itself could set up a crisis of legitimation when judged against the requirements of Dante's model of governance, in the sense of being perceived to amount to a straying into the temporal sphere reserved for the emperor. On the other hand, the pope's intervention could be seen as protecting the spiritual domain from being undermined by temporal encroachment by the emperor in which case the hidden model of sovereignty implicated in Dante's stated model could legitimately emerge.

<sup>85</sup> Below a further examination of the model of Augustinus Triumphus will reveal that in fact there is an arrangement which *in effect* bears significant similarity to that of Dante. It is constructed in a way that endeavours not to disturb the discourse of supremacy that Augustinus Triumphus attaches to the spiritual domain as embodied by the pope. It will also be seen that just as Dante's model fails by reference to its own purpose of being based upon two separate independent co-equal domains corresponding to the spiritual and temporal, Triumphus' model also ultimately fails to adhere to the hierocratic logic based on papal supremacy around which it is substantially structured.

<sup>86</sup> Various sources were consulted in the construction of this material. These include: Jackson, R 1999, Wilks, M.J 1963, Morrall, J 1980, Tierney, B 1988, Oakely, F 1988, Burns, J.H 1988.



writings of both Augustinus Triumphus and Dante, expressions of this conflict since each represents a different position on the spectrum between that which did not recognise a separate domain of secular governance as manifested by Triumphus and that which considered independent secular governance to be legitimate and in the middle, solutions to governance based on the ideas of Aquinas which recognised a largely independent secular domain but ultimately subject to religious control. Dante at first sight fitted into the radical secular wing of this debate by advocating a completely separate and independent domain of secular governance and therefore appeared to go beyond Aquinas in this regard by advocating two parallel paradises in effect.<sup>87</sup> However on closer inspection, this separation was not as complete as first appeared.<sup>88</sup> It potentially led to what was in effect a variant of the great chain of being which characterised the Christian mode of governance with its supreme governor at the head of a multi-layered system of governance. It was through the complete detachment of the secular from the spiritual and ultimately the latter being subordinated to the former, together with the predication of governance upon territorially limited but contiguous domains and the development of governance upon the will of the governor, as expressed through positive law unfettered by natural law, that provided the basis for the emergence of models of modern sovereignty. Early examples, leaving aside Hobbes, include the models of Bodin and Machiavelli, both of whom based their models on systems of centralised governance that were territorially limited where it was considered that supreme power should be located in one location. Both models reflected a long and ongoing process of social development producing the weakening of feudalism, the growth of territorially based states that were increasingly secular in character and the re-working of the Corpus Juris, leading to a re-conceptualising of the content of law amongst legal scholars which produced a body of law that was more responsive to the realities of the human condition as manifested regionally.<sup>89</sup> Brief coverage will now be given to Bodin's model with the aim of exploring the central characteristics of his model of sovereignty most particularly his claim that sovereignty required its holder to be supreme over a

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<sup>87</sup> Kantorowicz, E.H 1997: 469.

<sup>88</sup> This is a point that is not developed by Kantorowicz who considers that Dante had broken with Aquinas in this regard. My argument is essentially that while the great thrust of Dante's *Monarchia* does fit in with such a conclusion, there remains a thread of attachment to the spiritual domain in a manner that provided for the continuing domination of the temporal by the spiritual thus bringing him back inside the framework provided by Aquinas.

<sup>89</sup> This is usefully explored in Franklin. See Franklin, J.H 1963.

territorially limited population. This will be followed by a detailed introduction on Hobbes' model and will conclude with a brief word on Machiavelli.

### ***Bodin***

30. In the case of Bodin, one sees a definition of sovereignty as 'the absolute and perpetual power of a commonwealth.'<sup>90</sup> He conceptualised it as not being limited 'either in power, or in function, or in length of time.'<sup>91</sup> Its location depended upon the arrangements of governance. It was capable of being located within a single individual or group of individuals who if possessing it would not be subject to law, save for natural and divine law.<sup>92</sup> The most effective form of governance was however considered by Bodin to be that of monarchy.<sup>93</sup> However sovereignty would not be possessed if such power had been allotted for a specific period of time by 'the people' or by them through consent, whether by commission, nomination or delegation or generally by law,<sup>94</sup> since for Bodin, in such circumstances sovereignty remained with the donor of the power, namely the people.<sup>95</sup> For a person to become sovereign, the people must have been stripped absolutely of power which could occur for example by unconditional gift and was consistent with the laws of succession based on hereditary principles. It could also occur by a ruler imposing himself upon a people by force, even though in such circumstances the individual would be described

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<sup>90</sup> Bodin, J 1992: 1.

<sup>91</sup> Bodin, J 1992: 3.

<sup>92</sup> Bodin, J 192: 11, 13. Although the sovereign was not bound to keep laws made previously by his predecessors by virtue of them being laws, he might be bound by them by virtue of being subject to 'just and reasonable' contracts which the public good require him to keep (Bodin, J 1992: 14).

<sup>93</sup> Bodin, J 1962: VI, 4, 715 as cited in Holmes S: 1995: 104. In effect, the purpose of his model was to justify absolute monarchy and centralised government in response to the central problem of his time, namely religious civil wars in Europe that also afflicted France from the 1560s. Consistent with this, he objected to arrangements where sovereignty was divided between ruler and people and an axiomatic property of sovereignty was that it had to be undivided.

<sup>94</sup> Bodin, J 1992: 7. Agency which is central to the modern idea of sovereignty, for Bodin was incompatible with it since it suggests the power of the person claiming to be sovereign is derived from elsewhere.

<sup>95</sup> Bodin, J 1992: 4. In these circumstances the donee of such powers would be nothing more than trustees of it (Bodin, J 1992:4). In this sense, the arrangement would be similar to Locke's desired form of governance whereby a legislature held power as trustees for the people. Thus Bodin cites the example of the Cnidians who annually granted power to sixty citizens called *annemones* who were wrongly regarded as sovereign and in Bodin's view were not so since they were obliged to return such power at the end of the year. So for Bodin, sovereignty remained with the people and only its exercise was handed over to the *annemones* who at best could be called sovereign magistrates 'but not sovereigns pure and simple' (Bodin, J 1992: 4-5).

as a tyrant.<sup>96</sup> Sovereignty was conceptualised as being imposed upon a population located in a specific territory and amongst the (absolute) powers associated with it was that of law-making which was regarded as the first 'mark' of sovereignty.<sup>97</sup> It embraced all other powers associated with sovereignty, including but not limited to the declaring of war and peace, the hearing of appeals at last instance, the appointment and the removal of officials, the imposing of taxes and the granting of pardons.<sup>98</sup> Reflecting the sovereign's freedom from the law, the latter was perceived as a command emanating from the sovereign and generally his predecessors and affecting all his subjects.<sup>99</sup> What we see here referring back to qualities associated with sovereignty is that it concerns centralised governance, that the sovereign is supreme in terms of the legal order which he creates, that he is not bound by the laws he makes by virtue of them being laws, that there is a degree of closure because of the supremacy of the sovereign, that sovereignty is over a specific territory with a specific population and hence by implication involves exclusion of other populations. Underpinning this, certain qualities associated with sovereignty remain beyond his power to alter, namely, laws that 'concern the state and its basic form,'<sup>100</sup> that is to say they concerned the continuity and circumstances of the crown itself.<sup>101</sup> These included the laws of succession which ensured a successor and the law against the alienation of the territory and resources of the commonwealth thus ensuring the

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<sup>96</sup> Bodin, J 1992: 6. 120.

<sup>97</sup> Bodin, J 1992: 56-58. The idea of the first mark of sovereignty embracing all the others suggests that Bodin did not appreciate the difference between legislative and executive functions of government and is clearly consistent with his requirement that sovereignty was indivisible. Franklin J.H discusses this point and considers that Bodin was incorrect to claim that this was a requirement of sovereignty. (Franklin, J.H 1991: 302-305).

<sup>98</sup> Bodin, J 58-59 which contains a full list of what are regarded as the 'true' prerogatives of the sovereign. These prerogatives are consistent with the power associated with Bodin's sovereign being public in nature, that is to say power that is qualitatively differentiated from private power as emphasised by Aristotle in his observation that 'it is an error to suppose, as some do, that the role of the statesman ... of a statesman, of a king, of a household manager and of a master of slaves are the same on the ground that they differ not in kind but only in point of numbers of persons' (Aristotle, 1962:54). Bodin is quite explicit about the public nature of a sovereign's powers in contrast to the power of the heads of households, guilds and corporations which he considered to be private in nature. He states '[a]ll power to command another is either public or private. The public power resides in the sovereign who makes the law, or in the person of magistrates who bend beneath the law and command other magistrates or private persons.' (Bodin, J quoted in Franklin, J.H 1963: 71).

<sup>99</sup> Bodin, J 1992: 51. This gives rise to a comparatively narrow domain of exemption from the law as it does not include other categories of law which constitute higher law.

<sup>100</sup> Such laws included the laws of succession and another forbidding the territorial alienation of the kingdom by consent. This latter in particular underpins the territorially limited nature of Bodin's sovereignty.

<sup>101</sup> Franklin, J.H 1973: 70.

continuation of the latter.<sup>102</sup> To pass such laws would negate his sovereignty and hence such restrictions were regarded as part of God's fundamental laws.<sup>103</sup> The other kind of higher law the sovereign was considered to be subject to were those that mainly concerned with the protection of the rights of the sovereign's subjects. Reflecting this, the sovereign remained bound by God's and natural law, although there was no higher immanent authority that the population could appeal to in order to ensure that the sovereign did not breach such laws or punish or even depose him when he did, since to have such a body would remove sovereignty from the person in whom it was vested.<sup>104</sup> This difficulty was not satisfactorily resolved by Bodin as he claimed that the duty of subjects to obey the sovereign arose out of the laws of God and this applied even where the laws created by the sovereign were in breach of the laws of nature and yet elsewhere he claimed that it was the duty of magistrates and of all the people to disobey since the need to respect the laws of nature 'ought to be to all subjects greater and more precious than the wealth, the life, the honour of all the princes of the world.'<sup>105</sup>

31. Bodin's sovereignty continues to possess, albeit in weaker form, a feature of pre-modern sovereignty, namely that its legitimacy is descending in form from God from whom Bodin's sovereignty appears at least at first site to retain its agency. Reflecting this, are the continuing restraints upon sovereignty albeit with uncertain consequences

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<sup>102</sup> Bodin, J 1992: 18. Here one can see a separation between the incumbent of the crown and the office itself, given that the restrictions as to the alienability of sovereignty can be, as Skinner has suggested, attached to 'sovereignty' rather than the sovereign itself, which although not alluded to by Skinner at this point is consistent with the above separation (Skinner, Q 1978b: 294).

<sup>103</sup> Bodin, J 1992: 18. The expectation would be that the magistrates would correct this law once the offending sovereign was dead and that in the meantime they would not acknowledge them. There still remains a difficulty here in that in the absence of an uprising to reverse the measure, by the time it is altered, it may well be too late in practical terms to reverse the wrong created. Where for example, he has given away part of his kingdom, one would end up with a position whereby, as with a diminution or alteration of the territorial reach of the jurisdiction of the UK Parliament, any legislation to reverse such a position by subsequent parliaments would be valid but very probably ineffective. Returning to Bodin, the fact that such decisions would not be binding upon subsequent monarchs or their magistrates further undermines the legitimacy of such measures and if anything may encourage resistance to them prior to the offending sovereign's death most particularly by his successor who would be affected by such measures. See Franklin J.H 1973: 74.

<sup>104</sup> Bodin also considers that the sovereign is bound by what in effect could be regarded as *jus gentium* or international law, as he states that the sovereign is bound also by 'various human laws that are common to all people.' (Bodin, J 1992:10). Example of natural laws which bind the sovereign include the prohibitions of acting dishonestly and of stealing, and of being obliged to honour contracts he has entered into with his subjects, of only removing another's property against his consent by just and reasonable cause and of being liable to judgment in respect of debts owed by him to his subjects (Bodin, J 1992: 39-42).

<sup>105</sup> Bodin, J 324 1962 quoted in Skinner, Q 1978b: 295.

of higher law, which reflect a continuing attachment to medieval constitutionalism. In this sense, the idea of a transcendent God which provides the conceptual space for independent secular governance is clearly present. However as Buijs has put it, the idea of the sovereign's accountability to God, that is the "Christian qualification"<sup>106</sup> has not yet been completely removed, preventing a complete rupture of earthly governance from requirements associated with that of religion.<sup>107</sup> Closure which is central to the idea of sovereignty's supremacy has not been unambiguously achieved in a metaphysical sense although from the point of view of external territory, it has occurred.<sup>108</sup> From the point of view of the political community there is an ambiguity as clearly the sovereign is separated from community over which he rules by virtue of his role and powers including that of being free from the commands of law he issues but as he himself is subject to certain natural laws as is the rest of the population, it is arguable that complete separation has not occurred in this domain.<sup>109</sup> Paradoxically as Holmes suggests the limitations imposed upon the sovereign could be said to strengthen his legitimacy and hence his power in the eyes of the population and help forge an identity between sovereign and community,<sup>110</sup> not least because breach of higher law by the sovereign will according to Bodin cause him to be guilty of treasonous conduct against God.<sup>111</sup>

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<sup>106</sup> Buijs, G 2003: 247.

<sup>107</sup> The fundamental project which the Six Books of the Commonwealth aims to achieve is a systematic study of the legislation and law of all peoples and the development of a system of laws which reflects the best unearthed by this comparative study.

<sup>108</sup> The territorially defined nature of Bodin's model is reflected by the entitlement of magistrates upon a king's death not to acknowledge any decree of his that goes against the 'royal laws on which the sovereign majesty is founded and supported.' This would include decrees that include 'usurpation of the commonwealth's domain' (Bodin, J 1992:18).

<sup>109</sup> For example he was obliged to honour his contracts with his subjects and foreigners (Bodin, J 1992: 35.) Given the ambiguity concerning closure in relation to the political community, this leads to the conclusion that the attempt by Buijs to identify closure as expressing itself in three respects overlooks the interlinking between them.

<sup>110</sup> Holmes, S 1995:100-133. This comes across clearly for instance where Bodin states 'that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign since every earthly prince is subject to the laws of God and of nature and to various human laws that are common to all peoples' (Bodin, J 1992:10). This reflects more widely his conviction that good governance, geared towards ensuring social peace is most likely to achieve that if there 'is an adaptation of the state to the nature of the citizens' (Bodin, J quoted in Franklin, J.H 1963: 78). Reflecting this and indicative of the way that Bodin's scheme of governance was fundamentally secularised was his view that the sovereign must be prepared to tolerate religious diversity within his kingdom where to suppress it could lead to the destruction of the state (Bodin, J quoted in Holmes, S 1995: 125).

<sup>111</sup> Bodin, J 1992: 13.

32. The idea of the continual, that is to say a perpetual sovereign office explicitly comes to the fore in Bodin's model. The idea of the uncommanded commander as regards territorially based positive law emerges although in the case of Bodin, such laws are not yet completely set free from the requirements of higher law. The idea of political power which Hobbes goes on to develop in a systematic way is implicit in Bodin's model in the idea of the sovereign being perpetual and hence possessing a potentiality which is realised through law. The sovereign while undivided and hence in functional terms capable of engaging in all three modes of governmental power, namely judicial, legislative and executive now, in Hobbes' model revolves more around its legislative role than its judicial one. The sovereign as yet is not explicitly conceptualised in impersonal terms, a development which again emerges more clearly in Hobbes' writings.

### ***Hobbes***

33. Moving onto Hobbes, his work has been described thus:

‘... a philosophical progression which would start with natural bodies and the most fundamental principles of the natural sciences, move on to man and an account of his sense perception, language, reasoning, psychological nature, and morality and conclude with an account of civil society or the “body politic”.’<sup>112</sup>

34. The account concerned with his political philosophy and sovereignty is to be found largely in three works, namely *De Corpore Politico* in *the Elements of Law*, *De Cive*, and *Leviathan*.<sup>113</sup> In summary, the location of Hobbes' political philosophy is situated at the end of a logical progression and is largely based on an understanding of human psychology which he sought to underpin by an analysis of the laws of matter. What Hobbes therefore attempted to do was to provide a political philosophy which was one albeit important piece in a larger jigsaw puzzle endeavouring to explain man's existential condition by reference to scientific laws and assertions that in Hobbes' opinion were immutable. There is a vast literature relating to all aspects of

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<sup>112</sup> Gaskin, J 1994, xvii.

<sup>113</sup> I have cited them in the order in which they were completed, although *On the Citizen* otherwise known as *De Cive* was published before *The Elements of Law*.

Hobbes' work and it is beyond the scope of this chapter to engage with much of it. What is intended here is to concentrate on his understanding of the structure of sovereignty and its limits, and in the process to evaluate the relationship between the spiritual and temporal in his model.

35. In contrast to the Aristotelian approach, christianised and reinvigorated by Aquinas, Hobbes considered that man was not a political animal<sup>114</sup> and was not born fit for society.<sup>115</sup> The reason for this was that man in his natural state was not inclined to live in a co-operative manner or behave in a way that was consistent with the common good.<sup>116</sup> This arose out of his perception of man as a creature driven by inconstant desires and fears, many of them were not innate but the product of experience,<sup>117</sup> which were multifarious in character,<sup>118</sup> and varying from man to man.<sup>119</sup> These formed the basis for conflict since Hobbes perceives power as being:

‘ the eminence of the Faculties of Body or Mind ...[which] are means and Instruments to acquire more: as Riches, Reputation, Friends, and the secrete working of God, which men call Good Luck.’<sup>120</sup>

36. Implicit within this definition was the idea that life was ‘a zero-sum game’ in which one man's loss was another's gain and which was made explicit in *the Elements of Law*.<sup>121</sup> Pre-civil society which he described as the state of nature<sup>122</sup> was

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<sup>114</sup> As described by Aristotle, *Politics* 1,2, 1253a7.

<sup>115</sup> Aristotle, *Politics*:1.2, 1253a3.

<sup>116</sup> In contrast to the vision of man proposed by Aquinas who was created in God's own image: Aquinas, Qu.XCIII: Pegis, 1997: 885. Aquinas alludes to the inequality between the image as constituted by Man and God and thus the former's imperfections can stand in the way of man living in accordance with the common good and in accordance with God's divine plan. However he does not rule out the possibility of man naturally being able to live in accordance with such a plan since ‘the will of a man who sees God in his essence of necessity adheres to God...’ Qu. LXXXII.a 2 (Pegis, 1997: 779). Hobbes on the other hand in effect closes off this possibility for man in his natural state.

<sup>117</sup> Hobbes, T 1968:120.

<sup>118</sup> For example the desires to be rich, to enhance one's reputation and to have friends which he encapsulates in the desire for ‘felicity’ which he defines as the ‘*Continuall [sic] successe [sic]*’ in obtaining those things which man from time to time desireth’ (Hobbes, T 1968: 32).

<sup>119</sup> Hobbes, T 1998: 32.

<sup>120</sup> Hobbes, T 1968: 150.

<sup>121</sup> Hobbes, T 1994: 48.

<sup>122</sup> This term to denote pre-civil society was used by other theorists for example the Thomists such as Molina and Suarez as suggested by Skinner, Q 1978b: 156-7. There is some controversy over the ontological status of the state of nature. Gaskin for example asserts that it is a hypothetical model of what existence would be like if society was never formed or if it broke down (Gaskin, J.C.A 1994: xxx). Tuck and Silverthorne on the other hand whilst not discounting that it might be ‘a thought

characterised by conflict rather than harmony.<sup>123</sup> The desires and fears listed by Hobbes were an expression of man's self-interest and he was innovatory in asserting that man, in the state of nature, was motivated overwhelmingly by self interest as expressed through them. At rock bottom these desires were all a manifestation of man's overriding need to survive.<sup>124</sup> His actions were therefore determined by that end within an environment of finite resources and possibilities, where it was impossible for everyone to satisfy all desires. Conflict was intensified by all men having been borne with an equality of potential ability and expectation that they were able to fulfil their desires.<sup>125</sup> The result was a condition in which war between individuals prevailed since they were disposed towards violence to resolve their conflicts.<sup>126</sup> Life in the state of nature was characterised by Hobbes as poor, nasty, brutish and short.<sup>127</sup>

37. From these seemingly chaotic circumstances and his conclusion that the desire for self-preservation was universally present amongst men, he concluded that men were justified in taking all necessary measures to defend themselves in their quest for survival. As a result, he elevated that universal desire into a universal right. Thus he stated:

‘It is not therefore absurd nor reprehensible, nor contrary to right reason, if one makes every effort to defend his body and limbs from death and to preserve them. And what is not done contrary to right reason, is done justly and *of Right*.’<sup>128</sup>

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experiment’ (implying that Hobbes did not necessarily think that such a condition was possible) considered that it was possible that Hobbes thought it to have been a state of affairs witnessed in North America amongst Indian tribes (Tuck, R and Silverthorne, M 1998: xxv-xxvi). MacPherson makes the point that the qualities that Hobbes attached to man were those perceived within political society which suggests together with Gaskin's approach that the 'state of nature' might have been used as a polemical device to point out the consequences of the fall of government at a time of acute political instability in England ( Macpherson, C.B 1968:37)

<sup>123</sup> Again this was not a unique characterisation. For example in a sermon preached in 1621 Robert Bolton stressed the horrors of life without government which would include, ' murder, adulteries, incests, rapes, robberies, perjuries, witchcrafts, blasphemies' (quoted in Sommerville, J 1992: 38 from Bolton, Robert, *Two Sermons preached at Northampton* (STC 3256)).

<sup>124</sup> Hobbes, T 1998: 1.1-1.10. Hobbes never explains the basis upon which he asserts its universal applicability (Tuck, R and Silverthorne, M 1998:xxiv).

<sup>125</sup> Hobbes, 1968: 183-4.

<sup>126</sup> Hobbes, 1968:186; Hobbes 1998:29; Hobbes, T 1994: 80.

<sup>127</sup> Hobbes, 1998:186; Hobbes, T 1994.

<sup>128</sup> Hobbes, 1998: 27.



Developing this idea he asserted:

‘THE RIGHT OF NATURE which writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently of doing any thing, which by his own Judgement, and Reason, he shall conceive to be the aptest means thereunto.’<sup>129</sup>

38. This right of self- preservation for Hobbes was inalienable and formed the bedrock upon which political society could be created. Seemingly in conformity with the idea of natural laws, Hobbes constructed a set of these which he considered would ensure survival if implemented. These laws, predicated upon the right of self- preservation, he defined as:

‘a Precept, or general Rule, found out by Reason, by which a man is forbidden to do, that , which is destructive of his life, or taketh way the means of preserving the same; and to omit that which he thinketh it may be best preserved.’<sup>130</sup>

39. In effect he constructed a hierarchy of such laws for he indicated that there was a fundamental law of nature which required ‘That every man ought to endeavour to seek Peace...’.<sup>131</sup> However in recognition of man’s fundamental right to self- preservation, he qualified it by stating that ‘...and when he cannot obtain it, that he seek and use, all helps, and advantages of Warre.’<sup>132</sup>

40. Hobbes then formulated a number of laws that reflected the core principle of endeavouring to seek peace involving each individual giving up his right to govern himself if others would do the same,<sup>133</sup> keeping his covenants,<sup>134</sup> not being a judge in one’s own cause<sup>135</sup> and a number of others.<sup>136</sup> The difficulty about exercising such

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<sup>129</sup> Hobbes, T 1968: 189.

<sup>130</sup> Hobbes, T 1968: 189.

<sup>131</sup> Hobbes, T 1968: 190.

<sup>132</sup> Hobbes, T 1968: 190.

<sup>133</sup> Hobbes, T 1968: 190.

<sup>134</sup> Hobbes, T 1968: 201.

<sup>135</sup> Hobbes, T 1968: 213.

laws in the state of nature was that there was no central authority to interpret or enforce them and nor were there any objective criteria determining what each man was entitled to do to preserve himself. In the absence of such an authority which was the fundamental characteristic of the state of nature, as the quote above suggests, each individual was entitled to judge what was required to satisfy his perceived desires. In effect subjective judgements possessed by each individual determined their actions and hence their individual relationships with other individuals. Drawing out the implications of this state of affairs, Hobbes considered that each man 'has the right to all things.'<sup>137</sup> To impose limits on what man could do to satisfy his desires in the state of nature would in effect, undermine his ability to realise his fundamental right to survive.

41. Far from condemning such behaviour in the state of nature, by the construction of the right to self-preservation, he appeared to justify it. In doing so, he heightened what was a radical conflict between the nature of man and the natural condition of mankind.<sup>138</sup> A fundamental paradox can be inferred from this. Man, given his nature, might have been better off on his own in the sense that his basic survival might have been more assured, but he was more likely to be impoverished. To overcome the latter required the company of other men but the price he had to pay to obtain the benefits possibly available in such circumstances constituted by the state of nature, undermined his ability to survive. The conditions he needed to maximise his prospects of basic survival, namely isolation, were not achievable whilst those that did apply, minimised such prospects and were inescapable.

42. The solution for Hobbes lay in the creation of a central authority, namely a sovereign, through the formation of a social contract between all adult individuals in the state of nature. The motivation propelling people to enter into such a contract was that of self-interest, namely the fear of death.<sup>139</sup> The escape from such an eventuality under the influence of such fear was seen to be an agreement in which each individual suspended his judgement and will in favour of that of a sovereign whose single will

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<sup>136</sup> In each of the three major sources of his works, that is *Elements of Law*, *On the Citizen* and *Leviathan* there is a slightly different list but with a large degree of overlap. Those mentioned are also to be found in *On the Citizen*, Chapter II and III and in *The Elements of Law* Chapters XVI and XVII.

<sup>137</sup> Hobbes, T 1998: 28; Hobbes, T 1968: 189,354.

<sup>138</sup> Oakshott, M at p. xxxv in Hobbes, T 1957.

<sup>139</sup> Hobbes, T 1968: 192.

replaced that of the many.<sup>140</sup> Henceforth, the multitude of opinions, wills and actions were to be replaced by that of one will which had a complete <sup>141</sup> monopoly over what was required to ensure the preservation of all within a 'commonwealth'. In substance, the commonwealth equated to a territorially defined political society- that is a nation state.<sup>142</sup> Within this arrangement, separate individual wills formerly within the state of nature, ceased in a public sense to be, and were replaced by the one will which Hobbes regarded as being absolute.<sup>143</sup> This he defined as the authority to do '... whatever it [the commonwealth] chooses- *make laws, judge disputes, inflict penalties*, and make use of everyone's *strength and wealth* at its own discretion -and may do all this by right...'.<sup>144</sup>

43. There thus appeared at first sight to be no limit upon the authority that such a sovereign possessed. The unchallengeable individual judgements possessed by the many in the state of nature were replaced by what appeared to be the unchallengeable judgement (and actions) of the sovereign as to what was required to govern civil society.<sup>145</sup>

### *The Nature of Obligation*

44. What was the place of God within this construct? To investigate that requires an examination of the nature of the obligation to obey the sovereign under which each individual was placed following the agreement to set up civil society and also a brief exploration of Hobbes' eschatology. Much has been written on the nature of the obligation towards the sovereign. As has been said elsewhere there are a number of ways of explaining the basis of the obligation.<sup>146</sup>

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<sup>140</sup> Hobbes, T 1998:72.

<sup>141</sup> This will be qualified below.

<sup>142</sup> As will be seen below Hobbes assumes the existence of nation states.

<sup>143</sup> Hobbes, T 1998: 82.

<sup>144</sup> Hobbes, T 1998: 82. Note here that by implication an equation is made between the commonwealth and the sovereign again suggesting the absence of the population in a public or constitutional sense. Hobbes' paradigm about sovereignty also does not specifically indicate that it must comprise a monarchy since although he considered that monarchy is the most effective form of government (*On the Citizen*, chapter X), he did not discount the possibility of other forms of governance.

<sup>145</sup> The multiplicity of infallible wills is replaced by a single infallible will of the sovereign who in this sense resembles the papal sovereign authority constructed by Augustinus Triumphus.

<sup>146</sup> For example, one based on egoistic psychology as espoused by Watkins, J.W.N 1965; Taylor, A.E 1965; Warrender, H 1957.

45. In this respect, two fundamental approaches to the nature of obligation have emerged.<sup>147</sup> The first position claims that Hobbes' theory of obligation was essentially based on man's psychology and that his prescriptions for how they ought to behave as formulated in his laws of nature were based on his idea that men behave in accordance with what they perceive to be to their advantage. Hobbes' laws of nature therefore were a set of formulations shaping the relationships between individuals which if followed would maximise the probability of survival. Flowing from this, political authority as expressed by the sovereign was based on individuals' wants.<sup>148</sup> Fundamentally, an individual's preparedness to obey the sovereign rested on his calculation that it was more advantageous for him to obey than not.<sup>149</sup> Hobbes' claim that the laws of nature were the commands of God within this approach in essence amounted to an overlay crafted onto the main psychologically-based theory of political authority to attract the religious zealots of the day to "buy into" the idea of complying with the commands of a sovereign. The second approach was that embodied in what has become known as the Taylor-Warrender thesis.<sup>150</sup> In this, Taylor and Warrender separated Hobbes' ethical doctrine from his psychologically-based approach with which they considered there was no necessary logical connection, and tied it into what was perceived to be Hobbes' theism. Taylor considered that the duty to obey the sovereign could not simply be located at the door of the covenant entered into by each individual in the state of nature to obey the sovereign. Rather, by imputation, there had to be an antecedent moral obligation to obey natural law because they were the commands of God, one natural law being that men were to obey the covenants made by them.<sup>151</sup> Taylor considered that Hobbes' political philosophy could stand without recourse to his 'egoistic philosophy'.<sup>152</sup>

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<sup>147</sup> There have been a range of approaches but they can be reduced two fundamental positions and it is these that will be briefly explored.

<sup>148</sup> Watkins for example characterises Hobbes' laws of nature as 'doctor's orders' whose sanctions are not moral but based on individuals' self interests (Watkins, J.W.N 1965:76).

<sup>149</sup> As exemplified by Hobbes who justified the necessity for a coercive power to 'compell men to perform equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant...' (Hobbes, T 1968: 202).

<sup>150</sup> There are differences between the approaches of Taylor and Warrender but that described above is what is common to them both and characterises the second position.

<sup>151</sup> Hobbes, T 1968: 201; Hobbes, T 1998: 43; Taylor, A.E 1938 reprinted in Lively, J and Reeve, A 1989: 24.

<sup>152</sup> Taylor, A.E 1938 reprinted in Lively, J and Reeve, A 1989: 27.

46. Warrender considered that running through Hobbes' theory was an uneasy dualism consisting of two systems, one based on motivation and another based on obligation.<sup>153</sup> Warrender located the lack of 'fit' to the fact that he considered the fundamental law of nature was to 'seek peace' rather than to 'preserve thyself'. He further considered the former had more of a social and less of a self-regarding appeal than the latter<sup>154</sup> and was concerned not so much with self-survival but with the conservation of society.<sup>155</sup> In support, he observed that Hobbes had noted that the laws of nature "are contrary to our 'naturall Passions.'<sup>156</sup> Watkins in countering this observation has correctly pointed out, when Hobbes made that statement he did not mean that the laws of nature were contrary to all our passions but only to those that disposed us to 'partiality, pride, revenge and the like.'<sup>157</sup> The laws of nature however were predicated upon one overriding desire, that was to avoid 'most of all that terrible enemy of nature, death from who we expect ... the loss of all power.'<sup>158</sup>

47. Therefore although not explicitly raised by Watkins, in effect, Hobbes appeared to construct a hierarchy of desires just as he had constructed a hierarchy of natural laws. Hobbes' account of natural laws was predicated upon his perception of man's natural right and in this sense Hobbes was inverting the relationship supported by many natural law theorists that had preceded him that natural rights were derived from natural laws.<sup>159</sup> His perception of natural laws was born out of the observation of man's nature and a deductive process centred on his conception of the state of nature, that itself was part of his explanation of the cause of civil society. His perception of self-preservation and its implications therefore were not based on man in isolation but on man in the company of others in pre-civil society.<sup>160</sup> There was therefore no fundamental schism between the right of self-preservation and the laws of nature.

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<sup>153</sup> Warrender, H 1957: 213.

<sup>154</sup> Warrender, H 1957: 218.

<sup>155</sup> Warrender, H supports this line of argument by observing correctly that Hobbes accepted that the laws of nature were against human passions.

<sup>156</sup> Hobbes, T 1968: 223.

<sup>157</sup> Hobbes, T 1968: 223; Watkins, J.W.N 1965: 91.

<sup>158</sup> Hobbes, T 1994: 79; Watkins, J.W.N 1965: 116.

<sup>159</sup> Shapiro, I 1986: 42.

<sup>160</sup> Since Hobbes conceptualised man's natural state to be the state of nature, his conception of individual man could not in effect be stripped of the effects of that natural state.

48. What this does point to however is that there was no necessary hierarchy of systems implicit within Hobbes' thought. The theistically based model was not necessarily simply an adjunct to the egoistically-based model. At the very least there was an intertwining of the two. The means by which the laws of nature were constructed was based on what Hobbes perceived man was rather than on what he ought to be. This desire for unity was implied at the very beginning of the *Elements of Law* when he stated that the laws of nature have 'hitherto been built on thin air.'<sup>161</sup> By this he meant that until then, laws of nature whose contents had been chronically contested were based on a process of reasoning which excluded rather than embraced man's passions and hence denied man's reality. Furthermore, it is doubtful that Hobbes perceived his system to include two distinct systems. The study of the human mind was not a separate discipline in the seventeenth century and therefore the assertion that he was exploiting two systems which he perceived to be separated could well amount to an example of transporting back in time modern day categories which did not exist at the time.<sup>162</sup> In effect, Hobbes was developing one system of thought, albeit with elements which could later be perceived to be distinctly separate.<sup>163</sup>

### *Hobbes' Eschatology*

49. At this point one can see that the place of God in Hobbes' construct of sovereignty is less obvious than is the case in the writings of Dante and Augustinus Triumphus. These two models were based on a descending chain of authority in which God manifested Himself in the sovereign body or bestowed authority directly upon it. Whereas with Hobbes, the chain of authority was ascending in character since it emanated from a social contract, the parties to which were individuals in the state of nature. While God's role was prominent, it was no longer direct. The immediate reason for the sovereign's authority was the agreement that created the obligation and

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<sup>161</sup> Hobbes, T 1994:19.

<sup>162</sup> The philosophical exploration of human cognition and desires was beginning to develop with the writings of Descartes and Hobbes in *De Corpore* ( part of *The Elements of Law*) but to say that at that time the conclusions that sprung therefrom were perceived by Hobbes as comprising a separate knowledge system was to overstate the point.

<sup>163</sup> Watkins himself argues against the existence of more than one system but at the same time in effect suggests that there was a 'theological top layer'(Watkins, J.W.N 1965: 95). This also seems a problematic formulation since it enables the vertical boundaries between systems to reinsert themselves albeit horizontally.

not God's commands in the form of natural law.<sup>164</sup> However Hobbes throughout his major works did spend a great deal of time in drawing out the relationship between God and his ideas about political authority. The outcome was a 'hollowed out' version of God. This was a result of Hobbes' materialist ontology and nominalist epistemology that reduced the spiritual to a matter of private concern and elevated temporal government to the only form of government that was consistent with his perception of God and the only form of government that was possible.

50. Hobbes was a materialist and rejected matter-spirit dualism and has been described as an advocate of one- world realism.<sup>165</sup> This was expressed with clarity in *Leviathan* where he stated:

'... the *Universe*, that is the whole mass of things that are, is Corporeal, that is to say, Body: and hath the dimensions of Magnitude, namely Length, Breadth and Depth: also every part of the Body, is likewise Body, and hath the like dimensions; and consequently every part of the Universe, is Body; and that which is not Body, is no part of the Universe; And because the Universe is All, that which is no part of it is *Nothing*; and consequently *no where*.'<sup>166</sup>

51. Consistently with this, he asserted that incorporeal substances were a logical nonsense.<sup>167</sup> Having closed off the possibility of God being of such substances, Hobbes either needed to assert that no God existed or its existence was material in character or had a character which could not be defined according to human reason. A universe without a God was an unlikely proposition because it could only mean that either it was self-created or in fact never commenced at all. Hobbes rejected both these possibilities on the basis that the character of material existence was defined by cause and effect.<sup>168</sup> He philosophically deduced that there was a God on the basis that there needed to be a 'first cause of all causes'<sup>169</sup> and in this sense followed in the Aristotelian tradition. However, philosophically, he could only ascertain the existence and not the qualities that God possessed, since any reasoning of qualities

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<sup>164</sup> 'The right to rule arises from agreement' (Hobbes, T 1998: 173).

<sup>165</sup> Gaskin, J.C.A: 1994: xxv.

<sup>166</sup> Hobbes, T: 1968: 689.

<sup>167</sup> Hobbes, T 1968: 429.

<sup>168</sup> Pacchi, A 1988 in Roger, G.A.J and Ryan, A 1988: 175.

<sup>169</sup> Hobbes, T 1994: 64; Hobbes, T 1968: 167.

would lead to an anthropocentric construct in which man would attach to God human conceptions of space and time.<sup>170</sup> Hobbes' claim that God existed was therefore matched by his assertion that He was unknowable and incomprehensible<sup>171</sup> since natural reason could not stretch to that which was not material save to affirm existence. Even this assertion, however, had its difficulty, since for Hobbes, knowledge arrived at through philosophical deduction could only be conditional, that is conjectural and not absolute.<sup>172</sup> This philosophical uncertainty could only be remedied by an alternative means of ascertaining the truth, namely through the use of faith upon which the validity of the scriptures as the word of God rested.<sup>173</sup>

52. Hobbes proceeded to construct a theology that in effect was based around God's simultaneous presence and absence. As a result of philosophical deduction it was present as the first mover but unknowable and non-existent in the sense of being definable in terms of time and space. From the point of view of sacred history<sup>174</sup> as manifested in the Bible, the kingdom of God in line with his materialistic approach was considered to have always had a material rather than a spiritual expression.<sup>175</sup> Hobbes through his interpretation of the scriptures provided a precedent for the model of sovereignty that he was seeking to justify.<sup>176</sup> It manifested itself in the idea of God

<sup>170</sup> Pacchi, A 1988 Roger, G.A.J and Ryan, A 1988: 175; *Antiwhite*, 13.6, p. 198. Hobbes thus rejects descriptions of God as being "eternal" since such epithets do not capture his essence which is beyond reason (Hobbes, T 1968: 403).

<sup>171</sup> Hobbes, T 1994: 65; Hobbes, T 1994: 192.

<sup>172</sup> Hobbes, T 1968: 131; EW I, p. 531 reproduced in Watkins, J.W.N 1965: 70. This of course sets up a tension since to assert that reason can lead to the conclusion that God exists but yet is inconceivable puts His existence into doubt.

<sup>173</sup> Hobbes, 1968: 614; Pocock, J.G.A 1960: 163.

<sup>174</sup> Hobbes was distrustful of history as a valid form of inquiry to ascertain past events and to predict future ones as he considered historians to be more motivated by their desires to advance 'their own ends than of truth, and of the goods of others' (Hobbes, T 1995:40-41). He also considered it to be based on experience from which reliable predictions could not be drawn since 'experience concludeth nothing universally' (Hobbes, T 1994: 33). Given this defect and given that history does not fit into what has been described as Hobbes' unhistorical and synchronically based philosophy (Pocock, J.G.A. 1960) in which materially based cause and effect ascertained through reason rather than experience is the key determinant, the epistemological validity of the scriptures as accurate indicators of the past and reliable predictors of the future could only be derived from faith.

<sup>175</sup> Although not stated by Hobbes, to assume that the first mover was the same entity as that which gave rise to the Kingdom of God must have involved the operation of faith since philosophically there was no inevitability that they were one and the same. The material expression of the kingdom of God was simply that and could not embrace the totality of God which was unknowable.

<sup>176</sup> It is not being suggested here that Hobbes' interpretation of the scriptures was necessarily motivated by his desire to achieve this outcome. The purpose of Hobbes' writings on the nature of God and religion and the relationship to his own beliefs have given rise to considerable controversy and are discussed in a number of works for example, Lange, F *History of Materialism* Vol 1, Boston, 1881) Martinich, A.P *The Two Gods of Leviathan*, (CUP:1992); Warrender, H *The Political Philosophy of Hobbes*, (Clarendon Press: 1957); Hood, F.C *The Divine Politics of Hobbes* (OUP:1964) and Cooke,



who exerted concrete worldly sovereignty through the agency of Abraham and then Moses in a temporally and not spiritually based kingdom. Hobbes describes it as a commonwealth - that is a civil kingdom with God as king and Moses as his viceroy ruling over the Israelites who were the chosen people.<sup>177</sup>

53. This model had a profoundly archetypal quality in three other respects that were central to the legitimacy of the model of sovereignty he constructed. Firstly Moses's authority as God's earthly representative did not derive directly from God but was grounded upon 'the consent of the people' whereby the latter agreed to obey the former in what amounted to a social contract.<sup>178</sup> Secondly, in his explanation of the transmission of God's laws to his chosen people, the Israelites, Hobbes concluded from the bible that Moses had a complete monopoly of access to God. The latter's 'presence' manifested itself in the form of commands which were relayed by Moses, their only legitimate purveyor and interpreter.<sup>179</sup> This fitted with Hobbes' contention that God was ontologically unknowable and aside from personal revelation was knowable only through humanly recognisable expressions of His will in the form of such laws. Thirdly, Hobbes concluded that sovereigns historically were able to set the boundaries of what was permissible regarding the interpretation of the scriptures and the formulation of religion.<sup>180</sup> In effect therefore, religion and prophecy in an earthly sense were dependent upon the sovereign's role and it is upon this basis that Hobbes explained the authority of the Church and the pope as being derived from the sovereign himself.<sup>181</sup>

54. Moses therefore whilst not described by Hobbes as a 'Mortall God' in effect occupied this position since he was the heavenly God's counterpart on earth and his

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P.D *Reassessing the Bible in Leviathan* (Rowman:1996). These characterise Hobbes variously as a sincere theist, tepid theist, a crafty manipulator of religion and as being duplicitous. The point however is that for my purposes, what is relevant is not the extent to which Hobbes genuinely held the positions he espoused about religion but the extent to which his writings on religion support his theory of sovereignty.

<sup>177</sup> Hobbes, T 1968: 446.

<sup>178</sup> Hobbes, T 1968: 502.

<sup>179</sup> Hobbes, T 1968: 504. His legitimacy having derived from his emergence as a result of the social contract.

<sup>180</sup> Hobbes, T 1968: 504-5.

<sup>181</sup> For example in Chapter 42 of *Leviathan* (Hobbes, T: 1968).

claims about the substance of God's commands were unchallengeable.<sup>182</sup> He and his successors were according to Hobbes, sovereigns under God whilst the kingdom of God lasted which, according to Hobbes, was from the time that the people of Israel committed themselves to the ten commandments delivered by Moses to the election of Saul.<sup>183</sup> Hobbes' scriptural interpretations thus far strengthened the legitimacy of his model of sovereignty which was initially set up through philosophical reason, by providing layers of historical and theological consistency.<sup>184</sup> However at this point, Hobbes had not completely eliminated the threat of resistance to what he perceived to be the sovereign's absolute nature, emanating particularly from the Church resting upon the assertion that the spiritual domain was dominant over the temporal.<sup>185</sup> The notion of the spiritual as a separate domain with an independent source of authority had to be destroyed.

55. The existence and threat of a separate spiritual domain<sup>186</sup> over which a church could seek sole jurisdiction and therefore potentially compete with the secular sovereign for the loyalty of the commonwealth's subjects depended upon an existence in parallel with temporally based earthly society. For Hobbes this was impossible since nothing, leaving aside the fact of the first-mover, existed beyond the physical that was inherently rooted in time and space.<sup>187</sup> This included the existence of the Kingdom of God whose space and time-bound existence was confirmed in the bible as alluded to above. For Hobbes, although the Kingdom of God had existed in the past, it did not currently do so and would not return until Christ's second coming which lay indeterminately in the future.<sup>188</sup> Thus, the claim of the catholic priest to be able to act as gatekeeper to an existing non-material Kingdom of God and that the Catholic Church was part of that kingdom was unsupportable. So too was the contention put forward by certain protestant sects that the Kingdom of God was a

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<sup>182</sup> 'Mortall God' is the phrase used by Hobbes to describe the sovereign and denotes the latter's infallibility (Hobbes, T 1968:227).

<sup>183</sup> Hobbes, T 1968: 448. The kingdom would be restored with the restoration of Christ (Hobbes, T 1968: 448).

<sup>184</sup> Looking at *Leviathan*, the ahistorical and philosophical basis of sovereignty is provided in the first half of the work whilst its scriptural basis is found in the second half that also elaborates upon Hobbes' eschatology which itself is important for the coherence of the model.

<sup>185</sup> The rejection of any law other than that of the sovereign gave rise to charges that Hobbes had destroyed religion for example in Bramhall's *The Catching of Leviathan*.

<sup>186</sup> That is the Kingdom of God.

<sup>187</sup> Pocock, J.G.A 1960: 175; Hobbes, T 1968: 689.

<sup>188</sup> Hobbes, T 1968: 448, 598.

presently existing entity.<sup>189</sup> Hence the claim of the Catholic Church and certain protestant sects to be able to usurp temporal sovereign authority had no religious basis in Hobbes' view.

56. Contending for current purposes that the essence of existence was a materially based and therefore time-bound, Hobbes endeavoured through the above means to bring the content of religion into the secular domain and in so doing in effect to cause the temporal to absorb the spiritual. The sovereign legitimately subordinated the function of prophecy to his own secular requirements in the name of religion that was shown to be temporally bound.<sup>190</sup> In contrast to the tension lying at the centre of Dante's model between the spiritual and the temporal, the sovereign was in the position to define the 'temporal' and the 'spiritual'.<sup>191</sup>

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<sup>189</sup> For example the Presbyterians.

<sup>190</sup> Johnston, D 1986.

<sup>191</sup> Hobbes, T 1998: 216.

## Chapter 4: An Introduction to Austin

### *Background*

1. The territoriality of the models of governance expressed by Machiavelli, Bodin and Hobbes, was consistent with the emerging idea of the consolidated state, itself an outcome of the triumph of the temporal over the spiritual with regard to earthly governance and the resultant recognition of the need for an autonomous civil authority to regulate the affairs of communities which had secular existences.<sup>1</sup> Empirically this is reflected most clearly but not solely in the comparatively centralised kingdoms of Britain and France followed by the emergence of other continental European States facilitated by the Treaty of Westphalia. Having said that, Europe was characterised by turmoil throughout this period until the settlement reached at the Congress of Vienna. This occurred following the thwarting of Napoleon's ambition to create a French Empire within the heart of Europe. It involved the creation of a confederation of thirty-nine German states and a complex adjustment of borders involving, *inter alia*, the absorption of Norway by Sweden, Lithuania, Eastern Poland and Finland by Russia and half of Saxony by Prussia.<sup>2</sup>

2. The Hobbesian approach to law which manifests itself, *inter alia* as the commands of a sovereign released from restraints of natural or higher law expressed itself in the secular and positivist accounts of law developed in particular by Bentham and Austin. Unlike Hobbes' approach, that of Austin did not seek its authority in a founding social contract which he regarded logically incoherent and historically unfounded.<sup>3</sup> Like Hobbes, the existence of sovereignty was not limited to a particular institutional form and its existence was predicated upon the existence of an independent political society concentrated within a distinct and contiguous area of territory over which the sovereign held sway reflecting a dominant perception that the state was the ideal

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<sup>1</sup> Skinner 1989: 107. Early expressions of the idea of the state are found in the writings of thinkers concerned with the Italian cities of the 15<sup>th</sup> and 16<sup>th</sup> centuries such as Guicciardini in his *Discorso* which was concerned with the Italian city of Medici and Machiavelli in his *Discorsi* published in 1531. Early references in English political thought to the idea of the state can be seen in the writings of Thomas Starkey in the 16<sup>th</sup> century.

<sup>2</sup> Davies, N 1997: 762.

<sup>3</sup> Austin, J 1832: 253-258.

method of political organisation and had become the dominant method through which communities were structured.<sup>4</sup> Also like Hobbes, Austin considered that sovereignty was undivided and illimitable and in this sense he departed from Bentham who accepted that sovereignty was capable of being divided and limited in power.<sup>5</sup>

3. In Hobbes, one had seen the detachment of law from morality as defined by natural law. Natural law had been "demoted" to a set of moral axioms,<sup>6</sup> one of which formed the pre-legal basis for the nature and necessity of illimitable sovereignty, whose purpose was the realisation of one such moral axiom, namely the limitless right of man to preserve himself.<sup>7</sup> For Austin, the justification for sovereignty and law which emanated from it was to be found in utility. This comprised a principle most particularly associated with Bentham,<sup>8</sup> through which government and its policies, realised by law, could be justified, guided and evaluated. The essence of this principle was that any action of government should be approved to the extent that it promotes the happiness of the community.<sup>9</sup> The degree of happiness achieved by any such action could be assessed by measuring the extent to which it induced pain or pleasure. The sanctions associated with rules including law necessary to enforce government action against the misguided resistance of wayward individuals could also be assessed by reference to pain and pleasure.<sup>10</sup> Thus part of the task for any legislator as far as Bentham was concerned was to understand the impact of such pleasures or pain in order to construct punishments which would ensure obedience to the law. This required the making of detailed calculations on how they would affect individuals in the community.<sup>11</sup>

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<sup>4</sup> However the state had not yet become the dominant system of political organisation globally. Nor had nation and state during this period harmonised with one another within much of Europe (Van Creveld, M 1999:199).

<sup>5</sup> Bentham, J 1970: 18; Freeman, M.D.A, 2001:203.

<sup>6</sup> Although unlike Hobbes, Austin considered that divine law were laws *properly* so called. (Austin, J 1863 : 38).

<sup>7</sup> Hobbes, T 1968:189.

<sup>8</sup> The concept of utility filling the gap left by natural law was first alluded to by Hume (Freeman, M.D.A 2006). That concept is captured by Hume's claim that the 'great end of human industry, is the attainment of happiness.' (Hume, D 1985:148). Mill from whom philosophical utilitarianism is commonly considered to emanate defined it as '[t]he creed which accepts as the foundation of morals. Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain and privation of pleasure' (Mill. J 1861: 210).

<sup>9</sup> Bentham, J 1970:chps 1 and 2.

<sup>10</sup> Morison, W.L 1982: 40.

<sup>11</sup> Morison, W.L 1982: 40.

4. Austin whilst accepting the principle of utility as the guiding justification of the governing process did not in his major works on jurisprudence adopt the details of Bentham's evaluative system on pain and pleasure nor supply one of his own although he provided an extensive defence of the principle of utility.<sup>12</sup> He explained and justified the principle of utility thus:

‘ God designs the happiness of all his sentient creatures. Some human actions forward that benevolent purpose, or their tendency are beneficent or useful. Other human actions are adverse to that purpose, or their tendencies are mischievous or pernicious. The former, as promoting God has enjoined. The latter, as opposed to his purpose God has forbidden. He has given us the faculty of observing; of remembering; of reasoning: and, by duly applying those faculties, we may collect the tendencies of our actions. Knowing the tendencies of our actions and knowing his benevolent purpose, we know his tacit commands.’<sup>13</sup>

‘In so far as the laws of God are clearly and indisputably revealed, we are bound to guide our conduct by the plain meaning of their terms. In so far as they are not revealed, we must resort to another guide: namely the probable effect of our conduct on that *general happiness or good* which is the object of Divine Lawgiver in all his laws and commandments.’<sup>14</sup>

5. The glimpses of utility captured in Hobbes' idea that the rationale of sovereignty is the realisation of individuals' right to self preservation, further developed by Hume,<sup>15</sup> has thus been expanded to ensure the realisation of happiness or good. However like Hobbes, a justification for his founding principle of government, namely utility, lay in an identification being made between it and the will of God. Whilst Hobbes identified the will of God with the will of the sovereign, the principles of utility were not inherently identical to sovereign will. Hobbes accepted the inevitability of individuals exercising resistance where they considered that the sovereign imperilled their lives and that this could lead to his downfall. However this observation was not

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<sup>12</sup> Austin, J 1863:Lectures II and III.

<sup>13</sup> Austin, J 1863: 41.

<sup>14</sup> Austin, J 1863: 45.

<sup>15</sup> Hume, D 1985.

explicitly developed and in terms of emphasis remained peripheral to his overall scheme of governance, not least because for Hobbes, the population over which a sovereign ruled was not collectively capable of having an existence that was separate from that of the sovereign himself and hence was not capable of having interests that could clash with those of the sovereign.<sup>16</sup> Austin went further than Hobbes and considered that it would be just to take up arms against the enemies of utility including a sovereign who departed from its requirements and to overthrow him.<sup>17</sup> Hence he was a supporter of the French Revolution and the overthrow of the monarch.<sup>18</sup> However as with Hobbes, this was very much a last resort. In contrast to the radical Benthamites who considered that social progress would inevitably be accompanied by intense political and class conflict, Austin now considered that utility required that wherever possible government should promote harmony and reconciliation in order to avoid conflict.<sup>19</sup>

6. Whilst the emphasis of Bentham's interest was upon an analysis of law with a view to exploiting it to achieve reform by the construction of an ideal code, Austin was far more interested in building a systematic analysis of existing laws and legal systems.<sup>20</sup> Much of his writings therefore comprised a pursuit of what Bentham classified as expository jurisprudence in contrast to a censorial jurisprudence which concerned law as it ought to be and which tied in with Bentham's reforming project.<sup>21</sup> However it cannot be said that his view of law and its application took place in a political vacuum. Austin initially identified with Benthamite radicalism but all this was to change upon his return from Germany where he spent a year preparing his lectures, for when he took up his post as Professor of Jurisprudence and the Law of Nations at the University of London in 1828.<sup>22</sup> Whereas before he had been an advocate of democracy in order to empower the people at the expense of the aristocracy, he now considered that the mass of the population because of lack of education were not able

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<sup>16</sup> The potentiality of the right to resist within Hobbes' theory will be further explored in the next chapter on Hobbes.

<sup>17</sup> Austin, J 1824.

<sup>18</sup> Austin was a great admirer of Hobbes' work on sovereignty and its influence upon his work is plain to see. However he was critical in two major respects, firstly in his use of the social contract as a justification for sovereignty and secondly that he "inculcates too absolutely the religious obligation of obedience to present or established government." (Austin, J 1863: 230).

<sup>19</sup> Hamburger, L and J, 1985: 43.

<sup>20</sup> Morison, W.L 1982: 41.

<sup>21</sup> Morison, W.L, 1982: 42.

<sup>22</sup> Hamburger, L and J 1985: 33.

to make the choices necessary to give rise to good government. This required rule by an intellectual elite since it was best able to legislate upon the basis of ethical choices derived from the requirements of utility.<sup>23</sup> Acceptance by the mass of the population to the voice of reason as expressed by this elite was central to this process whereas the call by the radical Benthamites for an extension of democracy was not.<sup>24</sup> Reflecting this distrust, he considered that the autocratic Prussian monarchy was more capable than its partially representative counterpart in England of engaging in good and enlightened government.<sup>25</sup> The acceptance by the population of the governmental prescriptions of the intellectual elite required them to be subjected to a system of universal education through which they could gain a modicum of insight into the scientific principles and consequential conclusions expressed by the elite.<sup>26</sup>

7. Austin accepted that the method of social organisation most likely to achieve utility was market capitalism, the workings of which had been explored and enunciated by Ricardo and James Mill. This was for example reflected in his view that utility demanded the institution of private property and its protection from unauthorised interference failing which the ends of government and law would be defeated.<sup>27</sup> His perception of the best way of achieving this was for the state to be centralised, that is constructed around a single legal order with a stable moral framework that would be best equipped to defend the institution of private property and thus to successfully resist any socialist threat.<sup>28</sup> Property ownership had to be defended from the vagaries of the working classes that in Austin's view were prone not accept the sanctity nor the inequality that such a society would inevitably bring upon them.<sup>29</sup>

8. Austin's concentration upon jurisprudence was consistent with an orientation which saw the elimination of prejudices through the inculcation of reason, including

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<sup>23</sup> Hamburger, L and J 1985: 35.

<sup>24</sup> Austin's lack of faith in the extension of democracy as a requirement for improved government led to him not campaigning for the enactment of the first Reform Bill although he did not go as far as rejecting it (Hamburger, L and J 1985: 45).

<sup>25</sup> Morison, W.L 1982: 122-132; Mill, J.S 1873:96 quoted at length in Dicey, A.V, 1905: 161-164.

<sup>26</sup> Austin, J 1832: 68-69.

<sup>27</sup> Austin, J 1832, 85.

<sup>28</sup> Morison, W.L, 1982: 123; 85 *The Edinburgh Review* 221; Cotterrell, R 1989:77.

<sup>29</sup> Austin, J 1863: 64-68. The solution to the problem of working class hostility to the private ownership of property lay for Austin in their mass education whereby they would come to 'reason' that is to see and identify with the worth of such property and its attainment.



that relating to the centrality and operation of legal systems, inter alia, through education, rather than political conflict as the key to progress. It was the outcome of the belief that reform could be reduced to a technical scientific process led by experts whose conclusions would ultimately enjoy universal acceptance because of their self-evident truth. The underlying purpose of Austin's enterprise was to demarcate the area of concern for jurisprudential study that for him was characterised by the existence of positive law within independent political society. For Austin, positive law was an expression of earthly will and thus had to have an author to create it. Within what he referred to as an independent political society characterised by a legal hierarchy, the logical pre-condition for the existence of such law was the existence of an ultimate will from which all law ultimately emanates.<sup>30</sup>

### *Austin's Sovereignty*

9. For Austin, any centralised society is constructed around a legal hierarchy with a sovereign entity at its summit. Sovereignty is possessed by an identifiable institution to which the bulk of the population of a politically independent community habitually obeys and which must not be habitually obedient to any other institution.<sup>31</sup>

Sovereignty expresses its will through commands which Austin classified as including but not limited to positive law.<sup>32</sup> Unlike Bentham, he considered that a centralised society required an undivided and illimitable sovereign, without which there would be a risk of anarchy. Reflecting this and again unlike Bentham, he added the requirement that the sovereign must not habitually render obedience to anyone else.<sup>33</sup>

A sovereign subject to limitation for Austin was an unsupportable contradiction. Moreover the idea of constitutional limits upon the exercise of sovereign power held no useful purpose as they were unenforceable<sup>34</sup> and were in fact an obstacle to the exercise of sovereign power in accordance with scientific principles. There is an empirical feel to this definition. It is not at first sight what ought to be but what

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<sup>30</sup> Austin, J 1832: 165.

<sup>31</sup> Austin, J 1832: 172-173.

<sup>32</sup> Austin, J 1832: 25, 117.

<sup>33</sup> Austin, J 1832: 172-173, Bentham, J 1970: 37-8.

<sup>34</sup> If limits could be imposed upon the legislative power of the sovereign, the institution vested with these powers would cease to be sovereign. Constitutional limitations for Austin were expressions of positive morality and were not part of law.

empirically exists in Austin's view in any legal system. This definition and the way that it is treated by Austin is highly problematic for a number of reasons.

10. There is a considerable literature on the methodology that Austin employed in constructing what he regarded as universally present in any legal system of developed societies. Was his analysis the outcome of a rationalistic inquiry commencing with a number of *a priori* postulates from which deductions were made to ascertain the nature of law as logic required rather than as actuality existed?<sup>35</sup> Alternatively was it the outcome of an empirical inquiry in which a series of generalisations were abstracted by way of inductive logic from facts observed by Austin to exist in particular legal systems? The span of opinion on this is considerable and ranges from Stone's view that Austin's inquiry was essentially a deductive one embracing scholastic logic and therefore rationalistic in nature, although flawed, to that of Morison, Hart and Grey<sup>36</sup> who considered that the enterprise was empirical in nature although again flawed in approach and/or outcome. The difficulty with such evaluations at the risk of stating the obvious is that one is reliant upon the published version of any particular piece of work which may exclude completely or partially, particularly with regard to empirical investigations, the data upon which the abstractions are based. It is also the case that methodologically it is not the case that 'rational' inquiry is not common to both approaches if one takes the term to embrace logical precision, consistency, coherence, and a commitment to relentlessly pursue an argument.<sup>37</sup> In this looser sense, what is different is the way that logic is employed and the stages at which it is employed. In relation to classical rationalist inquiry regarded philosophically as such, deductive logic is employed which moves from general *a priori* principles to particular conclusions whose truth is guaranteed by the fact that they follow necessarily from those principles.<sup>38</sup> Typically, in relation to empirical investigation, one moves from the particular in the form of experience to the general through inductive logic to formulate general propositions from which through deductive logic, particular conclusions are reached which can then be measured

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<sup>35</sup> A logical dream world (Morison, W.L. 1958: 218).

<sup>36</sup> Gray, J.C, 1909: 92; Hart, H.L.A 1954; Morison, W.L. 1958; Stone, J 1968.

<sup>37</sup> Cottingham, J 1984: 3.

<sup>38</sup> Cottingham, J 1984: 141.

against experience to test their validity and hence the validity of the generalisations which are abstracted from the initial observations.<sup>39</sup>

11. The difficulty can be that it is not necessarily entirely clear as to whether the method in any inquiry consists of one approach as opposed to the other. Besides a lack of published data which can cause uncertainty there is the structure and language of the inquiry as presented in the published work. Even if the language of the publication under investigation embraces comments that appear to be references to the empirical world, this does not inevitably mean that they are the outcome of an empirical investigation. They could be formulated as generalisations seemingly from empirical investigation when in fact they are *a priori* principles more consistent with a rationalistic inquiry. Furthermore the level of abstraction reached following an empirical inquiry, may be so high as to put in doubt its relationship with the particulars from which it was inferred. It is also possible that the methodology employed is confused so that it becomes a matter of evaluative judgement as to whether the inquiry is essentially rationalist or empirical in nature. What makes this more difficult is that inevitably even in relation to rationalistic inquiry in the strict sense of the term, the nature and content of the *a priori* principles are likely to some extent to reflect the experience and knowledge of the enquirer and therefore cannot be completely divorced from the empirical domain.

12. Reflecting the last comment, it has been said that Austin used an *a priori* method but built his 'a priori concept' out of an 'actual system of law'.<sup>40</sup> If Austin's inquiry is rationalistic in nature then it may not correspond to any given legal system but will tend to express the inner truths of given legal systems, the unreliable and contingent empirical expressions being pale reflections of such truths. Alternatively the rationalistic model might be used as a filter with which to select empirical features which conform to the model in order to claim that concrete empirical reality corresponds to the outcome of the deductive logic of the rationalistic inquiry.<sup>41</sup> On

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<sup>39</sup> The idea that the movement from the particular to the general inevitably involves a logical process was challenged by Popper who considered this 'leap' to be the result of a number of different processes which may defy logic. For him the resultant generalisation cannot be shown to be true no matter how many times it is verified by particular instances.

<sup>40</sup> Dias R.W and Hughes, G.B 1957: 375,376.

<sup>41</sup> That is to say a tautology is created out of an exercise where 'reality' is 'bent' to conform with the theoretical model. It has to be said that even in empirical inquiries, this process of selection can occur

the other hand if it is empirical in nature then the expectation will be that the model produced will correspond to existing legal systems, although perhaps to varying degrees. This will obviously apply to any element within the constructed model including that of sovereignty. Austin's own intentions appear to have been that of conducting an empirical inquiry as suggested by various of his comments.

Thus for example he states:

‘Seeing that a true theory is a *compendium* of particular truths , it is necessarily true as applied to particular cases. The terms of the theory are general and abstract, or the particular truths which the theory implies would not be abbreviated or condensed. But, unless it be true of particulars, and, therefore, true in practice, *it has no truth at all*. ...They say that a truth in theory is not truth in practice. They *mean that a false theory is not a true one*...’<sup>42</sup>

13. Morison points out that Bentham who greatly influenced Austin clearly indicated that the existence of a sovereign was a political fact and not simply a legal postulate which is indicated by Bentham claim that there is commonly in states ‘some person or body of persons exercising this supreme power’ which he termed as ‘the Sovereign’.<sup>43</sup> Mill also in his system of logic asserts that theoretical conclusions can only emerge as a result of empirical investigation. However Austin's empirical claims sit uneasily with his method of presentation which takes on the appearance at times of a scholastic inquiry. This is perhaps amplified by modern day expectations of what an empirical inquiry should comprise. There is no clear separation of Austin's observations as to what is found in particular legal arrangements from which general propositions can be formulated which can then be tested against other particular examples of legal systems. Instead emphasis is given to general propositions. So for example in lecture one there is an immediate attempt at defining in general terms of what law comprises. It rapidly becomes apparent however that Austin’s conclusions on this and how it

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at the stage of abstraction in order to fit a pre-conceived model. Hence in part Popper's claim that any theory can never be completely verified by empirical observation, the other problem being that generalising from different sets of particulars can never rule out the possibility that there may exist an unexamined set of particulars which does not correspond with the generalised abstraction comprising the theory under investigation.

<sup>42</sup> Austin, J 1832: 51.

<sup>43</sup> Bentham, J 1970: 18; Morison, W.L 1982: 42-43.

breaks down into separate categories would probably not have been arrived at other than under the influence of empirical observation although the nature of such observations is frequently not made clear.

14. Similarly in relation to sovereignty, Austin commences with a definition of sovereignty which is then elaborated upon. At this point, it could be argued that Austin's inquiry is consistent with an *a priori* rationalistic approach rather than an empirical one. However the lecture in which sovereignty is explored also contains empirical observations from France, Mexico, Great Britain, Turkey, United State of America, Prussia, Bavaria and the German and Swiss Confederations, ancient Greece and Italy.<sup>44</sup> In his reference to Hobbes he does not consider that the role of a social contract has any validity.<sup>45</sup> This conclusion appears to be one based on an interpretation of Hobbes' texts fed by his positivist position as to the non-existence of natural rights upon which the social contract was claimed to be based. If one accepts that that the conclusion is the outcome of empirical observations, one cannot help concluding that these were selected to fit *a priori* propositions. This points to the inevitability that no empirical enquiry can be free of a prior assumptions and the need to view the claim as to the commitment to empirical enquiry made by Austin. Bentham and Mill in such a light even if it appears to depart from their subjective intentions. What appears difficult to argue against was that Austin intended that his inquiry should be empirical in character and that his concept of sovereignty should be applicable to actually existing legal systems.

15. His definition of sovereignty gives rise to a number of problems. For example, what does 'bulk' or 'habitual' mean? Austin does point to the difficulties of ascertaining whether in a given instance, the *bulk*<sup>46</sup> of the individuals of an independent society behave in manner that amounts to their *habitual* obedience to a given superior.<sup>47</sup> However, whilst acknowledging their lack of precision, he does not

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<sup>44</sup> Austin, J 1832: 167,175,185, 192-194, 209,211. If anything the range of systems he comments upon is perhaps too wide and superficial and he might have benefited from concentrating in depth on fewer ones. This is again perhaps a sign of the discrepancy between his commitment to empirical inquiry and the adoption of appropriate methods to achieve it.

<sup>45</sup> Austin, J 1832: 230.

<sup>46</sup> The word "bulk" also suffers from the same difficulty.

<sup>47</sup> Austin, J 1932: 172-174. His admission that 'the positive mark of sovereignty and independent political society is ...a fallible test' if anything attests to Austin's concern that his inquiry is empirically

explicitly seek to provide more refined definitions and thus the application of these terms to given empirical instances is not simply problematic from an evidential point of view, that is from an empirical perspective, but also from the standpoint of having clear criteria by which to judge given empirical circumstances.<sup>48</sup>

16. His conclusion as to the location of sovereignty in the United Kingdom was that it was to be found between parliamentary elections with the monarch, peers and member of the House of Commons.<sup>49</sup> At the point of parliamentary elections, the delegated share<sup>50</sup> of sovereign power, namely that of the House of Commons reverted back to the electorate and thus at this point sovereignty lies with the electorate together with the monarch and peers.<sup>51</sup> This of course departs from Diceyan thinking that legal sovereignty lies with the Monarch in Parliament while political sovereignty, or at least a predominate part of it lies with the electorate.<sup>52</sup> This discrepancy has been explained in various ways. For example by the claim that Austin's sovereignty was not legal in character but a pre-legal notion<sup>53</sup> namely that it is the "logical correlate of assumed factual obedience."<sup>54</sup> or the "legitimate ultimate locus of political authority" which for Manning lies in a collectivity at whose instigation the constitution subsists.<sup>55</sup> Dicey also criticises Austin's formulation claiming that he has confused the location of legal with political sovereignty. Dicey's formulations about the relationship between the electorate and sovereignty are not entirely clear. Within the space of a few lines he firstly states pointing to the confusion Austin expresses through his failure to distinguish between legal and political sovereign, that '[i]t is, however, ...true that in a political sense, the electors are the most important part of, we may even say actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience.' A few lines further down

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relevant and not as Stone alleges that it suggests that objectively Austin's concern was to create a logically coherent deductively-led legal model which had no particular connection to empirical reality.

<sup>48</sup> What percentage of instances must the bulk of a community obey the commands of the superior for the latter to be designated a sovereign? Must the threshold be 50 per cent or more and over what period of time?

<sup>49</sup> Austin, J 1832:192-3.

<sup>50</sup> The idea of delegation appears to be synonymous with representation and is described by Austin as binding the members of the House of Commons generally and vaguely 'to abstain from such exercise of the delegated sovereign powers as would tend to defeat the purposes for which they are elected or appointed' (Austin, J 1832: 194).

<sup>51</sup> Austin, J 1832: 192-3.

<sup>52</sup> Dicey, A.V 1915: 3.

<sup>53</sup> Manning, C.A.W 1933: 192,202 cited in Cotterrell, R 1989: 70.

<sup>54</sup> Manning, C.A.W 1933: 192,202 cited in Cotterrell, R 1989: 70.

<sup>55</sup> Manning, C.A.W 1933: 192, cited in Cotterrell, R 1989: 70.

again commenting on Austin he states, '[t]he electors are part of and the predominant part of the politically sovereign power.' In both comments the place of the electorate is not entirely resolved. It is suggested that this lack of resolution expresses a tension that is the product of the inter-play of two approaches to the location of political sovereignty. One approach might be regarded as causatively structured whereby the location of political sovereignty is placed where it is perceived the originating will or wills are located that give rise to society and its institutions. In addition one might be seeing a normative argument at play based on a political metaphysic whereby the electorate are perceived as being the unitary source of political will in a symbolic sense, thus excluding the other elements mentioned, as will be explored below when considering the writings of Cassirer on symbolism.

17. Regarding for the moment the above comments about the possible symbolic role of the electorate as an expression of a legitimating narrative, legitimacy is a concept with a normative character or set of characters and it is not inevitable that the actual source of obedience coincides with where it ought to be, according to a given framework of legitimacy.<sup>56</sup> The location of the sovereign, characterised by being the object of habitual obedience by the bulk of the community, whether it is ascertained at election time or between elections appears to be located by reference to pre-existing constitutionally important legal rules rather than empirical investigation.<sup>57</sup> These laws define such institutions as parliament and the electorate. There is a tautological assumption that the ultimate source of habitual obedience is where it ought to be. Austin adopts the same approach to the location of sovereignty in the United States of America again assuming that the ultimate source of the habitual obedience of the population is where its constitution in his view suggests it to be. In this case he claims that sovereignty "be inferred" from the amendment procedure contained in the fifth article of the constitution as residing in the states' governments as forming *one aggregate body* [sic].<sup>58</sup> In Austin's commitment to

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<sup>56</sup> This appears to suffer from the fundamental fallacy to derive what 'is' from simply from what 'ought' to be (Freeman, MDA, 1994:12-13).

<sup>57</sup> Reflecting this difficulty, Dicey asserts that Austin's conclusions as to the location of sovereignty was a deduction from the position of the British parliament and that it was a 'generalization drawn in the main from English law.' (Dicey, A.V 1915: 26-27).

<sup>58</sup> Austin, J 1832: 210. So he does not consider, with regard to the federal arrangement in the United States that the president and congress is sovereign but is 'merely the subject matter of the united states' government.' (Austin, J 1832: 209). Sovereignty is located in the states' governments forming one *aggregate body*; meaning by a state's government not its ordinary legislature, but the body of its

conceptualise sovereignty through what in his mind comprises an empirically orientated enquiry, he is guided by the requirements of establishing a chain of causation with regard to the production of law, as applied to each constitutional settlement he seeks to investigate so that he can discover the 'first cause' of such production. The substance of the chain is in effect determined by what he perceives to be the normative requirements of the system under examination.

18. For Austin, sovereignty lies with a determinate source (or sources) from whom or which all positive law in his view are attributed although it may not be directly involved in producing such law as can be seen in his analysis, described above, of the location of sovereignty in Britain and the United States.<sup>59</sup> It is these which the bulk of a given society must habitually obey if the body or bodies in question are to qualify as sovereign. It is the fact of habitual obedience rather than the causes of habitual obedience that is important. The word 'habitual' suggests repetition, in this case repetitive obedience. It also suggests that obedience occurs through unthinking compliance<sup>60</sup> which has an automatic quality to it. If obedience occurs only because of a sovereign's commands, is it necessarily habitual obedience even if it is repetitive if the motivation for obedience is the avoidance of punishment?<sup>61</sup> Therefore one's view of the meaning of the word "habitual" will impact upon the extent to which such obedience occurs. If it simply suggests repetition then one is not concerned with internal motivation but simply with external compliance. However even here there are difficulties. In the absence of an empirical inquiry which seeks to question

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ordinary citizens which appoint its legislative body and which, union apart, is properly sovereign therein' (Austin, J 1832: 209-210). He then goes on to suggest if for each state there was an 'immediate chief' then sovereignty in the United States would lie with an aggregate of all these individuals as a 'collective whole' suggesting, although not explicitly spelt out, that as a consequence sovereignty lies with the collective whole of the citizenry that determine the composition of each state legislature. He bases these conclusions on his reading of the Article V of the American constitution which concerns the procedures for amendment.

<sup>59</sup> Austin's definition of sovereignty refers to that determinate and superior entity to which habitual obedience by the bulk of a given society is expressed. The definition does not specifically refer to law as being the expression of the sovereign's will which gives rise to such obedience but it is clear from his assertion that positive law is a 'direct or circuitous command' of a sovereign, that this is what in substance is meant (Austin, J 1832: 116, 118). Such law comprises commands of a general character which trigger sanctions in the event of non-compliance (Austin, J 1832: 24-29).

<sup>60</sup> Hart raises this point. See Hart, H.L.A 1962: 51.

<sup>61</sup> This raises the problem of the fluctuation of motivation both between individuals and also in relation to each individual's motivation over time.



members of the population on their extent of obedience and reasons for it,<sup>62</sup> how would one measure whether habitual obedience is achieved by the bulk of a society? The external sign of such obedience at first sight might be considered to be that civil society is stable and thus there appear to be no significant moves to disrupt or overthrow the sovereign body. But even if that appeared to be the case by external observation over a period of time, could that automatically lead to the conclusion that habitual obedience by the bulk of the population is manifested? Arguably not, as it might be that in certain respects, there is not habitual obedience even though overall the claim is accepted that society is a stable one.<sup>63</sup> For example, there might be widespread theft or traffic crimes or white-collar fraud. Would such activity be incompatible with habitual obedience by the bulk of the population to the sovereign's commands? Attempts to illuminate upon the meaning of habitual obedience by equating it with stability in society creates its own uncertainties which go to highlight further the problem with the idea of habitual obedience as being a defining criterion by which the location of sovereignty is ascertained. The idea of habitual obedience providing the basis of the existence of sovereignty however while empirically highly problematic to verify does point to a profound observation of Austin and that is that ultimately the conformity of a population with the laws that are produced in its name whether by a sovereign or otherwise cannot ultimately be explained by the claim that it is the laws themselves that dictate that they are followed or indeed that behaviour consistent with them necessarily is a product of consciously following them.

19. Such practice becomes particularly apparent in relation to discussions about the extent if any to which a sovereign is bound by its own laws. From Austin's point of view logically a determinate sovereign body which is the source of all positive law cannot be bound by it. On this basis, if the sovereign were legally bound by it then he would be in a state of subjection to a higher sovereign which opens the way towards contemplating an infinite hierarchy of sovereigns which is an impossibility. Hence

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<sup>62</sup> This would be highly problematic in any event. Quite apart from the issue of representative sampling, there would inevitably be an under-reporting of disobedience as suggested by the problem of under-reporting in criminal surveys.

<sup>63</sup> This raises the issue as to who is doing the accepting. A government is more likely to argue that society is stable than an opposition and it might be that parts of population disagree with both. So there are issues about the nature of interpretative communities, how they express themselves and the extent of consensus. This of course raises issues as to the nature of representation since such communities express themselves through *de jure* or *de facto* representation.

Austin's characterisation of rules, which in form constitute laws and that seem to be applicable to sovereigns, are in reality only a form of positive morality as against the sovereign.<sup>64</sup> At any given juncture, the existing sovereign can change such laws, although to do this it would have to comply with what Hart has defined as secondary rules of the legal system.<sup>65</sup> These include those that are constitutive of sovereignty itself by for example regulating how succession is to proceed and also those which define those expressions of sovereignty that amount to its commands which the bulk of the population habitually obey.<sup>66</sup> This logical inference which he supports with empirical evidence<sup>67</sup> only however illuminates one aspect of the relationship between sovereignty and law. What Austin does not consider is the impact upon this conclusion of the *continuation* of sovereignty within a diachronically existing society.

20. Assuming for the moment that sovereignty is vested in one single individual, a pre-condition for the maintenance of a stable society is the orderly transfer of sovereign power from one sovereign to its successors so that damaging contests for power can be avoided at these points in time.<sup>68</sup> Austin himself recognised this requirement.<sup>69</sup> Laws therefore have to be in place which define when such transfer takes place and to whom. It is true that whilst a particular person occupies the office of sovereignty, he or she is not bound by such rules. However that does not mean that the sovereign within Austin's formulation is liberated from the law. Yes it is true that logically the sovereign from an Austinian perspective is not bound to obey his own laws. Yet from the perspective of the practice of sovereignty, the refusal by a

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<sup>64</sup> Austin, J 1832: 212-213.

<sup>65</sup> For Hart the lack of an appreciation of the rules of recognition, change and adjudication as central to any modern legal system was one criticism he made of the way Austin characterised legal systems. See Hart 1961.

<sup>66</sup> These latter constitutive rules are equivalent to the rules of recognition that Hart considered to be central to any functioning state legal system.

<sup>67</sup> For example Austin explores the possibility of the British Parliament departing from a fundamental condition of the union between Scotland and Wales contained in Article XXV of the Union with Scotland Act 1706 whereby the governance of the church in Scotland was not to be altered and considers presciently that Parliament is capable of altering this provision. This has in fact occurred for example by the British Parliament altering the terms of the aforementioned Article by the enactment of the Universities (Scotland) Act 1853 abolishing the requirement that university professors must subscribe to the Confession of Faith. The Union of Ireland Act 1800 required the churches of England and Ireland to be united into one church named the United Church of England and Ireland which was to remain in "full force for ever". In fact the Irish Church Act 1869 separated the two churches despite this clause and the validity of the latter Act's terms were upheld in *Ex p Canon Selwyn* (1872) 36 JP Jo 54; Munro, C 1999: 138-139.

<sup>68</sup> For Austin as for Hobbes, as indicated in the former's definition, sovereignty need not be limited to a single individual but can be vested in a group of individuals or institutions (Austin, J 1832: 165, 192).

<sup>69</sup> Austin, J 1832: 134.

sovereign to obey its own laws while not being illegal might well cause a rupture in the relationship between him and his subjects as manifested by the emergent lack of habitual obedience by a bulk of the population within the sovereign's jurisdiction as they perceive his actions to be illegitimate as a result of their legality.<sup>70</sup> This points to the self-evident observation made by Bentham that habitual obedience is conditional in character and points back to the relational quality of sovereignty.<sup>71</sup> The existence of habitual obedience therefore in the manner posed by Austin, even with the difficulties of establishing it, is likely to be affected by the extent to which a sovereign complies with his own or his predecessors laws and significant breach may but will not inevitably lead to governmental crisis. Indeed, it is not inconceivable that departure by the sovereign from existing laws might actually ensure habitual obedience whereas compliance might undermine such obedience for example in circumstances that amount to a national crisis for example in the event of a hostile invasion. This of course points to the possibility of the state of exception around which Schmitt constructed his idea of sovereignty and to whose model we will now turn.

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<sup>70</sup> In essence the sovereign's behaviour in this circumstance does not comply with the prevailing practice and expectation of the population. This indicates the deeper point that a system of formal law is grounded in everyday practices (Tully, J 2007: 321).

<sup>71</sup> '... the obedience of the governed is susceptible of every modification of which human conduct is susceptible: and the rules which mark it out, of every diversity which can be clearly described by word' (Bentham, J 1970: 69).

## CHAPTER 5: An Introduction to Schmitt

1. Schmitt's conception of sovereignty is boldly stated in the opening line of *Political Theology* as 'he who decides on the exception'.<sup>1</sup> Immediately several observations can be made. Firstly there appears to be an ambiguity lying at the heart of the definition. Is the person who decides upon the exception recognised as the sovereign prior to the decision or is it the decision itself that gives the person making it the status of sovereign?<sup>2</sup> In the first case the sovereign is identifiable whilst in the second he is not prior to the decision. The first is more consistent with the commissarial dictator as exemplified by the Reich President in the Weimar Republic. The latter is consistent with classical sovereignty which seemingly<sup>3</sup> exists outside the legal order, although not disconnected from it and whose decision creates law and ultimately order. Secondly it concentrates upon the exception and not the norm. The classical definition of sovereignty namely that sovereignty is the 'highest legally independent underived power'<sup>4</sup> appears not to fully capture the essence of sovereignty and yet as we shall see Schmitt oddly is incapable of escaping from it. There is a sense of the episodic about his definition. It is as though it is normally undetectable in terms of external manifestation and suddenly bursts forward at some point 'to declare the exception.'<sup>5</sup> Its manifestation has the feel of the miraculous and indeed Schmitt makes reference to the exception as 'analogous to the miracle'<sup>6</sup> in jurisprudence.

2. Four elements of work which are crucial to an appreciation of his idea of sovereignty will be concentrated upon. These will comprise firstly his analysis of the historical development of (European)<sup>7</sup> Man's *Weltanschauung* that is to say the way he has constructed the world around him, secondly the decisionism that is located at the heart of any legal system, thirdly Schmitt's idea of the political and finally his idea of democracy. These features will be considered and will provide the basis for an

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<sup>1</sup> Schmitt, C 1985: 5.

<sup>2</sup> Dyzenhaus, D: 1997: 43.

<sup>3</sup> In the next chapter I will argue that a sovereign cannot exist outside the legal order.

<sup>4</sup> Schmitt, C 1985: 17.

<sup>5</sup> Schmitt, C 1985: 5.

<sup>6</sup> Schmitt, C 1985: 36.

<sup>7</sup> Schmitt lays out his ideas on this matter in the context of an impending threat of the Russians upon the Weimar Republic whom he considers have 'seen through our great words and institutions' and whose vitality 'is strong enough to seize our knowledge and technology as weapons.' (Schmitt, C 1993: 130).

exploration of his idea of sovereignty which will take place in the third part of the thesis following the construction of a tentative theoretical approach with which to illuminate the nature of sovereignty.

3. For Schmitt, historically the dynamic of western history has been fuelled by a continuous search for neutral or central spheres free of conflict around which society could be peacefully organised. The operative domain of the sixteenth century was theology which was replaced by that of metaphysics in the seventeenth century, itself replaced by humanitarian concerns in the eighteenth followed by economics in the nineteenth century to be replaced by technology in the twentieth century.<sup>8</sup> Reflecting this latest shift Schmitt states:

‘ In almost every discussion one can observe the extent to which the methodology of the natural technical sciences dominates contemporary thinking. For example God of traditional theological evidence- the God that governs the world as the king governs the state- subconsciously is made the motor of impelling the cosmic machine. The chimera of modern big-city dwellers is filled to the last atom with technological and industrial conceptions, which are projected into cosmological and mathematical mythology, the world becomes a giant dynamo...’

4. Implicit within this quote one can detect two features associated with Schmitt’s view of modernity, namely innovation for innovation’s sake, an existential wandering which is accompanied by a rejection of descending authority and tradition, and a sense that pre-modern civilisation involved a wholeness and unity since lost.<sup>9</sup> Even the idea of God is itself turned into an entity which serves to explain and justify the domination of technology. The seemingly limitless possibilities of the production process is brought out starkly by Schmitt when he characterises it as ‘[a] marvellously rational mechanism [that] serves one or another demand always with the same earnestness and precision, be it for a silk blouse or poison gas or anything whatsoever.’<sup>10</sup> The underlying irrationality of it emerges in Schmitt’s contrasting the production process itself, that is technology which he describes as being ‘dead’ with

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<sup>8</sup> McCormick, J.P 1997: 98.

<sup>9</sup> Nehamas, A 1996a: 224.

<sup>10</sup> Schmitt, C 1996a: 14-15.

technicity<sup>11</sup> which is 'alive' and embracing a belief 'of an activist metaphysics, the belief in limitless power and domination of man over nature even human nature ...[which] can be called fantastic and satanic but not simply dead, spiritless or mechanized soulessness.'<sup>12</sup>

5. The rise of technicity, the idea of a life-world seemingly without a subject has its equivalent in jurisprudence, as far as Schmitt was concerned, in the construction of a hierarchy of norms most fully expressed in the idea of Kelsen which for Schmitt is a manifestation of the uncritical importation of the laws of science, that is to say the laws of cause and effect into the realm of human social relations. The net result is that the reality of man is distorted by the worship of the rational at the expense of the irrational that is expunged. The judge in Schmitt's interpretation of Kelsen's schema is reduced to an automaton whose expression of the law does not register as anything other than a confirmation of the impersonal norm over which he has no control in shaping. Just as the judge is reduced to nothing more than a cog in the machine so the state itself becomes nothing more than the machine itself, that is to say it is nothing more than a collection of norms.<sup>13</sup> This is reflected in his statement that '[a]t the foundation of his identification of state and legal order rests a metaphysics that identifies the lawfulness of nature and normative lawfulness. The pattern of thinking is characteristic of the natural sciences. It is based on the rejection of all 'arbitrariness' and attempts to banish from the realm of the human mind every exception.'<sup>14</sup> Schmitt's conception of the legal process refuses to countenance the extinction of the personal element which cannot be explained by the norm or necessarily any other identifiable rational processes which occur independently of the judge's personal will. Thus he claims that 'every concrete juristic decision contains a moment of indifference from the perspective of the content, because the juristic deduction is not traceable in the last detail to its premises and because the

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<sup>11</sup> It is worth noting here the difference in meaning that Schmitt places on technology that is *Technik* with technicity, that is *Technizität*.

<sup>12</sup> Schmitt, C "The Age of Neutralizations and Depoliticisations (1929) Matthias Konzett and J.P McCormick, *Telos* 96 (summer 1993) from McCormick, J.P 1997: 44.

<sup>13</sup> Emerson considers that Kelsen is insistent that his norm-based structure requires that 'the concept of will in any psychological sense must be banned from the philosophy of law as forming part of the juristically indifferent land of metajurisprudence....The legal person is not the real person but a legal construction for the purpose of attribution. This procedure leads Kelsen to absorb the State wholly into the formalism of the law.' Emerson, R 1928: 169-170.

<sup>14</sup> Schmitt, C 1985: 41.

circumstances that require a decision remains an independently determining moment.<sup>15</sup> What is seen here is the idea of the decision albeit at a micro-level which cannot be explained by any existing external structure of reasoning which is independent of the decision maker. It is thus an expression of decisionism, the idea that decisions even at this micro-level have an underived quality which means that law-making cannot be reduced to a set of machine-like impersonal norms which Kelsen allegedly claims it to be.

6. The irreducible personal element for Schmitt renders the state's production of norms meaningless without being brought to life as law through judicial decisions. The substance of judicial decision without which norms would have no practical meaning or impact legally are dependent on the fact of the decision for their realization or more disturbingly their non-realization. The decision is everything and decisions which are anti-normative in content are capable of having the force of law in any legal system. To simply reduce the existence of law to the form of norms and not to be alive to the way they are expressed actually renders one blind to the possibility of the law being deformed and ultimately becoming a tool for coercion. For Schmitt, Kelsen wrongly attempted to exclude the operation of personal will at the point where mediation occurs between norm and decision. It furthermore takes no account of the most explicit part of the law making activity, namely the legislative process itself which through the operation of quantitative majoritarian democracy leading to temporary opportunistic alliances results in the production of insincerely founded norms.<sup>16</sup> The excessive legal formalism of Kelsen's normative account of law with its artificial separation of politics and sociology from jurisprudence renders an account which is both completely incapable of capturing the reality of the legal process and empty of any moral content.<sup>17</sup>

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<sup>15</sup> Schmitt, C 1985: 30. In similar vein he claims that the 'constitutive, specific element of a decision is, from the perspective of the content of the underlying norm, new and alien. Looked at normatively the decision emanates from nothingness' (Schmitt, C 1985: 31-2). It would be interesting to speculate how Schmitt would have received the idea of Dworkin's Herculean judge. Schmitt's horror at the rise of the machine as the point of departure for the analysis of law and other social relationships would doubtless have been reinforced as Dworkin endeavoured to close and seal the gap, which for Schmitt the legal positivists had threatened to do, but behind an anti-positivist rhetoric as expressed in *Law's Empire*.

<sup>16</sup> McCormick, J.P 1997: 216. This mirrors Rousseau's aversion to factionalism which he regarded as being destructive of social unity that for him was by the institutionalisation of the general will (Rousseau, JJ 1993).

<sup>17</sup> Schmitt, C 1985: 18-22; Schwab, G 1989: 48.

7. The idea of the exception lying at the centre of Schmitt's definition of sovereignty can be seen to be embedded in his analysis of the transition from norm to concrete decision. Here the point at which a decision can be made cannot be completely accounted for by reference to the norms that are alleged to guide it. The decision is therefore surrounded by relevant norms although they ultimately do not fully determine it. Magnifying the scale of observation to that of the state, rather than consisting of simply a machine which can be explained exclusively by reference to such norms, for Schmitt, it also embraces the personal in the form of lawmaking and administration as concretely manifested by the decisions of judges, legislators and other state officials. The idea of state as machine seemingly simply comprising norms to the final degree is the product for Schmitt of the triumph of the enlightenment which rejected "the exception in every form".<sup>18</sup> The idea of law became equated with statute and that of statute with the state.<sup>19</sup> This idea of the law state, that is the Rechtsstaat, also suited its main advocate the liberal bourgeoisie who 'wanted a god [although] its god could not become active; it wanted a monarch but it had to be powerless; it demanded freedom and equality but limited voting rights to the propertied classes.'<sup>20</sup> The law of the state however for Schmitt did not exhaust its existence since preceding law is authority or commands from above.<sup>21</sup> Kelsen's reductionism excluded the idea of will falling outside the norms of the state and ultimately being their source not only in his analysis of the legal process but in his commitment to the suppression of the original underived earthly will namely that of sovereignty.<sup>22</sup> For Kelsen in contrast to Schmitt 'sovereignty can only be the quality of a normative order as an authority that is the source of rights and obligations.'<sup>23</sup>

8. As a result, Schmitt considered that the objectivity that Kelsen claimed for himself 'amounted to no more than avoiding everything personalistic and tracing the legal order back to the impersonal validity of the impersonal norm.'<sup>24</sup> More widely as a critique of positivism as up until then it had expressed itself, he considered that its

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<sup>18</sup> Schmitt, C 1985: 37.

<sup>19</sup> Schmitt, C 2004: 18.

<sup>20</sup> Schmitt, C 1985: 59.

<sup>21</sup> Schmitt, C 2004: 18.

<sup>22</sup> Kelsen considers that the 'concept of sovereignty must be radically repressed' (Kelsen 1920: 120 as quoted in MacCormick J.P 1997: 214).

<sup>23</sup> Kelsen, H 1945: 255.

<sup>24</sup> Schmitt, C 1985: 29.



supporters failed to understand that legal decision-making was ultimately personal in character and ultimately such decisions could not be derived from the positive legal norm that is to be applied.<sup>25</sup> In essence therefore, Schmitt transferred such an approach from the domain of daily judicial decision making in which the personalism manifested by the judge to the macro level, that is to say to the level of constitutions, states and the general system of law. At this level, Schmitt considers that Kelsen seeks to claim the purity of law, in the name of scientific objectivity, separating normative jurisprudence from its sociological variant and politics- an orientation which enables him to remove the personal from the fabric of the state conceptualising it as nothing more than a collection of norms. The validity of such norms is not determined by their contents but by their perceived relationship with 'higher' norms and ultimately tracing their validity back to a basic norm which in Kelsian terms is the product of presupposition and hence in that sense is a fiction.<sup>26</sup> This arises out of the product of the will of a decision-maker, most obviously a constitutional majority which gives rise to the first constitution upon which a given legal system ultimately derives its authority. Hence for Schmitt, the personal, despite Kelsen's claim to the contrary had not been removed but arguably suppressed or perhaps more accurately distanced.<sup>27</sup> Any legal system is ultimately predicated upon a personal decision which cannot be derived from any existing normative system and the content of any normative system is ultimately dependent on changing majorities increasing the possibility of endless change from a substantive perspective. Flowing from an explanatory framework which seeks to explain the law and its application simply by reference to systems of norms, sovereignty is in terms of its human manifestation, suppressed and replaced by what has been described as an hypothetical device namely the basic norm whose function is to make sense of already existing normative frameworks in an act of what Derrida would consider to be a form of fabulous retrospectivity, which provides

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<sup>25</sup> Schmitt, C: 1985: 30.

<sup>26</sup> As specifically stated by Kelsen in his explanation of the basic norm (Kelsen, H 1986: 117).

<sup>27</sup> This emerges when Kelsen seeks to respond to the question of how a particular constitution comes into being. He considers that it is the product of an amendment of a previous constitution and is in fact the 'grandchild' of the historically first constitution which gives rise to the basic norm (Kelsen, H 1986: 114). This emphasises continuity rather than rupture by attributing the creation of two constitutions to their predecessors, thus suppressing the personal character of the amendment process that cannot be ultimately explained by the amendment provisions, and distances the rupture to an historically first constitution which is 'two generations' away from the existing constitution and suppresses the decisionism occurring outside any existing legal normative structure by the explanatory device of the basic norm fiction.

foundation and avoids indefinite regress.<sup>28</sup> In contrast, the idea of sovereignty remained central to Schmitt's thinking, a centrality that emerged with the rise of modernity characterised by the removal of the end-telos and the need to negotiate and more importantly respond effectively to the unforeseen emergency in respect of which an existing normative system could be fundamentally undermined because to function required the existence of a normal situation. It was the potentiality of the exception with its negation of normality that for Schmitt pointed to the existential need for a sovereign who was able to determine the existence of such exceptional circumstances and had the authority to suspend the existing system of norms to the extent needed to deal with such circumstances and which could ultimately result in the negation of existing formal constitutional arrangements in order to preserve what fundamentally united the collective against its enemy. It was the circumstances of such conflict that for Schmitt lay at the heart of human existence and which in the final analysis necessitated and legitimated the state structured around the sovereign. The state was the central institutional expression of a people's political existence and it was their political existence that most fully expressed their existential being.

9. Schmitt claimed that at its core the idea of the state preceded the law. In turn, the state presupposed the political and the political was expressed by conflict between friend and enemy through which a people's homogeneity and identity would be forged.<sup>29</sup> The idea of the political as being the centrally existentially defining concept began to emerge in some of his earlier writings<sup>30</sup> but was explicitly explored in *Concept of the Political*. Like Hobbes whose writings influenced Schmitt considerably, his ideas developed against the background of political and social instability. Both men considered that Man was inherently dangerous, that conflict was Man's natural condition and that to ensure stability and order required authoritarian solutions predicated upon a strong state.<sup>31</sup>

10. The implications of this were profound for Schmitt. The idea of the peoples' homogeneity expressed in the form of the state rested upon that of exclusion of "the

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<sup>28</sup> Derrida, J, 1986.

<sup>29</sup> Schmitt, C 1996c.

<sup>30</sup> For example in 1996a and 1988.

<sup>31</sup> In the case of Schmitt, his ideas develops against the background of the Weimar's republic's instability.

other” as a result of the playing out of what he termed as ‘the political’.<sup>32</sup> This for Schmitt was a transcendent existential category upon which the state rested. Contrary to the idea of the social contract which ultimately was based upon the ontological supremacy of the individual, Schmitt’s idea of the political was based upon the supremacy of the collective, that is the friend/enemy distinction around which peoples coalesced as units of governance in opposition to other peoples.<sup>33</sup> Hence his opening statement in the *Concept of the Political* that ‘[t]he concept of the state presupposes the concept of the political.’<sup>34</sup> The reason for the state’s creation was not a matter of indifference as in Kelsen’s jurisprudence. However it was not necessarily the individual’s desire to survive or a collective desire to have the benefits of some form of distributive justice<sup>35</sup> which required the coercive power of the state, or a rejection of the role of a given state as operating to secure the privileged position of the capitalist in his exploitative relationship with the working classes to name three examples that might necessarily be the reason for the creation of people and its resultant state.<sup>36</sup> It was not that such qualities or purposes might not form the focus for social conflict. It was that for Schmitt, the political denoted a condition which took on its clearest expression when the intensity of conflict between people, irrespective of what had concretely triggered it, had reached its most intense expression in which the issue of who was friend or enemy was acutely posed.<sup>37</sup> It was the point at which there was an existential threat to one’s way of life.<sup>38</sup> The possibility for peaceful resolution was past and violent conflict involving a life and death struggle between friend and enemy occurred in the form of military conflict. War for Schmitt was the ‘existential negation of the enemy’<sup>39</sup> and the most extreme expression of enmity. The friend/enemy distinction which was increasingly posed the more intense conflict became was not for Schmitt a normative claim<sup>40</sup> but an existential one which

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<sup>32</sup> As in Schmitt’s *The Concept of the Political*.

<sup>33</sup> It has to be said however that there is an individualistic trace embedded in his explanation of the friend/enemy antithesis. See below.

<sup>34</sup> Schmitt, C 1985: 19. He thus reverses the relationship between the state and the political, that is to say, he rejects the argument that political conceptions derive from the state (Kennedy, E 1998: 99).

<sup>35</sup> As Kant would explain the reason for the need for a state (Guyer, P 1992:4-5 and 351-3).

<sup>36</sup> Dyson, K 1980: 104.

<sup>37</sup> ‘The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping’ (Schmitt, C 1996c: 29).

<sup>38</sup> Schmitt, C 1996c: 49.

<sup>39</sup> Schmitt, C, 1996c: 33.

<sup>40</sup> This was profoundly challenged by Strauss in his illuminating analysis of *The Concept of the Political*. See Strauss, L 1996: 83-107.

explained the condition of violent conflict which was frequently exhibited in humankind's history.<sup>41</sup> While Schmitt therefore did not claim that social conflict could only be solved by war, he did consider that the political and ultimately politics rested on the ever-present possibility of war breaking out. The possibility of violent conflict therefore always lurks in the background and 'it is the leading presupposition which determines in a characteristic way human action and thinking and thereby a specifically political behaviour.'<sup>42</sup>

11. At the heart of the idea of the political there is at least at surface level a contentless form and circularity,<sup>43</sup> the only defining point, leaving aside the particularities of any given conflict, being its intensity within the public domain.<sup>44</sup> The political and its associated friend/enemy relationship did not possess identifiable social substance in the form of conflict for example over race or culture or economics. No identifiable category such as the aforementioned exhausted the meaning of this transcendent concept and the intensity associated with it could potentially attach to any such category or combination of categories and hence potentially to no identifiable category at all. As Schmitt stated '[o]nly the actual participants can correctly recognise, understand, and judge the concrete situation and settle the extreme case of conflict.'<sup>45</sup> There was therefore a sense in which the moment of eruption of intense conflict could defy prediction and also a sense in which the concrete circumstances leading to such an eruption could defy easy classification. As Schmitt stated 'the morally evil, aesthetically ugly or economically damaging need not necessarily be the enemy [whereas] the morally good, aesthetically beautiful and economically profitable need not necessarily become the friend in the specifically political sense of the word.'<sup>46</sup>

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<sup>41</sup> Schmitt, 1996c: 33. Schmitt claims that 'the definition of the political...neither favours war nor militarism, neither imperialism nor pacifism.'

<sup>42</sup> Schmitt, 1996c: 34. The idea of the possibility of a violent clash between friend and enemy erupting as conflict intensifies has also been characterised as expressing an 'ever-lurking potential' (Bockenforde, E.W, 1998: 40).

<sup>43</sup> What is intensely felt by the collective is political and what is political is intensely felt. If the social existence of the collective is embraced in a Hobbesian sense by one individual who has a sovereign function, then the political becomes individually determined. This is a logic that is played out in Schmitt's thoughts given his attitude to democracy and representation.

<sup>44</sup> Schmitt specifically makes the point that the enemy is public in nature and only exists when 'at least potentially, one fighting collectivity of people confronts a similar collectivity' (Schmitt, C 1996c:28).

<sup>45</sup> Schmitt, C 1996c: 27.

<sup>46</sup> Schmitt, C 1996c: 27.

12. There is thus at the heart of the political an underived quality and hence the point at which the exception applies, that is to say this point cannot be deduced from some pre-existing normative framework.<sup>47</sup> This means that there is no limit to the grounds used by a collective to arrive at the conclusions regarding who is the potential enemy and at what point a threat to its existence is posed by that 'enemy'. There is seemingly no privileged position from which to judge the legitimacy of a collective's decision.<sup>48</sup> No overarching external configuration of values or principles, whether they be economic, moral, aesthetic or religious can be relied upon. This does not mean to say however that Schmitt was claiming that no arguments of this kind might arise in the process of the conflict, but that each such conflict will generate its own concrete configuration of disputation and there is no inherent limit as to what these might be. The logical outcome of this lack of substantive specificity is that it is not impossible, however improbable, for one nation to declare an intense hatred of another such that physical conflict erupts for no apparent reason or for reasons that might be regarded as truly bizarre.<sup>49</sup> Just as the reasons for the identity of an enemy are not constrained by any overarching normative limits, so too is the point at which antagonisms reach the threshold at which violent conflict ensues. In terms of conduct, there is no privileging of peaceful politics conducted within normative frameworks over violent conflict. Furthermore there is no privileging of one type of violent conflict over another so that there is no inherent reason why defensive war should be preferred over offensive ones in order to safeguard oneself from the apparent enemy<sup>50</sup> and thus 'no first strike' doctrines have no privileged position over pre-emptive ones.<sup>51</sup>

13. Having said that, there appears to be no explicit normative constraints as to the circumstances in which conflict might arise. There are nevertheless a set of

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<sup>47</sup> The advent of war, the most intense expression of the political, 'has no normative meaning but an existential meaning only, particularly in a real combat situation with a real enemy' (Schmitt, C 1996c:49).

<sup>48</sup> See below for a qualification on this point.

<sup>49</sup> For example, to cite the war that occurred between El Salvador and Honduras ostensibly over a football match in 1969 although its roots were economic and nationalist in character. See <http://www.onwar.com/aced/data/sierra/soccer1969.htm>. accessed on 1st August 2007.

<sup>50</sup> Howse, R 1998: 66. Schmitt's formulation that violent conflict should only be justified if there is an existential threat to one's way of life is sufficiently vague to justify an adventure to safeguard oil supplies- a reason which some commentators have suggested lies at the heart of invasion of Iraq in 2003.

<sup>51</sup> This is graphically illustrated by the defence policy of the United State's government which is committed to the pre-emptive strike doctrine.

assumptions upon which Schmitt operates in his development of the political. He operates on the basis that the operating political community comprises of 'a pluriverse'<sup>52</sup> of states rather than a global state or other kinds of formations. He considers that the waging of war in the name of universal categories such as 'humanity' will lead to particularly intense conflict manifesting the most extreme inhumanity as the enemy is not even considered to be human.<sup>53</sup> He goes on to assert that the concept of humanity excludes the concept of the enemy 'because the enemy does not cease to be a human being.'<sup>54</sup> The outcome of a war fought in the name of a universal category such as 'humanity' therefore is not the removal of 'a particularly intensive political meaning'<sup>55</sup> but of the friend/enemy distinction central to Schmitt's idea of the political.<sup>56</sup> On the one hand, any reason appears to be valid by mere fact of its existence reflecting the existential character of the friend/enemy distinction and Schmitt's endeavour with it to move beyond the universal categories of good and evil. On the other hand, the potentially endless panorama of existential possibilities propelling the conflict between and separation of friend from enemy appears to exclude universal categories because of existential specific nature of collectivities in Schmitt's pluriverse of such entities.<sup>57</sup>

14. The state for Schmitt amounted to a socio-political phenomenon that expressed the existence of a unified people whose manifestation was the product of the

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<sup>52</sup> Schmitt, C 1996c: 53. Schmitt accepted that the idea of statehood as the primary unit of international social organisation was not valid for all time but was historically specific (Schmitt, C 2003: 126).

<sup>53</sup> Schmitt, C 1996c: 54. In footnote 23 discussing the justification for war he ironically declares that '[m]aybe one day it will be enough if a people were unable to pay their debts.'

<sup>54</sup> Schmitt, C 1996c: 54.

<sup>55</sup> Schmitt, C 1996c: 54.

<sup>56</sup> The tendency towards treating certain groupings as excluded from humanity and hence subject to annihilation clearly troubles Schmitt. It is all the more paradoxical that he found himself, in the light of his conclusion that the Weimar Republic was incapable of avoiding its own self-destruction because of its degenerate liberal democratic character and of supporting a regime which went on to undertake a technologically sophisticated and efficient extermination of much of the European Jewish population whose humanity was clearly denied. Again the idea of Schmitt's seeming opposition to the exclusion of a people's membership of humanity suggests an underlying moral framework at work in this attitude.

<sup>57</sup> Howse claims that what Schmitt does is to 'turn pacifism against the natural law just war tradition in order to remove any moral constraint from the conduct of war' and 'how little his approach is non bellicose' (1998:66). This might be overstated since it can be argued that Schmitt is not saying that there should be no moral constraints but rather that given the fundamental nature of the political and the friend/enemy category, the reality is that such moral constraints will not be effective. Paradoxically it could be argued that precisely because of the ever present possibility of the emergence of the friend enemy distinction and of war, that this encourages states to be more careful and circumspect in the way they behave towards others in order to lower the risk of war.

separation of friend from enemy.<sup>58</sup> Its existence was therefore fundamentally based on the continuing exclusion of non-homogeneous elements who were the enemy or had the capacity to become so. Within the state itself, social relationships were predicated upon this continuing unity that bound people together on the basis of some sense of compelling solidarity forged in conflict whether it was for example based on religion, culture or economics. It was a pacified unity<sup>59</sup> where differences in so far as they existed were managed by the institutions of the state in such a way as to avoid the eruption of conflict which if allowed could result in civil war. This in turn could lead to the destruction of that unity, the reconfiguration of the population, the reorganisation of statehood involving the destruction of the existing state reflecting the emergence of alternative collectivities. While the interior of the state constituted a domain where the likelihood of clearly demarcated friend enemy polarity was normally remote, the possibility remained. The same could not be said for the relationship between states where there existed a substantially greater risk of the intensity of conflict erupting into a violent struggle between friend and enemy which were clearly defined in the process, that is to say the playing out of the political on an international scale.

15. The friend enemy distinction suggests a particular mode of existence in which the survival of the collective was valued above individual existence. It appears to be profoundly anti-individualist in character. The collective's will while having a similarity to Rousseau's general will does not countenance the idea of the social contract as an explanatory and legitimating narrative. For Schmitt any such contract was individualist in nature and was capable of undermining the collective will that was predicated on its collective unity supported by its exclusion of heterogeneous elements. Democracy could only operate meaningfully within such a unity since only within this context could it operate in a way that did not negate the collective's ability to identify the enemy and thus ultimately to protect itself.<sup>60</sup> Individualism cut across a governance primarily based around the centrality of obedience most profoundly

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<sup>58</sup> Schmitt endeavoured to capture the idea of the sovereign state by characterising it within the context of the political as 'the specific entity of the people' and in the final analysis it is the 'ultimate authority' (Schmitt, C 1996c: 19-20).

<sup>59</sup> 'The endeavour of a normal state consists above all in assuring total peace within the state and its territory' (Schmitt C, 1996c: 46).

<sup>60</sup> Schmitt, C 1988: 14; Rousseau, 1973.

expressed in a preparedness to sacrifice one's life to protect friend and destroy enemy and an ordered society which are in line with his authoritarian perspective.

16. Therefore the prospect of the liberal state being able to determine who is friend and who is enemy is unacceptably problematic for Schmitt although the need for such determination remains. 'The negation of the political which is inherent in every consistent individualism leads necessarily to political distrust toward all conceivable political forces and forms of state and government.'<sup>61</sup> Ultimately, the destruction of the enemy, a violent process 'must demand the sacrifice of life'<sup>62</sup> and such a demand is fundamentally incompatible with individualism. A strong state, necessary to confront the enemy, is incompatible with liberal freedoms which are the product of a limited state. The enemy therefore is a public one and here Schmitt draws on the distinction made by Plato who distinguishes between public and private enemy. 'An enemy he states only exists when "one fighting collectivity of people confronts another a similar collectivity."<sup>63</sup> The decision to determine whether an enemy exists and hence the steps necessary to protect the collectivity leads to Schmitt's exploration of dictatorship and sovereignty.

17. Schmitt's conception of democracy therefore was not as one would imagine a liberal state. The pre-condition for mass democracy was homogeneity.<sup>64</sup> Reflecting what Schmitt saw to be the interpenetration of state and people arising out of the development of mass democracy, an intervening organisation in the form of parliament-based representation through discussion was incapable of realizing the expression of the peoples' will.<sup>65</sup> The ideal solution<sup>66</sup> for Schmitt to the continuing

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<sup>61</sup> Schmitt, C 1996c: 70.

<sup>62</sup> Schmitt, C 1996c: 71.

<sup>63</sup> Schmitt, C 1996c: 28.

<sup>64</sup> Schmitt, C 1988: 15.

<sup>65</sup> Schmitt, C 1988: 15.

<sup>66</sup> Schmitt's attitude to parliamentary democracy displays the tension between the idealist and pragmatic elements of his writing. At the beginning of *Parliamentary Democracy* he states in the preface to the second edition that 'the parliamentary enterprise today is the lesser evil, that it will continue to be preferable to Bolshevism and dictatorship... that it would have unforeseeable consequences if it were discarded' (Schmitt, 1988:2). On the other hand, he characterises liberalism 'as a consistent comprehensive system' that embraces the idea that truth is the outcome of 'eternal competition of opinions' and that in contrast to the truth, discussion means 'renouncing a definite result' (Schmitt, 1988:35). In a similar vein, he considers that parliament is against the will of the people...an institution based on discussion by independent representatives has no autonomous justification for its existence. (Schmitt, C 1988:15). If anything, McCormick's claim that Schmitt was



prospect of government by discussion however was not a return to some form of representation more in keeping with a medieval configuration as expressed by the Catholic Church<sup>67</sup> but executive- led direct democracy achieved through the agency of plebiscites or acclamation.<sup>68</sup> For Schmitt, this alone within the context of the crisis of the Weimar republic, is capable of meeting the challenge posed by the creation of the total state. Democracy involving a direct relationship between the governed and the governing lies at the heart of this proposition. Real democracy is one where 'dictatorship and Caesaristic methods not only can produce the acclamation of the people but can also be a direct expression of democratic substance and power.'<sup>69</sup> The crises of the liberal state in fact for Schmitt amounted to a subversion of democracy at the hands of liberalism since the liberal and democratic elements were counter-posed to one another. Democracy needed to be rescued from 'from its concealment by liberal elements.'<sup>70</sup> Secret ballots, a central mechanism for the indication of political will, within the liberal mode of democracy needed to be replaced by the 'original democratic phenomenon' of acclamation through the 'accepting or the rejecting shouts of the assembled crowd.'<sup>71</sup> <sup>72</sup> Democracy was for Schmitt, expressing his allegiance to Rousseau's idea, about ensuring the identity of the governed and governing.<sup>73</sup> It did not require, and indeed ideally should have excluded revocable consent and representative institutions, since these amounted to

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inconsistent in his attitude towards parliament underplays the reality of his position which was contemptuous of it within liberal democracy.

<sup>67</sup> Schmitt has considerable sympathy for forms of governance wherein authority is derived from above as with the Catholic Church itself. Legitimate representation is predicated upon personalised authority as expressed in the following: '...the idea of representation is so completely governed by conceptions of personal authority that the representative as well as the person represented must maintain a personal dignity- it is not a materialist concept. To represent in an eminent sense can only be done by a person, that is not simply a 'deputy, but an authoritative person or an idea which if represented, also becomes personified' (Schmitt, C 1996a: 21).

<sup>68</sup> Schmitt, C 1988: 16. The anti-democratic character from a representative liberal perspective of plebiscitary democracy is suggested by Weber's characterisation of it as a 'variant of charismatic authority, which hides behind a legitimacy that is *formally* derived from the will of the governed. The leader (demagogue) rules by virtue of the devotion and trust which his political followers have in him personally.' Modern examples (as opposed to ancient ones) that Weber provided include the dictatorship of Cromwell, the leaders of the French Revolution and the First and Second French Empires (Weber, M 1978: 268).

<sup>69</sup> Schmitt, C 1988: 17.

<sup>70</sup> Schmitt, C 1927-8: 202 quoted in Jacobson A.J and Schlink, B 2000: 385.

<sup>71</sup> Schmitt, C 1927: 34 quoted in Jacobson A.J and Schlink, B 2000: 385.

<sup>72</sup> This in effect might be thought as a form of governance which in substance is akin to a form of descending authority (rather than the ascending variety associated with genuine democracy) which if anything reduces the people to a manipulated plaything used to legitimate the will of an exclusive political elite as suggested by Preuss, U 1987: 109.

<sup>73</sup> Schmitt, C 1988: 14.

qualities that could easily be distorted by heterogeneous political parties and interest groups who undermined the unity upon which, in Schmitt's view, meaningful democracy was based. Voting more generally appeared to have the potential to disrupt this unity or falsely claim its existence since he considered that it should only permit a latent and presupposed agreement and consensus to become evident.<sup>74</sup>

18. This concern about the way in which participatory procedures can be distorted is consistent with his views on the dispensation of the involvement of the electorate altogether. In his analysis of the law making provisions available in the Weimar Constitution he provided a remarkably positive account of government by decree in states of emergency declared under Article 48 of the Constitution. He posed its necessity as in part being the outcome of the fundamental contradiction between the first part of the constitution which concentrated upon the functional and value neutral matters detailing the institutions of government and their jurisdictions and the second part which provides protection to certain substantive individually based rights.<sup>75</sup> The difficulty with the first part was that because of its value neutral orientation, there was nothing to prevent the constitution being amended out of existence using the procedures in Article 76.<sup>76</sup> The implication here is that this very value neutrality, within the context of party politics would render the state incapable of identifying threats externally or internally that might profoundly undermine it. The difficulty with the second part was that the privileging of such individual rights and hence, in his view of minorities, negated democracy itself and was capable of destroying the first part of the constitution.<sup>77</sup> Schmitt's preferred plebiscitary democracy could not overcome this contradiction whereas emergency governance under Article 48 could substantially do so in that various articles protecting civil rights could be suspended.<sup>78</sup>

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<sup>74</sup> Schmitt, C 2004: 28. This ties into his general comments about the nature of representation described above.

<sup>75</sup> Such as freedom of movement (art 111), freedom of speech (art 118), inviolability of home (art 115), marriage (art 119) and peaceful assembly (art 123). Schmitt considered that the contradiction was so profound between the two that one part or the other should be repealed since rather significantly 'the constitution is a unity' (Schmitt, C 2004: 47). The significance here is that this very much reflects the idea of the people as a pre-constitutional unity emerging out of the exclusion or separation of enemy from friend.

<sup>76</sup> Schmitt, C 2004: 48-49.

<sup>77</sup> Schmitt, C 2004: 41.

<sup>78</sup> Article 48(2) allows suspension of Arts 114, 115, 117, 118, 123, 124, and 154 which concern the rights to liberty, the inviolability of the home, privacy, freedom of speech, peaceful assembly, the right to form societies and the right to inheritance. There was considerable controversy over the latitude of Art

Therefore for Schmitt, the Reichpresident's emergency powers were superior to ordinary law making in that it could not set basic rights aside and er 'the extraordinary lawmaker can, by contrast, do both and apart from everything else, thereby already surpasses the ordinary legislature and is superior to it in a novel way.'<sup>79</sup> Such superiority was strengthened further as under the emergency powers of Article 48, the Reich President could issue decrees which effectively overrode provisions in the first part of the constitution which otherwise could only be altered by constitutional amendment in accordance with the provisions of Article 76.<sup>80</sup> This of course meant that the powers of the Reich President under Article 48 also surpassed those available to him and the electorate in plebiscitary decisions.

19. The ambiguity latent within Rousseau's writing between the existence of the anti-individualistic general will and the individually based social contract upon which it is based is for Schmitt firmly resolved in favour of the collective. However he went past this point with his embrace of the advantages of the powers in Article 48 to open the door to permanent rule under these provisions. If anything, his position in terms of the shape of these powers was Hobbesian as he proclaimed that for the extraordinary lawmaker, referring to the Reich President's article 48 powers, the distinction between statute and statutory application, legislative and executive, was neither legally or factually an obstacle. The extraordinary lawmaker combined both in his person."<sup>81</sup> Furthermore 'he can directly issue an order that would "in itself" constitute a police ruling that could be understood as stemming from legal norms governing police action, thereby evading the administrative law instruments established to provide legal recourse against the police.'<sup>82</sup> Here, one sees a figure who combined the unified executive and legislative role of a Leviathan-like figure and who represented for Schmitt the embodiment of the Machtstaat, the executive state which, in contrast to the Rechtsstaat coalescing around it, possesses the ability to tell friend from enemy whether manifesting itself internally or externally.

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48(2) with Schmitt arguing that it did not limit the Reichpresident's suspensory powers to the above articles.

<sup>79</sup> Schmitt, C 2004: 73-74.

<sup>80</sup> This includes the requirement that two-thirds of the members of the Reichstag are present and two-thirds of them vote in favour of the constitutional amendment.

<sup>81</sup> Schmitt, C 2004: 71.

<sup>82</sup> Schmitt C 2004: 71.

## Conclusions

20. For Schmitt, the key question in political philosophy in the age of modernity is that without a transcendent God, who would take his place 'as the highest and most certain reality and thus serve as a point of legitimacy in human reality?'<sup>83</sup> Was it to be the community or history? For Schmitt, the answer was the community as opposed to history.<sup>84</sup> At the heart of that reality was human existence and at the heart of that was death or at least the possibility of struggle that could lead to it. How was this the case? At the centre of the human condition is the political for Schmitt. The political in its starkest form involves a clash between friend and enemy in the form of life and death struggle that war gives rise to. In essence it is the possibility of that struggle that infuses man with his human quality and the denial of the possibility of that struggle that leads to an existential death. It is the clash or potential clashes between collectives that provide for Schmitt the basic social existence of man, an existence that is reminiscent of Hobbes' state of nature but is depicted at collective rather than an individual level. Furthermore, arguably, whereas for Hobbes that task is to escape the state of nature through the creation of the sovereign, for Schmitt such an escape is illusory and indeed given his evaluation of the existential requirements of being human, it is undesired.<sup>85</sup> What was the source of this illusion which opens the way to the erroneous belief that the friend/enemy antithesis can be avoided through, *inter alia*, the adoption of universal categories such as 'humanity' which paradoxically can lead to wars that are far more inhumane than those fought around causes that are specific to specific collectivities and which therefore do not seek to deny to the opposing side its membership of humanity? For Schmitt, the cause for such developments was, influenced by Weber, explained primarily through the rise of technology and the cultural blindness it provokes as exhibited by the spirit of technicity that co-exists with it. That spirit considers that all problems can be solved through technology's use, that is to say it gives rise to the religion of endless technical progress.<sup>86</sup> Technology appears to be neutral and thus capable of serving everyone in

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<sup>83</sup> Schmitt, C 1996b: 103.

<sup>84</sup> Therefore Schmitt distinguished himself from Hegelian inspired notions of historical determinism.

<sup>85</sup> The contrast between Hobbes' state of nature and Schmitt's equivalent as captured by the friend enemy antithesis is usefully explored by Strauss (Strauss, L 1996).

<sup>86</sup> Schmitt, C 1993:139. The relationship between Schmitt's writings and those of others including Weber are explored in McCormick, J.P 1997. The character of economic-technical thinking is caught

a world in which a process of depoliticisation dominates as manifested by the belief in the possibility of creating permanent peace and understanding.

21. The illusory possibility that the necessity of such struggle could be avoided paralysed the European elite who for Schmitt were central in what he perceived to be a life and death struggle that in all probability had to be undertaken with the Russian communist state.<sup>87</sup> Here for Schmitt, the economic-technical thinking at the heart of the Communist project in effect was harnessed by the collectivity of the Russian soviet state so that the 'anti-religion of technicity has been put into practice on Russian soil' and posed a grave threat.<sup>88</sup> This association of the Russian soviet state with the Anti-Christ points in substance to the depiction of the struggle between friend and enemy, but in religious terms. The spiritlessness of technicity was pitted against the institution of the Catholic Church which Schmitt considered to be the paradigmatic institution that historically prevented man from losing himself spiritually. The difficulty was however that the Catholic Church, had for Schmitt, as a *complexio oppositorum*, that is to say a complex of opposites, become an institution that was capable of embracing incompatible movements and ideas and hence avoiding antithesis. It had come to undermine the unity of the state rather than strengthen it.<sup>89</sup> Hence the place for the political which was constructed by Schmitt to take account of the age of modernity and the predominant forms of governance associated with it but as a rejoinder to the rise of technicity. It became central to the capacity of the institution which had emerged out of the ashes of the empire of the church, namely the state, from which the capacity to engage in such struggle had been undermined through the rise of technicity. However in the church as Slade has argued in terms of its representational character was the template for the form of governance that could potentially explicitly engage in the political.<sup>90</sup> The church had derived its authority

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by Schmitt's claim that 'a completely irrational consumption conforms to a totally rationalised production' (Schmitt, C 1996a: 14).

<sup>87</sup> This is sharply depicted in the opening words of Schmitt in 'The Age of Neutralisations and Depoliticisations' where he states that '[w]e in Central Europe live under the eyes of the Russian' (Schmitt, C 1993: 130).

<sup>88</sup> Schmitt, C 1993:131.

<sup>89</sup> Schmitt, C 1996a: 7.

<sup>90</sup> Francis Slade provides a useful exploration of the influence of Catholicism upon Schmitt's conception of the political. She is careful to point out that the church was the paradigm for his conceptualisation of representation within the domain of the political since 'the political power of Catholicism rests ...on her absolute realization of authority' in contrast to economic thinking that knows nothing of representation (Schmitt, C 1996a: 17-18; Slade, F 115-117). However it was not a



from the sacrifice at the centre of the religious narrative to which it was committed and had developed into a centralised hierarchically constructed collective with authority-based leadership which had once been prepared to engage and direct life and death struggle associated in substance with the political.

22. The centralisation associated with church governance now had to be generally transposed to the secular domain within the context of the inevitability of an acute struggle most probably with the Russians which could not be predicted or ultimately catered for by any normative structure. Its necessity was further reinforced by what he considered to be the profound contradiction at the heart of the liberal democratic order between liberalism and democracy whereby there was at best an uneasy compromise between the two which expressed itself in a crisis of legitimacy featuring different groups each clustered around differing conceptions of private interest endlessly fighting for dominance in the name of the overall interests of the *volk*.<sup>91</sup> As a result the capacity of the state to decisively identify and protect itself from hostile forces was fundamentally weakened. Decisive decision-making could only be achieved by the sovereign decision in the name of the people whose will would be expressed by acclaim. Ultimately the clearest expression of such decision making in the face of acute crisis was the declaration of the state of exception which constituted the uniquely held capacity of sovereignty which would in effect cause the suspension of the existing constitution in order to save it. There lay the sovereign's legitimacy.<sup>92</sup>

23. The idea however of the exception and the relation of norm to it requires further investigation as it will be my contention that to fully understand it requires the construction of what I will describe as a grammar of normalities. However before that can occur, a theoretical model has to be developed through which Schmitt's

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paradigm for rule in the civil domain as regards its commitment in the political order to the primacy of the common good which according to Catholic teaching was defined as 'the harmonious development and natural perfection of man' according to the Pope Pius XII in the *Encyclical Letter on the Function of the State in the Modern World* quoted in Slade, F 1996: 121). The character of representation as expressed in the Catholic Church however does not sit easily with the idea of decisions made by the Weimarian president validated by plebiscitary democracy, which for Weber rested on charismatic authority (Weber, M 1978:268). Nor does it sit easily with the idea of sovereign dictatorship which might well also rest on such authority.

<sup>91</sup> Dyzenhaus, David 1996: 135.

<sup>92</sup> Schmitt's idea of sovereignty was therefore deeply embedded in what he perceived to be the international practice of states captured by his phrase 'pluriverse of states'.

model of sovereignty and other models, namely those of Triumphus, Hobbes and Austin will be discussed.

## PART 2

### CHAPTER 6: A Tentative Theoretical Approach

#### *Introduction*

1. The purpose of this chapter will be to tentatively outline a theoretical approach whose elements will then to be used to re-examine the models of sovereignty already covered. Out of this exercise of re-examination, further refinements will be made to the approach and the elements of which it comprises will be brought together and used to illuminate sovereignty's articulation.
2. For the purpose of analysing the models of sovereignty discussed in previous chapters, one of course has to resort to a further model or models with which to make sense of them.<sup>1</sup> This could for example involve models that concentrate upon man's psychic condition, with a view to explaining the models of sovereignty in the light of such needs. It could involve models that seek to root sovereignty in the theocratic categories that dominated metaphysical understanding prior to the advent of modernity and the enlightenment. One could consider that sovereignty should really be explained by reference to theories that seek to explain the nature and development of social power by reference to economic development and resultant inequality as exemplified by Marx, or by reference to the nature of the development of political leadership as an expression of the rationalization of society as explored by Weber or by use of the functionalist approach, developed by Durkheim and exemplified by Parsons or through structuralist approaches as originally developed by Saussure and expounded in the writings of Foucault, Poulantzas, Levi Strauss and Lacan.<sup>2</sup> The reality of course is that the relationship both within and between 'schools' of theorists is complex and contingent upon the criteria applied to determine the configuration of such schools. In any event social analysis is probably enriched by not keeping to one particular theorist, with the aim of producing a tension and contradiction- free account.

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<sup>1</sup> Underlying this of course is the inescapable necessity of the engagement in the process of 'world-making' as exploited by Goodman which rests on the proposition that reality cannot be simply perceived but must also be conceived (Goodman, N 1978: 6).

<sup>2</sup> See Weber's 'Types of Legitimate Domination' in Weber, M 1978.



3. All models of sovereignty so far discussed at the risk of sounding trite, centrally involve the domain of language. The centrality of language to the construction of sovereignty is most obviously captured by Walker's rather unwieldy definition of sovereignty which refers to discursive forms.<sup>3</sup> Beaulac in her paper on Bodin's approach to sovereignty remarks on the role of reality-creation that the word 'sovereignty' possesses, reflecting the more general proposition that words both represent and create such reality in the human mind.<sup>4</sup> The creative character of the word 'sovereign' or 'sovereignty' is reflected in work of authors such as Werner and Wilde<sup>5</sup> and Walker<sup>6</sup> who consider sovereignty to be a speech act drawing on the work of Searle.<sup>7</sup> Searle himself while not specifically mentioning sovereignty devotes a book to the construction of social reality and claims in essence that language, more specifically, performative utterances are central to the creation of what he describes as institutional facts.<sup>8</sup> More specifically it is the symbolic feature of language that in his view is essential for the constitution of institutional facts of which a sovereign would be but one.<sup>9</sup> To begin to further understand the nature of sovereignty and the variation of arrangements associated with it, some of which are illuminated in the models so far covered, it is to this symbolic feature of language which I will now turn.

4. Searle's reference to the symbolic content of language is captured by his observation that words are capable of representing something beyond themselves.<sup>10</sup> Institutional facts for Searle are partly constituted by language because they contain some symbolic element in the form of 'words, symbols or other *conventional* devices that mean something or express something or represent or symbolise something

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<sup>3</sup> Walker considers that sovereignty can be defined as *the discursive form in which a claim concerning the existence and character of supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.* (Walker, N 2003:7).

<sup>4</sup> Beaulac, S 2003: 24.

<sup>5</sup> Werner, W and De Wilde J.H 2001: 287.

<sup>6</sup> Walker, N 2003: 7.

<sup>7</sup> Searle, J 1969.

<sup>8</sup> Searle, J 1995 More will be said below about how Searle's idea of institutional facts is relevant to the study of sovereignty in this thesis.

<sup>9</sup> Searle J 1995: 60 The theory of 'institutional facts' within legal philosophy has been developed by MacCormick, D and Weiberger, O (1986).

<sup>10</sup> Searle, J 1995: 60-1.

beyond themselves 'in a way that is publicly understandable.'<sup>11</sup> One can immediately see the validity of this observation when considering the models just discussed. So for example Hobbes' sovereign is capable of being constituted by an individual whose presence is not simply captured by his biological manifestation but by additional qualities he is considered to possess which separate him from the rest of the community over which he is said to be sovereign. In that sense Searle's observation is encapsulated with regard to sovereignty in the idea that the kings possess two bodies.<sup>12</sup> The physical body that is common to both man and king has attributed to it the qualities associated with two subjectivities,<sup>13</sup> one of which in the case of the sovereign is given priority over the other which as a result is suppressed.<sup>14</sup> If that is the case for men, one immediately has to ask whether the symbolic character of language is not more pervasive than is suggested by Searle and that perhaps that it is that pervasiveness that needs to be interrogated a little more if one is to grasp hold of the role that language plays in the construction of sovereignty.

5. At the level of sociological method one might immediately consider the approaches of symbolic interactionists commencing with Mead and more latterly those of Erving Goffman who focussed on symbolic interchange in the process of personal interaction.<sup>15</sup> At a philosophical level the symbol as a site of the generation of meaning, particularly but not exclusively, through linguistic processes, has been touched upon and explored by a diverse range of thinkers. The idea of the symbol, as being central to the construction of meaning, has its roots in Kantian philosophy and its concerns with the processes of cognition. It emerges as a central feature in the writings of Cassirer, a neo-Kantian who sought to expand Kant's critique of reason to a critique of culture by considering that the symbolic form features in every form of human thought. Other philosophers for whom the symbol was a significant feature include Ricoeur and Lefort.<sup>16</sup> Ricoeur in his earlier works explored the hermeneutics

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<sup>11</sup> Searle, J.1995 61.

<sup>12</sup> The logical, legal and constitutional consequences raised by the king possessing two bodies is exhaustively explored by Kantorowicz, E.H 1997.

<sup>13</sup> The social construction of subjectivities is a central theme of Foucault's work on power. See for example Foucault,M 1980: 98.

<sup>14</sup> So for example in the case of George 111, he had to obtain Parliament's permission to hold some land as a man and not as king. (Kantorowicz, E.H. 3).

<sup>15</sup> For example in Goffman, 1969.

<sup>16</sup> There are numerous others, for example, various American philosophers including Dewey, James and Blanchot from the continental tradition.

of symbols<sup>17</sup> and subsequently widened his hermeneutical approach in his exploration of the relationship between discourse and action.<sup>18</sup> Lefort primarily a political philosopher has sought to explore the political condition prevailing within modern society. This investigation has included an exploration of its metaphysical structure with reference (*inter alia*) to its theocratic foundations and the symbolic order that characterised pre-modern order and the way this order was profoundly altered in the passage to modernity.<sup>19</sup>

### ***Cassirer***

6. Returning to Cassirer, he anchored his philosophy in the Kantian distinction between things- in – themselves and the appearance of things.<sup>20</sup> He considered that the ultimate grounding in knowledge lay not in ontology but in epistemology.<sup>21</sup> He accepted that the construction of reality involved two modes of intuition posed by Kant, namely that of space and time and also the twelve categories of understanding. However he did not consider that these on their own adequately explained the processes involved in enabling man access to the appearances that confronted him in the world he occupied since Kant's categories were static and did not take account of functions other than that of pure cognition, to be found in linguistic communication, mythico-religious, artistic and scientific perception. Cassirer therefore expanded Kant's critique of reason to include a critique of culture which he regarded as embracing the aforementioned domains of human activity. All such functions, although different in character, including that of cognition were expressed for Cassirer through the agency of the symbolic form.

7. For Cassirer, the process of making sense of the world, that is to say, the process of giving it meaning, involved an original formative power which gives rise to a particular ideational content. All mental activity, whether it simply concerns cognition, or art or religion or myth gives rise to image worlds which do not merely reflect the empirically given but 'rather produce it in accordance with an independent

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<sup>17</sup> For example in Ricoeur, P 1960.

<sup>18</sup> Ihde, D 1971.

<sup>19</sup> For example as explored in Lefort, C 1986.

<sup>20</sup> That is to say the distinction between the noumenal and phenomenal worlds.

<sup>21</sup> Crowell, S.G 1999: 185.

principle.<sup>22</sup> For Cassirer, the relationship between the human mind and life's experiences was a dynamic one in which each impacted upon the other, the relationship between them being expressed through a functional bond that is inherent in the symbol which embraces humanly created universal meanings constructed through its experience of life. The centrality of the symbol in the processes, whereby man makes sense of the world he inhabits, is reflected in his classification of man as *animal symbolicum* which is a transformation of Aristotle's description of man as an *animale rationale*.<sup>23</sup> Thus unlike other animals, human existence does not simply involve the physical world but also a symbolic world. This means that reality is not confronted directly but can only be apprehended through the process of symbolisation and resultant symbolic forms which take on a variety of structures and constitute for Cassirer, the medium of all forms of thought and culture.<sup>24</sup> The consequences of this for Cassirer is that our understanding of our experiences of the world involves a creative process whereby the representational process involves a constitutive one.<sup>25</sup> From the perspective of a person's experience of the empirical world, language as one of these symbolic forms is therefore central to the conceptualisation process itself and without it no sense can be made of the chaotic sense data continually received by human beings.<sup>26</sup> As Habermas suggests, the constitutive role of language means that

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<sup>22</sup> Cassirer, E 1953: 78.

<sup>23</sup> Cassirer, E 1946a: 25.

<sup>24</sup> Bayer, T 2001:18. This need for Man to take refuge behind the shelter of symbolic forms is required to enable him to tolerate and make sense of the world and therefore to avoid, what Blumenberg referred to, as the absolutism of reality, that is a situation in which man comes close to not having control of the conditions of his existence and subjectively senses that he does not have control of them. See Blumenberg, H 1995: ix, 4-5. The indirect relationship between mind and reality is alluded to by Habermas in his evaluation of Cassirer's symbolic forms when he states that ' [m]ind only makes contact with its environment in a mediated way' (Habermas, J 2001:24). A particularly forceful account of the disconnection between the noumenal and phenomenal worlds and the nature of claims to representation and the truth is given by Nietzsche. In his writings, one can see reference to what he considers to be the pervasively metaphorical character of language. See for example Nietzsche, F 1873: 87-99.

<sup>25</sup> Different symbolic forms contribute to the construction of meaning in different ways. So for example, myth gives rise to the expressive function embedded in meaning where the signifier is taken to be the signified. Language gives rise to representational function embedded in meaning where a separation between signifier and signified is appreciated so that the signifier is perceived to exist independently of the signified and hence the former is considered to stand for the latter. Lastly there is significative function whereby the signified is in effect suspended and the significance of the signifier is determined by its position in a chain of signifiers. This corresponds to the symbolism associated with scientific and theoretical thought (Cassirer, E 1953: 76-78; Cassirer, E 1957:92; Bayer, T.I, 2000: 18-19; Lofts, S.G 2000: 57-58.

<sup>26</sup> The conceptualisation allowed by the function of the symbol is therefore disclosive in character (Habermas, J 2001: 16).

its structure 'embraces both the internal and the external.'<sup>27</sup> The cognitive stabilisation of the world is enabled through the adoption of universal meanings which are fuelled by the immediate particularity of life. Making sense of life-experiences involves the universal being perceived by reference to the particular and the latter being given meaning by reference to the former.<sup>28</sup> The idea of the universal present in the meaning attributed to a particular experience suggests that there is present a sense of other possible experiences which could be expressed using the same language. So when one identifies particular sense data experienced visually as constituting 'a leaf', implicit in that identification by virtue of the application of a universal idea of a leaf is the possibility of other sense data which could be captured by the idea conveyed by the word 'leaf' which is not present but could become so. This sense of possibility which is not simply triggered by the actual appearance of a leaf but which is capable of being present when its actual appearance is no longer, is a manifestation of the power of language to allow for the conceptualisation of what Habermas terms 'a world of possible states of affairs.' Possibilities which may amount to potentialities therefore tie into the idea of language as a symbolic form whose elements comprise the particular and universal. These possibilities whether or not potentialities are characterised by an absence in terms of actuality as measured against the requirement of immanence and hence possess a transcendent quality.<sup>29</sup> The conceptualising of possibilities means that anticipation<sup>30</sup> is capable of being experienced and hence futurity. This idea of anticipation is captured by Blumenthal

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<sup>27</sup> Habermas J 2001: 14. He too refers to the creative power of symbolic forms by referring to their 'form-giving power which transforms sense impressions into meaningful structures (Habermas, J 2001: 24).

<sup>28</sup> Cassirer, E: 1953: 86.

<sup>29</sup> The term 'transcendent quality' is used as opposed to 'transcendence' as it exists within experience rather than being unbounded by it and amounting to a 'pure alterity'. The idea of transcendence is problematic. See for example Schultzer, B 1935 for an exploration of its difficulties. Kant considered that it was possible to think about transcendent objects despite the fact that we have no sensible experience of them because in Kant's view his categories, necessary for the construction of thought, are applicable to them (Gardner, S 1999: 200). Others argue that a transcendent 'object' is in fact unknowable since its very essence as something knowable suggests a relationship between man and the object represented. Hence Derrida for example suggests that knowable transcendence is more accurately described as quasi-transcendence. See Ward, G 2004: 129. The transcendent quality referred to above, is more modest in character and is posited simply to suggest that the idea of the symbol and its universal component suggests a degree of detachment from the individual particularities that may have provoked and fed the universal. The transcendent quality associated with the idea of the universal in the realm of language will be seen below to be joined by the transcendence of mythic symbolism to provide an important aspect of the state of sovereignty. See below in this chapter.

<sup>30</sup> Cassirer, E 1944: 54.

in his account of the absolutism of reality.<sup>31</sup> Hence the development of the symbolic form and particularly language is vital to the conceptualisation of time.<sup>32</sup>

8. The development of language as a symbolic form allows for the overcoming of chaos experienced as a result of the unending momentary impressions that emerge in man's experiences. This is achieved through the attribution of meaning which allows for the structuring for this chaos and hence its abatement by the introduction of stabilised difference and so ensuring the expression of sameness.<sup>33</sup> This is not to say that within 'sameness' there is no difference and that in 'difference' there is no 'sameness'. In each there is the presence of the other since in the very construction of sameness, differences are suppressed in the act of making sense of the world.<sup>34</sup> Hence the boundary between sameness and difference is capable of shifting so that words associated with particular ideas, whether associated with physical objects or social phenomena, are capable of changing their meaning and new words are capable of emerging to take account of such reconfiguration that may involve changing degrees of specification. Paradoxically therefore, it at least appears that the fundamental liberation achieved at least in part by language<sup>35</sup> is threatened by

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<sup>31</sup> This idea of possible states of affairs amounting to potentialities is also captured in Blumenberg's account of the absolutism of reality which is provoked by the situational leap from enclosed forest to open plains which rendered the 'unoccupied distant horizon into the ongoing expectation of hitherto unknown things (Blumenberg, H 1985: 4). This involved the development of anticipation and preparation of what is 'absent, beyond the horizon' and to negotiate this profound, unsettling and unfocussed anxiety, language becomes central to the construction through stories of the familiar and identifiable. In this way calculable risks are identified which can provoke routinised ways to ensure avoidance (Blumenberg, 1985: 6). This does not quite capture Cassirer's assertion that the symbolic forms including language develop in response to the chaotic character of reality as actuality present and experienced by individuals.

<sup>32</sup> Cassirer, E 1953: 286. He alludes to the development of anticipation denoted by the development of the cry in response to fear or pain which he considers is not the mere reflex following instantly from a sense impression, but is rather the expression of a definite and conscious intent. For now consciousness no longer stands in the sign of mere reproduction but enters the sphere of anticipation. 'Accordingly the sound no longer merely *accompanies* a present state of feeling and excitement, but itself acts as a *factor* intervening in a process' (Cassirer, E 1953:286).

<sup>33</sup> Cassirer, E 1961: 60. Meaning as Cassirer puts it 'constitutes something repeatable and recurring, something which is not limited to the bare here-and-now but which comes to be meant and understood as one-and-the-same in countless life-moments and in the appropriation and use of countless other persons' (Cassirer, E 1961:60).

<sup>34</sup> Interestingly this is starkly captured in Nietzsche's comment about the nature of ideas when he states that '[e]very word ... becomes an idea when, rather than serving as a sort of reminder of the unique, entirely individualised first experience to which it owes its origin, it simultaneously must fit innumerable, more or less similar (which really means never equal and, therefore, altogether unequal) cases. Every idea originates through equating the unequal' (Nietzsche, F 1873: 91).

<sup>35</sup> From Cassirer's perspective the other symbolic forms already mentioned also contribute to stabilising the world as humanely experienced and reference will be made below to the mythico-religious form in particular.

potentially endless shifts and reorganisations of the conceptual landscape leading to the very chaos that it seemed capable of averting.

### *Myth*

9. Although Cassirer was not prepared to give priority to any of his symbolic forms, language pervades the other forms including that of myth through which it is expressed. Many of the separations of sensory experiences through language were initially accompanied by the expression of what Cassirer regarded as mythical life, which for early man enabled him to make sense of life experiences.<sup>36</sup> It was the initial domain of existential meaning and begins to arise at a point where, while man is decreasingly grounded in the world by instinctual behavioural patterns, he has not yet managed to compensate for this weakening through the stabilisation achieved through the separation of representations from what they represent, a separation which is embedded in the differentiation between the particular and universal which language ultimately provides. The fusion between image and thing means that every appearance is an incarnation in its own right.<sup>37</sup> Without the separation between representation and the represented, in the early stages of mythic thought, the lines of differentiation between phenomena are constantly shifting. Familiar impressions of the 'homelike, familiar and sheltering can shift into their opposite, the inaccessible, terrifying, monstrous and gruesome.'<sup>38</sup> The development of mythical thought is characterised by a process of increasing stabilisation of man's perception of the world. Manifested in this process is a series of separations that occur through the vehicle of language. Initially there is no separation between man and the outer world. The endless flux of sensory input gives an experience of the world as alive where there is no differentiation as yet between man's interior and external worlds. Stabilisation is achieved through a distancing of man from the immediacy of the world. It involves a process of unremitting externalisation whereby the original

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<sup>36</sup> This term 'life' is used by Cassirer to denote that myth did not comprise simply of images and representations but for Cassirer 'consisted much more in actions' that is to say a form of social practice characterised by rituals and which invested every facet of life with a system of taboos (Cassirer, E 1944: 79, 104-108). Again, linking this to the observations above of Blumenberg, one can see the role of taboos in the formulation of calculable risks and the strategies to avoid them.

<sup>37</sup> Cassirer, E 1957: 88.

<sup>38</sup> Cassirer, E 1957: 90.

expressive character of the outer world takes on an increasingly stable objective form.<sup>39</sup>

### *Language*

10. Myth is intimately linked to the development of language. There are three stages in its development, namely the 'mimetic', 'analogical' and 'truly symbolic'.<sup>40</sup> At the mimetic stage, sound is used to attempt to 'reproduce' the sensory impression it seeks to represent and therefore it is characterised by onomatopoeic expressions. There is as yet no universalisation embedded in language as there has not yet been a separation between sign and thing. Each utterance is a response to the particularities of the particular experience to which it is a response.<sup>41</sup> The relation between sign and experience undergoes a change in the analogical phase whereby the reduplication of sounds develops to reflect the repetition of experiences.<sup>42</sup> Finally, language moves from what has been a designatory function to one of universal signification. In this mode, any appearance of similarity between it and the world of immediate perception has disappeared.<sup>43</sup>

11. The process of stabilisation and objectification involves an increasing sense that the world exists independently of the individual and in this process the concept of 'I' emerges separated from 'thou' and the construction of objects in response to sensory experiences now occurs through the agency of symbolisation. 'Things' are created by bringing together a series of elements whose 'existence' is the product of the imposition of a series of dividing lines upon the influx of sensory data. As part of this process, according to Cassirer, language enables the grasping of the basic intuitions of space, time and number and therefore creates 'the indispensable condition for all intellectual mastery of phenomena...'.<sup>44</sup>

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<sup>39</sup> Cassirer, E 1955: 204; Cassirer, E 1957: 84.

<sup>40</sup> Cassirer, E 1953: 190.

<sup>41</sup> This is revealingly referred to by Cassirer as 'sound painting' (Cassirer, E 1953: 190).

<sup>42</sup> Cassirer, E 1953: 194. 'The phonetic repetition conforms closely to a repetition given in the sensuous reality or impression' (Cassirer, E 1953: 195).

<sup>43</sup> Cassirer, E 1957: 451.

<sup>44</sup> Cassirer, E 1953: 226.



12. Part of the stabilisation process accompanying the relationship between man's actions and the world he acts upon, is its mediation via the emergence of gods through which action is deified.<sup>45</sup> These gods, initially, very transitory in character,<sup>46</sup> stabilise into more permanent personal gods and in turn out of these images emerges a creator god.<sup>47</sup> 'In him all the diversity of action seems, as it were, concentrated in a single summit...'.<sup>48</sup> The very emergence of gods which are increasingly anthropomorphic in character and the divine 'I' feeds into the growth of man's self. Language remains central to this process of differentiation and the increasing and diversely expressed process of permanency. For Cassirer, it provides the anchor around which forms man's conceptualisations of his life experiences.<sup>49</sup> Through language religion emerges out of myth although always remaining attached to it. In religion there comes to be the separation of meaning from existence. In mythic rituals, the imagery used in such practices is experienced as the magic reality embodying the sacred itself. In ritualistic practice, the expressive behaviour adopted by its participants does not simply comprise images of the gods being referred to but are in fact the gods themselves. There is no representation as such and there is nothing that is being 'thought...[or]...'supposed' that is not at the same time real and effective.'<sup>50</sup> Separation between image and meaning accompanies the conceptual separation of the particular from the universal. Image no longer fuses with determinate meaning but can only point to it and remains inadequate to it.<sup>51</sup>

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<sup>45</sup> This, using the language of Berger and Luckmann, contributes towards the process of socialisation whereby human activity is habitualized. This ensures the narrowing of choice and the production of stability to avoid the ever present threat of chaos which arises as a result of man's underdeveloped instinctual organisation (Berger and Luckmann 1966: 66-71). This underdevelopment is also implied by Cassirer who, referring to a remark made by Uexkull, says that 'lower animals...are so completely adapted to their environment that each rests as peacefully and serenely in this environment as an infant in its crib. But this undisturbed serenity comes to an end as soon as we enter the human sphere.' (Cassirer, E 1961: 77).

<sup>46</sup> Cassirer refers to the transition described by Usener from that of momentary gods to continuing personal gods and cites the transition to the emerging corporeality of such gods that is crucial to the emergence of man's conception of himself as a continuing 'I' (Cassirer, E 1946a:33).

<sup>47</sup> Cassirer, E 1955: 206.

<sup>48</sup> Cassirer, E 1955: 206. This attribution of diverse experiences to one single source will be seen to form a very important ingredient of sovereignty.

<sup>49</sup> The place of language will be returned below as it will be my contention that one of Cassirer's weaknesses is his underdevelopment of the social domain within which language occurs and the centrality of social practice to the anchoring of man's experiences which is not simply limited to the role of language, albeit one that remains very important.

<sup>50</sup> Cassirer, E 1955: 238.

<sup>51</sup> Cassirer, E 1955: 239.

## *Religion*

13. Within religion's fabric there is contained answers to the cosmological question of the world and also the anthropological one that concerns the origin of human society and the duties and obligations that arise from it.<sup>52</sup> Religion like myth is based on the idea that there is a common bond between man and nature. Both are expressions of the unity and fundamental identity of life.<sup>53</sup> The mythic perception that the whole dwells in each part remains. However as a result of various separations that occur, there is now scope for the development of the experience of individuality marked by the rise of 'I' that accompanies the emergence of the Divine-Other. Reflecting the inter-relation between the two, the idea of self-responsibility develops and the transition from mythos to ethos.<sup>54</sup>

## *Science*

14. For Cassirer, the most advanced symbolic form was that of science. Science which has a wider meaning than that given to it in English refers to any theoretical body of knowledge.<sup>55</sup> Science is characterised by an intellectual process by which empirical observation is explained through a 'system of well-ordered symbols in order to make them coherent and interpretable in terms of scientific concepts.'<sup>56</sup> As with other symbolic systems that Cassirer developed, it is based on the contention that while the drive to understand the world is located in our experiences of it, the explanation of the way we make sense of them is located in the domain of epistemology and more particularly, for Cassirer, the symbolic forms that pervade that domain. Like religion, scientific thought rests on the idea that 'everything objective' comes to be seen as mere appearance. The perception of things is considered to be an expression of a more profound reality. Just as religion is unable to completely detach

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<sup>52</sup> Cassirer, E 1944: 94.

<sup>53</sup> Cassirer, E 1946b: 371.

<sup>54</sup> Cassirer, E 1955: 168. The separations referred to, lead to the emergence of 'I', to primitive conceptions of the objective world and to the beyond where the Divine-other is taken to be located.

<sup>55</sup> Lofts, S.G 2000: 161

<sup>56</sup> Lofts, S.G 2000:167.

itself from myth, just as language is unable to break away from the intuitive givenness of perception,<sup>57</sup> science is unable to completely detach itself from verbal language. Science as with the other symbolic forms enables man to stabilise his experience and perception of the world.<sup>58</sup> That world's contours are constructed by man through the generation of concepts which make sense of it and in so doing enters into a fundamentally different relationship to reality.<sup>59</sup> The primary task of science is to set up rules which allow prediction to take place in terms of what occurs in the intuitive sphere<sup>60</sup> and therefore ultimately the validity of scientific concepts are rooted in that sphere. While language, in its role of stabilising our experience of the world, begins the process of conceptualising the fluctuating input of sensory data through the agency of representation, the representation remains in profound contact with the sensory input that gives rise to it, thus giving to language a fluidity whereby it adapts to lived perception in ways that are primarily determined by the language structure of which the representations form part.<sup>61</sup> That structure is such that it is constantly developing as each linguistic concept 'establishes a definite centre [sic] and focus in which the rays from the various spheres of intuitive being come together and permeate one another.'<sup>62</sup> It is constantly developing in a chaotic and reactive way, which provides it with its dynamism and strength. Yet this strength is also a weakness, from the perspective of scientific concept formation, since the latter 'demands stability and unambiguousness.'<sup>63</sup> Scientific discourse derived from the flux of intuitive experience seeks to construct a view of the world in which the personal is eliminated as far as possible in its quest to establish a system of inter-subjectively and universally valid statements<sup>64</sup> whereas the development of language is one that is place, time and culture bound where inter-subjective understanding is far more tenuous. The free play of meaning, which gives words their power and

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<sup>57</sup> Lofts, S.G: 2000: 167.

<sup>58</sup> Cassirer, E 1957: 407.

<sup>59</sup> Cassirer, E 1957: 282.

<sup>60</sup> Cassirer, E 1957: 282.

<sup>61</sup> The point here is that for Cassirer language emerges from a given speaker and therefore always reflects the perception of a particular speaker who experiences the world as a 'thing-world and a person-world.' (Cassirer E 1960:93). These two aspects are in constant tension with one another and the extent to which each is expressed varies. For example in the mythical view of the world, it is person-world which Cassirer describes as 'expression-perception' that dominates while in scientific discourse the thing-world dominates.(Cassirer, E 1960: 95)

<sup>62</sup> Cassirer, E 1957:336; Cassirer, E 1944: 207.

<sup>63</sup> Cassirer, E 1957: 336.

<sup>64</sup> Cassirer, E 1960: 96.

language its strength, in the domain of scientific discourse, must be abolished.<sup>65</sup> The meaning of concepts needs to be constant and have stable relationships with others.<sup>66</sup> Yet of course language remains central to the pursuit of scientific discovery that exploits language in its stage of full maturation which occurs when it becomes 'purely symbolic expression.'<sup>67</sup>

### ***The Value of Cassirer's Writings for the Understanding of Sovereignty***

15. It is worthwhile pausing here to assess the potential value of Cassirer's observations about man's relation to his environment and the role of symbolic forms in enabling him to make sense of that environment, in understanding the nature of sovereignty and more specifically the models of sovereignty so far considered. In contrast to other animals, man's subjective experience of his environment is not firmly structured by his own instinctual organisation. He is 'world open' in the sense that he can draw upon and react to what he perceives to be his environment in a multitude of ways that are only weakly determined by his biological propensities.<sup>68</sup> The result of this is man's potential state of acute ontological insecurity, suggested by his exposure to the chaotic flux of life from which he cannot be shielded by innate instinctual propensities. For Cassirer, the central mechanism by which this is achieved is through the mediation of reality through the agency of the symbolic form which cognitively provides for points of unity around which meaning can be constructed, hence allowing for the amelioration of the threat of chaos. These points of unity or stability come in a variety of forms, the most relevant for our purposes being those of mythico-religious and language. The former provides forms of explanation through which man can make sense of his life experiences and have a sense of control over what is otherwise potentially at least the profound senselessness and unpredictability of life. Such explanations predicated around gods provide explanations which are structured and flow from the point of unity or unities expressed by them. The evocation of the actuality of gods through ritual experience either directly within the mythic domain or in a representational sense as religious

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<sup>65</sup> Cassirer, E 1957: 337.

<sup>66</sup> 'The particular concepts strive towards a community of concepts' which must relate to one another in accordance with identifiable principles (Cassirer, E 1957: 337).

<sup>67</sup> Cassirer, E 1957: 451.

<sup>68</sup> Berger, P and Luckmann, T 1966: 65-66.

experience develops provide points of unity to which can be attributed the diverse flux of life. That attribution not only occurs through the agency of the imagery associated with the mythic but also language. Language of course also supplies the cognitive stabilisation required by man through the agency of comparatively fixed meaning which is a pervasive symbolic form through which man's ability to interact and make sense of his environment is facilitated. One can immediately see here that the institutional manifestation of sovereignty and the language through which it is expressed provides a point of unity to which the flux of life can be attributed and through which it can be explained and ordered. At the same time, this point of unity as constituted by sovereignty, seen as an incident of language, provides a site of contestation with regard to its properties, roles and location. These play themselves out, *inter alia*, in the ongoing debate about sovereignty's character of which the models discussed in this thesis are manifestations.

16. However, the value of Cassirer in understanding the nature of sovereignty goes beyond the above and points to the process of transcending the flux of life which leads to the possibility of conceptualising social institutions including that of sovereign hence the avoidance of existential chaos which drives the development of the symbolic forms. Such transcendence manifests itself in two variants that are implicitly suggested by Cassirer's symbolic forms. These are what can be called transcendence inside time or common place transcendence suggested by language, art and science on the one hand and metaphysical transcendence on the other suggested most obviously by the mythico-religious symbolic forms. These forms of transcendence are both relevant to operation of sovereignty and will now be explored.

### ***Transcendence inside time - a commonplace transcendence***

17. Despite the difficulties associated with the idea of transcendence, it constitutes an important ingredient to understanding sovereignty. The need to avoid chaos, which is at the centre of Cassirer's framework, can also be seen expressed in the writings of other philosophers and reference will now be made in particular to those of Deleuze and Guattari whose explorations of chaos provide a useful supplement to Cassirer's approach. Chaos for Deleuze and Guattari was present in the physicality of the world but potentially also in thought. For them, the problem of philosophy was 'to acquire a

consistency without loosing the infinite into which thought plunges.’<sup>69</sup> Their description of chaos is more explicit than that of Cassirer. It comprises an infinitely variable flux manifested by ‘all possible forms which spring up only to disappear immediately, without consistency or references’.<sup>70</sup> Hence chaos for Deleuze and Guattari is the enemy of thought and the activities of philosophy, science, literature and arts, echoing Cassirer, are ways of keeping such chaos at bay.<sup>71</sup> Immanence itself is therefore conceived as a plane through which chaos is filtered and provides the fixity that chaos lacks. As a result the idea of immanence possesses the quality of transcendence which is unavoidable. It is the product and enabler of everyday human activity and in our everyday existence we are unaware of it as it does not present itself to us from an embedded perspective as a ‘transcendent’ experience. For Deleuze and Guattari, ‘thought cannot stop itself from interpreting immanence as immanence to something...[a]nd if this cannot be avoided it is because it seems that each plane of immanence can only claim to be unique, to *the* plane, by reconstituting the chaos it had to ward off: the choice is between transcendence and chaos.’<sup>72</sup> The unavoidability of transcendence however does not suggest that this quality is manifested in its absolute pure form as the chaotic constantly impacts upon what is separated and identified in its immanent existence. Logically, the purity of such transcendence is captured by Derrida’s claim that it can only be defined negatively captured by the formulation as being ‘neither x or not x’.<sup>73</sup>

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<sup>69</sup> Deleuze, G and Guattari, F 1994: 42.

<sup>70</sup> Deleuze, G and Guattari, F 1994: 118.

<sup>71</sup> Deleuze, G and Guattari, F 1994: 202. A list which has more than a passing resemblance to Cassirer’s symbolic forms. The sense of transcending such flux is also captured by the Heideggerian term *ek-stase* used for example by Merleau-Ponty. (Merleau-Ponty, 2002: 81).

<sup>72</sup> Deleuze, G and Guattari, F 1994: 51.

<sup>73</sup> Smith, D.W 2003: 54. This approach is displayed in Derrida’s analysis of difference when he claims that it is ‘neither this or that, neither sensible nor intelligible, neither positive or negative, neither superior or inferior, neither active or passive, neither present or absent, not even neutral, not even subject to dialectic with a third moment, without any possible sublation (*Aufhebung*)’ (Derrida, J 1992:72 as quoted in Smith, D.W 2003: 54). Deleuze did not accept that God was transcendent unlike other beings as he adhered to the univocity of being as originally formulated by Duns Scotus so there was no difference ultimately between God’s being and man’s being in that they all existed in a plane of immanence (Smith, D.W 2003: 55). He does not therefore appear to reject the transcendent quality captured by Derrida’s formula simply because it existed in a plane of immanence but considered that characterising God in this way lacks ontological credibility. For my purposes I will not be basing my comments on his ontological framework in so far as it characterised God as an immanent being. However his comments about how immanent qualities themselves involve a synthesis that gives to the idea of immanence a transcendent quality will be used.

18. Considering sovereignty and more generally government with which law is associated, the idea of it also involves a form of transcendence as will be seen in the re-examination of the models particularly when considering the question of attribution.<sup>74</sup> One will be able to see that each involves the presentation of a stream of a variety of decisions and activities of a legislative, judicial and executive character, embodied in a variety of practices which may be associated with particular individuals or collectives of such individuals through whom such activities occur, against the setting of normative requirements, which are implicated in the production and reproduction of the institution.<sup>75</sup> One will see that there is a sense that the totality of the institution exists in the moments of its manifestations of which the embedded individual is aware and evaluations of such moments can occur against the context of previous manifestations which in the subjective experience of passed time can become sedimented into a general impression which can form property-like qualities.<sup>76</sup> As a consequence, fresh decisions are not only capable of providing the structural continuity of the institution's manifestation but also are capable of disrupting such continuity.<sup>77</sup> That is to say, such decisions have the potential to disrupt the embeddedness of some or all of the institutions associated with sovereignty within the society over which they claim jurisdiction.<sup>78</sup>

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<sup>74</sup> See for example chapter 8 paras 32-40..

<sup>75</sup> Giddens, A 1984: 23-25. Such requirements are captured by MacCormick's institutional rules, namely institutive, consequential and terminative rules (MacCormick, N 1986:52-53).

<sup>76</sup> The equation of a totality to its manifestations which suggests both presences and absences is explored by Giddens by reference to Marx and Althusser. (Giddens, A 1979: 160). The idea of reification is posed here.

<sup>77</sup> The different awarenesses of individuals contributes towards a diverse range of impressions of the nature of institutions. The embedded judge is likely to have a markedly different awareness of the nature of such institutions from the taxi-driver.

<sup>78</sup> This could be seen to be playing itself out in Pakistan prior to the recent parliamentary election in the early part of 2008, with the executive branch of government in the form of Musharraf declaring a state of emergency in what in effect amounted to an unconstitutional introduction of marshal law, suspending the constitution without lawful authority and suspending the members of the supreme and other courts. He was being increasingly confronted by a section of the population who were opposed to these actions together with his insistence on holding parliamentary elections while the 'state of emergency' was still in place. Yet at the same time, the population or at least vociferous parts of it including the lawyers continued to hope for judicial resolution of existing disagreements with Musharraf. One can therefore see that from a Schmittian point of view, Musharraf's position was capable of being that of commissarial or sovereign dictator, depending on how one assesses the constitutionality of the 'declaration of emergency' as he sought to claim that his suspension of civil liberties was necessary to preserve the state in the face of extremist violence. Yet at the same time, this was a position that was contested by significant parts of the population who would have liked him to relinquish power and in that sense again, from a Schmittian perspective, they contested his sovereign position (*The Economist*, November 10<sup>th</sup> 2007).

### *Transcendence outside of time - a metaphysical transcendence*

19. In Cassirerian terms, the generality of its existence is fed by the particularities of its decisions, which spread across time. Conceptualising the experience of the existence of institutions involves transcending these particularities and perceiving the institution as existing through time with property-like forms that amounts to a form of reification. The properties attributed to such institutions are expressed as thing-like, consistent with possessing the same facticity as that presumed in the domain of nature. Here one can see, that such reification fits in with the underlying existential need to construct points of unity or solidity to provide experience with a sense of order, without which the sense of profound chaos would embrace the individual. Referring to the institutions associated with sovereignty, for example Hobbes' sovereign, its characteristics associated with its supremacy can be experienced as fixed, and fact-like and natural which is born out of experience and the quality of language itself with its capacity, subjectively speaking, to fix and to conceal the mutability of such qualities by its very function of revealing.<sup>79</sup>

20. The idea of transcendence in the above sense is engaged irrespective of the type of institutional expression of sovereignty. Commonplace transcendence is the product of existence which to be meaningful has to pull itself out of the chaotic flux of which it is part both internally and externally. But moving back to Cassirer's idea about the need for ontological security requiring an overcoming of chaos, this requires the positing of fixed sources outside time that can provide seemingly unchanging points of fixity and reference that man experiences as ultimately outside his control and thus provide what are considered to be fundamentally grounded anchors and

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<sup>79</sup> One can 'reveal' the apparent illusion of an institution's fixity by alleging that social institutions including those associated with sovereignty are relational in character. Hence the idea espoused that sovereignty is the expression of the relationship between constituent and constituted power as promoted by Agamben and Loughlin for example. This does help to overcome the seeming fixities associated with conceptualising sovereignty in terms of particular institutions whether embodied by an individual or otherwise. Yet in so doing and adopting what from a Cassirerian point of view is an expression of scientific symbolism that is abstract in character leads to a moving away from the embedded experiences of institutions by institutions as *loci* of fixity. Hence one produces an impoverished view of sovereignty.



sources of explanation for such experiences.<sup>80</sup> To repeat, with regard to the creator god, ‘in him all the diversity of action seems, as it were, concentrated in a singly summit...’<sup>81</sup> This is captured by Lefort’s claim that religion is characterised by a simultaneous concrete presence existing in time and space and another presence whose relationship to time and space is far more tenuous. This is expressed in his statement that in the metaphysics of human organisation, ‘human society can only open itself to itself by being held in an opening it did not create.’<sup>82</sup> Humanity ‘naively invents a time that exists before time [and] organises a space beyond their space.’<sup>83</sup>

21. The manifestation of such transcendence within the context of governance has come in the form of the divine and the quasi-divine. The pre-modern and early modern era saw the centrality of the idea of God to the explanation and the ultimate source of the manifestation of law. In terms of pre-modern models of governance, one can see this most clearly in the model of Augustinus Triumphus where there is no distinction between spiritual and temporal governance. However even where there is such a separation, for example in the model of governance proposed by Dante, it remains the case that in the final analysis the requirements of God’s laws trump those of the emperor in the event of clash. Moving on to the early modern era, the centrality of God continues with Bodin’s sovereignty with the existence of the latter explained as the outcome of action by the former;<sup>84</sup> with his laws being circumscribed and limited by the requirement of higher law and with the sovereign prince being conceived as the image of God.<sup>85</sup> The hold of the idea of God upon sovereignty had not yet been completely detached and indeed one can detect a hierarchy of being reminiscent of the Chain of Being demonstrated in Triumphus’ model, stretching from God through the sovereign to the population under the latter’s jurisdiction.<sup>86</sup>

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<sup>80</sup> Cassirer, E 1955: 206.

<sup>81</sup> Cassirer, E 1955: 206.

<sup>82</sup> Lefort, C 1988: 222-223.

<sup>83</sup> Lefort, C 1988: 223. The term ‘invent’ from an embedded perspective does not fully capture the complexity of the situation as the power of the time before time is that it is experienced as an existence and not an invention.

<sup>84</sup> Bodin, J 1992: 46.

<sup>85</sup> Bodin, J 1992:39. The intimate connection between Bodin’s sovereignty and God is captured by Bartelson’s observation ‘that sovereignty is necessary in order for the state to fulfil its this worldly purpose, but within a divinely ordained universe ...’ (Bartelson, J 1995: 141).

<sup>86</sup> The idea of the ‘Great Chain of Being’ is explored by Lovejoy. See chapter 8 below at para 1. This is expressed by Bodin’s reference to God as the ‘great’ sovereign and proclaims that ‘[j]ust as God, the great sovereign, cannot make a God equal to Himself because he is infinite and by logical necessity...two infinities cannot exist, so we can say that the prince, whom we have taken as the image

However even with the onset of modernity, even with the increasing relocation of the spiritual to the domain of the private, the idea of a transcendent all powerful God or gods at least initially remains important to the operation of sovereignty so that in the case of Hobbes, his model embraces attempts by him to ensure that it is the sovereign himself who will possess such characteristics.<sup>87</sup> And in later models of governance the idea of God or gods remain important as supplementary devices with which to ensure the acquiescence of populations to the modes of governance which are increasingly constructed around the idea of a transcendent 'people'. This can be seen for example in the writings of Locke, Rousseau and Kant.<sup>88</sup> The emergence of 'the people' as the central focus of sovereignty embodied in the idea of the 'nation' and constitutionality which was accompanied by the residualisation of the idea of God was reflected in the language of constituent and constituted power associated with the writings of Sieyes. The nation as constituent power was 'prior to everything and the source of everything', its will always being legal, and 'is the law itself' from which government arises as the nation's representatives whose powers are circumscribed by laws.<sup>89</sup> This provides an example of a transcendent entity existing outside time and reflects Lefort's propositions above mentioned.<sup>90</sup>

22. As both types of transcendence contribute towards human ontological security, they also contribute towards an explanation of the power of the idea of sovereignty and its association with a particular governmental arrangement. One can see for

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of God, cannot make a subject equal to himself without the annihilation of his power. (Bodin, J 1992: 5).

<sup>87</sup> The quasi-divine quality, associated with the sovereign position, similar to that manifested in Hobbes' sovereign, is reflected in the iconography of rulership including the portraiture of monarchs and other heads of state. Of such portraits, taking the period for example from 1750-1820, the most important contribution to a ruler's imagery was the one created upon the ruler's assumption of power. The task of the artist was to ensure that the image projected a personification of rulership in which the figure is perceived as an incarnation of the country over which rulership was exercised. Reflecting this, compositional formula were transferred from one political context to another so that aspects of Washington's image appears in the portrait of Napoleon and of George IV (Lloyd, C 2007:60-61).

<sup>88</sup> In the case of Rousseau ensuring obedience to laws, 'has in all ages, compelled the fathers of nations to have recourse to divine intervention and credit the gods with their own wisdom in order that the peoples, submitting to the laws of the State as to those of nature, might obey freely and bear with docility of the yoke of public happiness' (Rousseau, J 1993: 216). Kant in a similar vein claims that '[a] law which is so sacred...that it is practically a crime even to cast doubt upon it and thus to suspend its effectiveness for even an instant, cannot be thought as of coming from human beings, but from some infallible supreme legislator. That is what is meant by the saying that "all authority comes from God".' (Kant, I 1991: 143).

<sup>89</sup> Sieyes, E.J, 1963: 124-126. The nation as existing outside law is, in terms of the models discussed clearly in Schmitt's narrative.

<sup>90</sup> See paragraph 17 above.

example in the model of sovereignty proposed by Augustinus Triumphus, the centrality of an entity that crosses the boundary between common place and metaphysical transcendence as the holder of the papal office is a material manifestation of a metaphysically transcendent and materially absent God. That material manifestation is constituted through the existence of the institution of the papal office, which in its diachronic manifestation, is the product of the exercise of common place transcendence of the stream of decision-making attributed to it. The holder of the papal office, as a manifestation of an entity that exists outside time, is both fed by and feeds his institutional existence which is the product of common place transcendence. In relation to Hobbes, the distancing of God in his model to the original mover and the absorption of the spiritual by the temporal means that the quasi-divine quality of his sovereign, from Hobbes' perspective, rests with the presentation of its immanent form, that is to say it is ultimately the outcome of the particularities of commonplace transcendence as applied to the construction of the sovereign entity.<sup>91</sup> From Hobbes' perspective the loss of quasi-divine status is likely to lead to the destruction of the holder's sovereign status as obedience to him is undermined. As a result the institutional presence of Hobbes' sovereign is centrally dependent on the mimicry of metaphysically transcendent attributes that are in his model created out of the process of commonplace transcendence.<sup>92</sup> Austin's model of sovereignty on the other hand is silent as to the reasons for habitual obedience by the bulk of the population and hence does not exclude the possibility of the sovereign exhibiting metaphysically transcendent qualities which provide an inducement to such obedience. As will be seen with Schmitt's sovereign, particularly in its more radical variant, namely that pertaining to sovereign dictatorship, his position may well be dependent upon his capacity to become the sole expressor of the peoples' will which might be achieved through personal charisma or even as the charisma of office.<sup>93</sup>

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<sup>91</sup> This process is explored further in Chapter 8 below. See in particular paragraph 31. What in essence is sought is a simulation of metaphysical transcendence so that from the perspective of the embedded subject the experience of the sovereign is as though he is metaphysically transcendent.

<sup>92</sup> This ties in with Schmitt's observation that Hobbes' Leviathan is variously depicted 'god, man, animal and machine' (Schmitt, C 1996: 19-20). See Chapter 8 below and paragraph 33. What one sees here are both features of the purely mythic from a Cassirerian point of view in a depiction that is unstable in form and 'mutates' from one recognisable form to another and the religious in the emergence of the stabilised form of the god.

<sup>93</sup> Weber referred to the routinization of charisma being expressed in the form of the charisma of office (Weber, M 1978: 246-254).

23. In the context of sovereignty, both commonplace and metaphysical transcendence point to the necessity to establish causal closure, namely that the cause of society's normative structure derives from the sovereignty entity so preventing infinite regress.<sup>94</sup> The resort to the idea of God for example by Leibniz leads the way out of this general difficulty, which from a Cassirerian point of view, expresses the role of the mythico-religious in seeking a 'final answer' to the infinite flux of the world. In the age of modernity, the rationality of science comes to replace the theological, as the primary vehicle to discover ultimate causes, but the problem of infinite regress remains and, if anything, is exacerbated through the realisation that there is no ultimate foundation for a causal explanation or framework of values which is external to itself.<sup>95</sup> Reflecting this, Weber refers to the unceasing struggle between 'the gods' that represent the different explanatory devices through which attempts are made to make sense of the world and the consequential necessity to 'make a decisive choice.'<sup>96</sup> Schmitt, in this regard, acting consistently with the intractable dilemma, thrown up by Weber, makes that choice in relation to sovereignty and rejects the idea of sovereignty as located in the highest located independently derived power which is present in the models of Triumphus, Bodin, Hobbes and Austin.<sup>97</sup> Schmitt's definition of sovereignty's location is expressed in the more limited and narrower formula of 'he who decides upon the exception'.<sup>98</sup> Here, Schmitt attempts to avoid what he sees as the weakness of those definitions of sovereignty that have gone before him, with their emphasis on underived power by reference to causation. But that does not mean that causation, despite Schmitt's claim, ceases to be relevant as Schmitt's definition rests on this claim that 'like every other order, the legal order rests on a

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<sup>94</sup> Chains of causation suffer from two obvious and inter-related difficulties. The first is indeterminacy of causal pathways particularly as applied to complex events as for example cited by Hegel in the form of the French Revolution whose existence can be said to the product of an 'endless number of factors' (Hegel, G.W.F 1967: 79. Weber referred to this as 'the infinite causal web' (as cited in Rasch, W 2004). The second is that even if one could determine a specific chain of causation, its end point would remain a problem because of the difficulty of 'endless regress'. Hence the need for causal closure which overcomes the second difficulty and in so doing, while not eliminating the first difficulty, ameliorates it and provides for ontological security. Leibniz refers to the infinite regress problem and seeks a solution in the metaphysically transcendent God who provides the first cause of the world (Leibniz, G.W 1989: 150 as cited in Rasch, W 2004:25). It is of course the metaphysically transcendent solution or mimicry of it that are sought in the pre and early modern models of sovereignty.

<sup>95</sup> Rasch, W 2004: 26.

<sup>96</sup> Weber, M 1991: 152.

<sup>97</sup> Schmitt himself rejects the idea that there is in terms of political some 'irresistible highest or greatest power that operates according to the certainty of natural law' (Schmitt, C 1985: 17).

<sup>98</sup> Schmitt, C 1985: 5.

decision, and not a norm.’<sup>99</sup> Tolstoi’s ‘warring gods’,<sup>100</sup> to which Weber refers, remain and from a Cassirerian point of view this conflict is the outcome of gazing at the world’s complexities through different symbolic forms, namely the mythico-religious, language and the scientific as ontological security is sought. Mindful of the difficulties associated with determining causation, the relationship between social institution and the activities and decisions associated with them and which through the process of commonplace transcendence feed their existence are described in terms of ‘attribution’. This reflects the possibility of explanations of causation that may range from those that are mythic to those that are scientific in content and which may be regarded as expressions of the power of language in making sense of ‘our world’ around which Cassirer’s philosophy is substantially based and which points to that which lies ‘beyond’.

### *Cassirer’s Shortcomings*

24. Ontological security for Cassirer is driven by the necessity to avoid profound existential chaos experienced as the ‘inaccessible, terrifying, monstrous and gruesome.’<sup>101</sup> The techniques for establishing ontological security are potentially diverse. For Cassirer they reside at the level of language and other modes of thought and communication he identifies with the symbolic forms. The symbolic medium has a structure which embraces both the internal and external, that is to say the world of the subject and object and in so doing overcomes the opposition between subject and object.<sup>102</sup> There is therefore a sense in which Cassirer is moving towards a conceptualisation of the human as an embedded agent rather than a detached one but he does not draw out the implications of embeddedness. What Cassirer does not sufficiently reveal to put it in Heideggerian terms is the sense of ‘the ready at hand’ as opposed to ‘the present at hand’ denoting the difference between the idea of practical interaction with the world and that of detachment.<sup>103</sup>

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<sup>99</sup> Schmitt, C 1985: 10.

<sup>100</sup> Weber, M 1991: 153.

<sup>101</sup> Cassirer, E 1957: 90.

<sup>102</sup> Habermas, J 2001: 14-15.

<sup>103</sup> ‘Readiness to hand’ reflects the idea of Being in the World (Mulhall, S 2001: 40). The centrality of the symbol as the point of departure for the explanation of existence, reflects Cassirer’s neo-Kantian approach rooted as it is in epistemology and Cartesian duality, depicted in Kant’s metaphor of his position to the enquiry of the nature of human contact with the world as observing a ship moving

25. This idea of embeddedness suggests, looking at it from the perspective of the individual, that there is in the daily contact of humans with the world what Taylor has described as foreground and background. For Taylor, these domains are symptomatic of a conceptualisation of the object of philosophical enquiry as the embedded agent rather than the disengaged one.<sup>104</sup> In so doing, he seeks to draw on the works of Wittgenstein, Heidegger and Merleau-Ponty who in rather different ways reacted to a form of ontologizing of rational procedure whereby the processes of rational thought are read into the constitution of the mind, an approach which derived from the dualities including that of subject/object associated with Cartesian thought.<sup>105</sup> Central to the idea of the disengaged agent is the idea that reality is captured most authentically by the state of objectivity which is within the disengaged agent's grasp. In contrast the idea of the embedded agent suggests finitude, that is to say a world whose existence transcends the capacities of human beings to reduce it to the categories of their own thought.<sup>106</sup> Such an agent is embedded in the experience of his own existence and has to be seen in that way. The sense that an individual makes of conscious experience is affected by an unarticulated background. This amounts to a kind of pre-understanding or, to use the terminology of Wittgenstein, a type of stage-setting when considering how the social intelligibility of language is achieved.<sup>107</sup> The idea of embeddedness will emerge in the further discussions of the models of sovereignty with particular emphasis upon Austin's model, referring it as it does to the idea of habit and hence by implication to routine. In discussing Austin's model, further insights will be provided about the idea of routine which will be seen as a process which helps to satisfy the need for ontological security, lying at the centre of Cassirer's framework. It will be developed in the closing chapter where its

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down- river, never seeking to imagine the experience of it from the perspective of its occupants (Mulhall, S 2001: 39).

<sup>104</sup> Taylor, C 1997.

<sup>105</sup> Taylor, C 1987: 61. Dillon for example identifies such dualities as being characterised by separations between consciousness and thing, being for itself and being in itself and immanence and transcendence. (Dillon, M.C 1988).

<sup>106</sup> Dillon, M.C 1997 90.

<sup>107</sup> Wittgenstein, L (1998): para 257. The idea of background is captured by Taylor's formulation influenced by Polanyi whereby 'it is subsidiary to the focal object of awareness; it is what we are "attending from" as we attend to the experience' (Polanyi, M 1964 and 1966 in Taylor, C 1997:69). Taylor's background however is narrower than Wittgenstein's stage-setting in that it is what the agent 'always knew or had a sense of'. Wittgenstein's stage-setting on the other hand may include matters of which the agent had no sense. Giddens himself refers to the idea of 'setting' for interaction which is akin to Wittgenstein's stage-setting and provides the contextuality and hence contributes towards the meaning of such interaction. (Giddens, A 1979: 207; Giddens A 1984: 118).

relationship with rupture will be explored against the continuing need for ontological security.

### *And Searle*

26. The experienced ‘solidity’ of social institutions as the outcome of commonplace transcendence which has ingredients of the metaphysically transcendent in the case of the early models of sovereignty, is consistent with the structural properties referred to by Giddens. It can be seen to be the product of the embedded experience of those subject to a given sovereign’s jurisdiction. That embeddedness involves a process of attribution referred to above whereby the individual instances of particular activities are attributed to particular social institutions including that of the sovereign institution. It is the two-way process between the stream of such instances and the institution to which they are attributed which both gives meaning to such instances and fuels the commonplace transcendence through which ‘the structural properties’ of the institution are conceptualised. What determines the meaning of ‘event A’ and its attribution to ‘institution B’ will inevitably depend on a form of social practice which may be complex, and where a complete line of causation is impossible to identify. And this leads to the idea of the institutional fact and its link to social practice posed by Searle’s constitutive rule, ‘X counts as Y in circumstances C’.<sup>108</sup> One can immediately see here a two-way process in operation, whereby the activities associated with a social institution, both feed and are fed by the existence of the latter. So for example, by reference to the British parliament, the enactment of statutes are attributed to it which in turn contributes towards its existence. The ‘enactment’ refers to document ‘X’ which ‘counts as’ statute ‘Y’ in circumstances (C). The latter (C) are constituted by the attribution of the instance of enactment of ‘Y’ to the British parliament which both feeds and is fed by such attribution which drives and is driven by ‘X’ counting as ‘Y’. And yet this does not fully capture the interlocking processes which contribute towards the creation and continued existence of Parliament and the statutes associated with it. Parliament’s existence and constitutional position is contingent upon a multiplicity of factors including the practices of democratic elections to the House of Commons, executive activity in seeking to implement

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<sup>108</sup> Searle, J 1995: 43.

policies through the process of legislative enactment by Parliament, the political convention of ministerial responsibility to Parliament and a continuing judicial commitment to upholding the statutes that emerge from Parliament. There is therefore a potentially complex interlocking and interacting set of social practice which is associated both with what is 'produced by' a social institution and the existence of the social institution itself. In so far as circumstances C are identified, this is an exercise in what is akin to foregrounding through which the totality of such interlocking practices is selectively presented in a way which, *inter alia*, provides what is perceived to be the most immediate and powerful explanation of the creation of the institution in question. That immediacy helps to distanciate multiple contingencies that are operational in the creation of a given social institution and which are submerged into what is akin to the background seemingly becoming peripheral in character, thus bringing into relief the institution's solidity, inevitability and seeming naturalness.<sup>109</sup> This will be seen to emerge in relation to the forthcoming investigation of sovereignty where Searle's formula is used as a presentational device to highlight the circumstances that are central to the creation and continued existence of the sovereign but which do not necessarily appear explicitly within the models under discussion as central factors upon which the institution is dependent. In using Searle's formula what can be foregrounded and hence highlighted are factors which within the language of the models occupy peripheral positions. In the very foregrounding of them not only is the contingency of the location of sovereignty highlighted but in certain circumstances alternative sites of sovereignty are posed

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<sup>109</sup> Searle himself explores the idea of background in relation to the intelligibility of speech for example in his exploration of the statement that 'George Bush intends to run for president' (Searle, J 2002: 196.). Searle in fact distinguishes between what he refers to as 'the network' that is to say understandings that are closely related to the above claim and are needed to make sense of it such as the existence of regular presidential elections. He distinguishes between these understandings and more basic assumptions such as that the elections go on at the surface of the earth. He considers this is not a belief but a 'preproposition' that is 'so to speak 'pre-suppositional' or 'pre-intentional'. The network hence comprises beliefs in contrast to the background. Looking at his formula for the creation of institutional facts, namely X counts as Y in circumstances C, one can see using his approach that operating is 'a network' of understandings and activities, in relation to the creation of a particular institutional fact such as the appointment of a particular president and behind that a background. The difficulty with the separation between network and background is that the dividing line between the two domains is uncertain. Differentiating between supposition and pre-supposition with the former located in the network and the latter in the background he fails to appreciate that it is the articulation of a presupposition such as 'elections take place on the surface of the earth' which turns it into a supposition. His explanation of network and background does not adequately capture the possibility of the presupposition or pre-belief becoming supposition or belief as it moves to the foreground. A more accurate differentiation which does not suggest the kind of qualitative difference suggested would be near and far background which is a modification of Taylor's approach.



which are incompatible with the model's claims. So for example, it will be seen that in relation to the model of Augustinus Triumphus, the individual's position as the sovereign pope is contingent upon the continued acquiescence of the Council of Bishops and hence from a Schmittian perspective sovereignty appears to rest with the Council of Bishops and not the pope. With regard to Hobbes, Austin and Schmitt, an individual or collective will only continue to 'count as' a territorially limited sovereign upon, *inter alia*, an international practice of non-interfering processes of governance that exist beyond the jurisdiction of the sovereign entities under examination.

## **PART 3**

### **Chapter 7: A Re-Examination of the Model of Sovereignty by Augustinus Triumphus**

#### ***Introduction***

1. For the purpose of this Part, my aim is to examine a number of the models that were initially described in the first part of the thesis. The character of the examination will comprise a set of what can be described as thought experiments whereby I endeavour to imagine the models chosen as constituting a set of lived diachronic experiences over time. Therefore, at least in part, I will examine these models from the inside, endeavouring to imagine the steps required to make the models operate effectively. I will assume that the terms of each model examined have been socially implemented and that they reflect the constitutional arrangement through which social governance is organised. I will not be generally concerned with the extent to which the authors' intentions in constructing their ideas about sovereignty or institutions to which sovereignty can be attributed, were aimed at describing governance as it actually took place or whether they were aimed at providing a set of prescriptive requirements around which government should be organised.

#### ***Augustinus Triumphus***

2. To briefly recap on what has been mentioned so far about Triumphus' model, here sovereignty was ascribed to the pope and at first site it appears to be absolute in terms of authority, territorial scope and temporal duration. On the face of it the pope was not subject to any higher earthly authority.<sup>1</sup> The sovereignty expressed by the pope was a manifestation of God's cosmic supremacy and the pope himself was the earthly embodiment of God. Therefore the pope's will was God's will and it expressed itself in the form of positive law that was the earthly expression of divine law. Papal expression was at first sight the only channel through which divine law could become known on Earth and required unquestioning obedience of the universal empire over which he would rule. The supreme position of the pope was reflected in Triumphus'

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<sup>1</sup> This will be examined below.

assertion that 'the law cannot be greater than the legislator.'<sup>2</sup> In so far as it is described, this amounts to a model of absolute supremacy possessed by the holder of the papal office. While the holders of the office would vary over time, the office itself was continuous. The papacy embodied a juridical personality- a corporation- identified with the *Ecclesia* which was equated simultaneously with the mystical body of Christ and the men and women who were considered to comprise the territorially based Christian community so that the *Ecclesia* existed on both planes, the temporal and spiritual, corresponding to the immanent and transcendent.<sup>3</sup>

3. Looking at the model from the perspective of Cassirer's symbolic forms, a number of observations can be made. From the point of view of the different symbolic categories posed by Cassirer, one can immediately see the strong presence of a mythico-religious form manifested by the transcendent quality of the occupier of the papal office who is regarded as the vicar of Christ,<sup>4</sup> having the attributes of God,<sup>5</sup> occupying the position of head of the *Ecclesia* as well as personifying it, where the absolute good of society is located<sup>6</sup> in respect of which the exercise of his sovereign will is equated with the absolute good. The result is that there appears to be a complete identification between papal office and *Ecclesia* so that its occupant is infallible and yet human in constitution.<sup>7</sup>

4. From the point of view of the role of the model more generally, considering the relationship between the particular and universal associated with Cassirer's symbolic forms most evidently language, one can discern a number of different perspectives. One can look at Triumphus' model from the outside and consider it to be a particular expression of a constellation of possible arrangements to which the assignment of sovereignty is given and hence the assertion that it contains a manifestation of sovereignty. From Triumphus' perspective, one can argue that his claims as to the

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<sup>2</sup> Wilks, M J 1963: 173.

<sup>3</sup> Wilks, M J 1963: 48-49, 53, 469; Russell, J.B and Lumsden D.W 2000:21. The *Ecclesia* as a human-divine organization reflects Christ the God-man. Its immanent manifestations in the form of earthly society however is simply a reflection of its transcendent reality with its human elements seeking to be incorporated into such reality. See Augustine, 1998: Book XXII: 18 for an early expression of this.

<sup>4</sup> Wilks M J 1963: 157.

<sup>5</sup> Wilks M J 1963: 160.

<sup>6</sup> Wilks M J 1963: 157.

<sup>7</sup> The identification of pope with absolute good and hence his identification with the *Ecclesia* will be explored below as in fact there is a fissure running through Triumphus' model.

position of the papal office in the process of earthly governance is an attempt to formulate a universal arrangement. Flowing from this one can also see the model as forming the basis of a specific form of governance in which the particularities of how it would be constituted are developed in accordance with the generalities of the requirements of the model. In the process of exploring the model, various incongruities about Triumphus' model will be exposed and the conditions necessary to ensure the continued sovereign position of the occupier of the papal office. To do this, Searle's general formula embodying the conditions necessary to be satisfied for the creation of social institutions will be used, namely that the X counts as Y in C circumstances.<sup>8</sup> It will be applied to Triumphus' model and others that are going to be investigated. Its use will be seen to be its role in exposing the difficulties and uncertainties associated with each model. It also provides a common vantage point from which to view the diversity of arrangements found in the models.

5. In relation to Triumphus' model, applying Searle's formula, person X counts as pope (Y term) and hence possesses sovereign powers where he is elected to that position by the cardinals (C term). Clearly one can imagine the election of a pope as part of a social practice where there have been past holders of the papal office and they have exercised absolute governmental powers that amount to those associated with sovereignty. Each such transaction where a pope is elected derives its validity from the perspective of the model's requirements because it is considered to be a particular instance complying with a normative practice laid down in general terms in the model. Therefore the validity of the exercise whereby any particular cardinal is elected as pope derives at least in part from the fact that it fits into the generality of expected practice which has occurred in the past in what can be perceived as a historically continuous process.

6. The difficulty that is immediately faced here is the incongruity between the occupier of the papal office who is considered by Triumphus to possess the attributes of God on earth<sup>9</sup> and his election by mortal cardinals. A chain of authorisation which in the final analysis involves any entity other than God is potentially problematic. To argue that the cardinals are empowered by God to choose the pope sets up the

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<sup>8</sup> Searle, J 1995: 43.

<sup>9</sup> Wilks, M J 1963: 473.

possibility that they rather than the pope rest at the summit of the Ecclesia. The temporal arrangement threatens to disrupt the character of the hierocratic order to which Triumphus is committed. Hence to avoid this difficulty, Triumphus considers that the cardinals in fact only nominate one of their number to be pope and it is only by the confirmation of that nomination by the chosen candidate in his apparent capacity as pope that the appointment is completed. The difficulty is therefore apparently resolved through a circular process which amounts as Derrida has described in a different context as a 'fabulous retroactivity'.<sup>10</sup> If one looks at the process of papal appointment through its diachronic practice using Searle's formulation one can identify the following stages:<sup>11</sup>

- (1)  $A_1$ s (X term) count as cardinals ( $Ca_1$ ) (Y term) when appointed by  $P(ope)_1$  (C circumstances);
- (2) Cardinal  $B_1$  counts as  $P_2$  when nominated by cardinals ( $Ca_n$ s)<sup>12</sup> and confirmed by  $P_2$ ;
- (3)  $A_2$ s count as cardinals ( $Ca_2$ ) when appointed by  $P_2$ ;
- (4) Cardinal  $B_2$  counts as  $P_3$  when nominated by cardinals ( $Ca_n$ s) and confirmed by  $P_3$ ;
- (5)  $A_3$ s count as cardinals ( $Ca_3$ ) when appointed by  $P_3$ ;

7. One can see that within Triumphus' hierocratic framework, there is an indeterminate quality about  $P_2$  and  $P_3$  when first nominated. He completes his transition to become the holder of the papal office when in that indeterminate state he endorses himself and by doing so that status is retroactively resolved. In this sequence of events, the particularities of each stage in the practice will have to match with the general expectations of what is to occur at each stage. That is to say the

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<sup>10</sup> Derrida, J 1986: 10. Here Derrida was describing the 'fabulous retroactivity' involved in the creation of 'the people' by their representatives at the time of the signing of the US declaration of Independence.

<sup>11</sup> In fact, reflecting the seemingly absolute supremacy of the pope, Augustinus Triumphus did not consider that a pre-condition for appointment to the papal position, was that the candidate had to be a bishop or that appointment had to be undertaken by the cardinals. However he did not go as far as claiming that the normal method of appointment, namely of a cardinal by a conclave of cardinals could not occur and that this method would likely constitute the normal practice (Wilks, M.J. 1963: 464, 468).

<sup>12</sup> The notation  $n$  is used in relation to the cardinals who choose a pope as their membership may be determined not only by appointments to their number made by the pope immediately preceding the one being appointed but may also include those cardinals appointed by preceding popes.

particularities of each stage of the practice leading to the creation of particular institutional facts such as P<sub>2</sub> and A<sub>2</sub>s will have to conform with the general requirements denoted by the normative framework associated with the model.

8. The major difficulty for Triumphus however was that he could not deny the possibility that a pope could fail to carry out his functions and this of course potentially undermines the entire basis upon which the occupant of the papal office's rests. Triumphus endeavoured to minimise the consequences of the possibility by claiming that an occupant of the papal office who acted in a manner that was incompatible with divine law divorced himself from the papal office in so doing and hence was not acting as pope in such circumstances. Triumphus in admitting the possibility of a pope not acting in accordance with divine law allowed ideas associated with conciliar theory<sup>13</sup> to undermine his hierocratic model. He admitted the necessity of a general council of bishops on behalf of the community having the authority to override the law made by the pope if it failed to comply with the requirements of divine law.<sup>14</sup> In the event that the pope had acted heretically, although the cardinals could appoint a new pope since the incumbent had dismissed himself by his actions, it was only a general council that could confirm a 'pope's heresy, pass judgment upon him, appoint a replacement and take over government during the interregnum.<sup>15</sup> The generality of God's will in Triumphus' model was therefore capable of being expressed through the particularity of papal governance in normal circumstances and action by a general council in extraordinary ones. Looked at from the perspective of Schmitt's model of sovereignty, what one can see here is that the general council has jurisdiction to decide upon what is akin to the exception

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<sup>13</sup> Within the conciliar movement, one can identify a number of different currents but in essence it centred around the idea that the supreme authority within the Christian community was not the pope but a general council of bishops of which the pope was one amongst equals. The conflict between those who considered the papacy had supremacy and those that considered that the general council had supremacy was fundamentally a conflict between the location of sovereignty, namely whether it rested with the pope or elsewhere. See Russell, J.B and Lumsden, D.W 2000: 175, Wilks M J 1963 and for a general account Black, A 1988: 573-587.

<sup>14</sup> Wilks, M J 1963: 507.

<sup>15</sup> Poole, R.L 1920 222; Wilks, M J 1963: 512. The implications of the general council effectively deposing a pope despite Triumphus' claim that the pope did this through his own actions are profound since, as a matter of possibility, this ultimately leads to the centre of Conciliar theory which claims that the council is superior to the papal office as expressed by the Council of Constance (See Figgis, J.N. 1915: 31).

in Schmitt's model, on the grounds in effect of necessity<sup>16</sup> triggered by the inability of the existing incumbent of the papal office to act consistently with the public good.<sup>17</sup> which would occur where he had acted heretically. This immediately gives rise to the situation where the potentiality of a general council being convened and the replacement of the pope as usurper is ever present. In effect, all the particularities of all papal action are capable of being compared to the generality of how a pope ought in the final analysis to behave to conform with the requirements of non-heretical behaviour, interpreted in the final analysis by the general council.

9. Applying Searle's formula, looked at from the perspective of each expression of papal will, even though there was a presumption that the expression of papal will would amount to an expression of divine will and hence to be obeyed, the presumption was always rebuttable even if only improbably. Hence, the exercise of will by the occupant of the papal office would only count as the exercise of divine will and hence to be obeyed, if the general council of bishops had not declared it to be heretical.

10. Looking at the position of the pope more generally in times of exception where the existing incumbent is regarded by the general council of bishops to be a usurper, the consequences following on from this are that:

*Cardinal  $B_2$  counts as  $P_3$  when appointed by  $GCB_1$  in circumstances where  $B_1$  ceases to be  $P_2$  by becoming a usurper ' $P_2$ ' as a result of acting heretically in the opinion of  $GCB_1$*

Integrating the state of normality with the state of exception where the bold type denotes events constituting a state of exception.

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<sup>16</sup> This results in effect to a transfer of authority from pope to general council to act in *casu necessitates* against the presumed head, that is the pope where he is considered to have acted heretically.

<sup>17</sup> Akin to state necessity triggered by the prospect of governance by the existing papal incumbent not being able to govern in accordance with the public good as defined by the requirements of divine law. That is to say a new unacceptable normality from the perspective of the general council beckoned, one which was intolerable and had to be prevented by the removal of the offending pope.

***Cardinal B<sub>2</sub> counts as P<sub>3</sub> when appointed by GCB<sub>1</sub> in circumstances where Cardinal B<sub>1</sub> who had been appointed as P<sub>2</sub> by Ca<sub>n</sub>s no longer counts as P<sub>2</sub> by becoming usurper 'P<sub>2</sub>' as a result of acting heretically in the opinion of GCB<sub>1</sub>***

11. Mirroring the two complimentary locations which the Ecclesia's intentions are expressed in times of normality and exceptionality, Triumphus ultimately accepted that taking into account normality and exceptionality, supreme power rested with general council and pope, since in the event of the latter being held by a general council of bishops to have acted heretically, the Ecclesia would continue to be represented albeit temporarily by the former.<sup>18</sup> Looked at from a Schmittian perspective however, it is clear that sovereignty in effect lay with the general council because of its ever present authority to declare what was in effect a state of exception when it considered that the holder of the papal office was acting heretically.

12. One can see from the above that the logic of the hierocratically orientated discourse that dominated Triumphus' model, to achieve closure, could not accommodate the arrangements involving the role of the general council of bishops in the event of the pope acting heretically. The logic of the claim made by Triumphus that the supremacy of the pope's position meant that the legislator came before the law and that the pope was free from all legal restraints<sup>19</sup> meant that there was no place for what amounted to an adjudicator also possessing executive powers, in this case the general council of bishops, operating independently of the pope that had the power in effect to remove him from office in the event that it determined that he had acted heretically. To allow the incorporation of this provision meant that despite the hierocratic emphasis in Triumphus' model, papal supremacy in the final analysis was fundamentally undermined.

13. Augustinus Triumphus produced his model of sovereignty within the context of a three-way struggle which occurred between the pope, Holy Roman Empire and the emerging territorially based kings. He was considered to be the author of the Unam Sanctum issued by Pope Boniface VIII in his bid to establish papal sovereignty at the

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<sup>18</sup> Wilks, MJ:505. '...in Ecclesia et in papa.'

<sup>19</sup> Wilks, M.J 1963: 175.



expense of that of the emperor.<sup>20</sup> Out of this struggle emerged the idea of territorially based inalienable and indivisible sovereignty in which the ruler was supreme with his own domain, that supremacy expressing itself in the form of every kingdom being independent of the empire and that its ruler exercised supreme power in his domain independently of the emperor. The king's powers hence were the same within his territory as the emperor's outside it. This ideological struggle which reflected an emerging practice whereby kings were increasingly assertive in their own kingdoms centred around the possession of what might be called the marks of sovereignty, namely those rights and powers associated with sovereignty's condition. It was around these that conflict was joined. These included that as with the emperor, high treason could be committed against the king and conversely the king, as with the emperor, could not be subject himself to such a charge. In the same vein, those advocating territorial governance to be independent of the emperor also considered that judicially, there could be no appeals from the rulings of the king's sentences and the emperor had no right to appoint key officials within territorially defined kingdoms. In the process, the configuration of temporal governance was considered to require regionally based units to meet the diverse needs of diverse populations in contrast to the uniform approach of the emperor which was more suited to the needs of spiritual governance associated with the pope. Justifications for the supremacy of kings over emperor in the domain of temporal governance ranged from the prescriptive acquisition of kings' rights, to the greater efficiency of regional governance to ensure the enforcement of law, to the rejection of the legitimacy of the empire because it was perceived to have been created by force which had no legal validity, to interpretations of various biblical passages to support the idea of such kingdoms, to Aristotelian arguments resting on the claimed nature of man to want to live in communities with elected leaders. Through the struggle between pope, emperor and princes, the modern idea of sovereignty emerged, expressing the liberation of secular politics from the yoke of theology, the emergence of law as being a central vehicle for stately governance, the dominance of secular over cannon law in the event of conflict and the idea that the lawmaker was anterior to the law, the latter

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<sup>20</sup> Catholic Encyclopaedia; Divine Right of Kings.

depending on the will of the former and the former not being bound by the latter.<sup>21</sup> The next re-investigation will concentrate upon Hobbes' model but before this is attempted, it is worthwhile pausing a moment upon Triumphus' model.

## *Conclusions*

14. Referring to Cassirer's symbolic forms, the essence of their rise was to enable human beings to make sense of the world that was rushing towards them. The rise of the most primitive type of symbolic form, namely that of the mythic emerged out of this need. The outcome of activity on the immanent plane gave rise to the transcendent in the form initially of mythic gods of increasing stability which led to the development of religion with the separation of meaning from existence.<sup>22</sup> The point is that the desire for what might be called ontological security,<sup>23</sup> gives rise to a number of mental constructions through which the experiences of existence are perceived, explained, developed and tolerated. These within the context of a discussion about sovereignty<sup>24</sup> include the idea or ideas of gods or God existing in a transcendent domain as exemplified in Triumphus' and Dante's models; stable origins which provide the starting points for explanations of how the present and its nature came to be as exemplified in the forthcoming discussion of the Hobbesian model of sovereignty and the daily use of repetitive practices through which life is undertaken, an example of which will appear in Austin's model and by way of observation the construction of normative reference points as exhibited in law itself. What is suggested in the construction of these stable points of unity particularly with regard to the idea of gods and origins, both of which suggest that man's existence occurs by reference to something that preceded him and transcends him is that the 'fabulous retrospectivity' referred to above is a pervasive occurrence in the process of governance. This retrospectivity in turn suggests that while the relationship between the transcendent and the immanent is perceived to be one whereby the former gives

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<sup>21</sup> Accounts of the development of the idea of sovereignty within the medieval and early modern period can be found in numerous publications including Wilks, M.J, 1963; Ullmann, W 1964; Merriam 1968; Tierney, B 1979; Hinsley, F H 1986; Canning, J.P 1988; Onuf, N 1991; Buijs G 2003.

<sup>22</sup> See the previous chapter for a fuller explanation of this point.

<sup>23</sup> A phrase used by Anthony Giddens. See Giddens, A 1984: 376.

<sup>24</sup> Clearly outside this discussion one could broaden the examples to include for example Kantian transcendental categories and more broadly generally the points of departure of any theoretician including Cassirer himself with his symbolic forms.

rise to the latter, at least from the idea of man as generator of his own symbolic world, it is the latter that gives rise to the former. More will be said about these points in due course.

## Chapter 8: A Re-Examination of Hobbes

### *Introduction*

1. The model of Augustinus Triumphus reflects a metaphysical concept of being in which the immanent is an outcrop of the transcendent which is where reality truly lies. His model follows the contours of the 'Great Chain of Being'<sup>1</sup> as manifested by the structure of the Ecclesia. Hobbes' model in contrast reflects the nominalist thinking that had developed in the later middle ages with the separation of immanent from transcendent, with the former being able to be studied within its own context on the basis of experience and experiment, and with the residualisation of the idea of God to that of the Aristotelian first mover who is withdrawn, inscrutable, transcendent and detached from the immanent world which is increasingly perceived to be self-propelling.<sup>2</sup> What pervaded nominalist metaphysics was the idea of contingency both in respect of the vertical relationship between man, the cosmos and God and also in a horizontal sense regarding the relationship between man and his past and future.<sup>3</sup> Unlike the model of Triumphus, that of Hobbes is based on the territorially limited centralised state.

2. The idea of the social contract which provides the core of the legitimating narrative, which is used by Hobbes to justify the existence and authority of a centralised and absolute sovereign, can be seen as a point of fixity in an uncertain and contingent world. The synchronic and diachronic contingent, fluctuating and diverse existence of the multitude is replaced by an expression of unified but episodic collective will which produces a further point of unity in the form of a unitary sovereign which unlike that of the social contract does not have an episodic existence but is continuous in time and is perceived to embody and in effect replace the multiplicity of wills that, through momentary agreement, gave rise to it.

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<sup>1</sup> Lovejoy, A 1964:59.

<sup>2</sup> For a discussion of the impact and contribution of nominalism to the emergence of modernity see Oberman, H.A 1963; H.A Oberman 1986, Dupre, L 1993: 174-177 and usefully synthesised in Buijs, G 2003. More will be said about in the concluding chapter.

<sup>3</sup> Oberman, H.A 1983:27.

3. This legitimating narrative is central to Hobbes' justification of governance as it seeks to establish that without such governance, man would descend into an intolerable state of uncertainty captured by the idea of the state of nature given his natural and unchanging anti-social and individualistic propensities. This can be regarded as a form of antirrhetic discourse<sup>4</sup> in which the prospect of a descent into 'chaos' is used as a form of verbal violence to justify the continuation of governance which alone can insure the protection of the community from such an outcome. It is a form of world-making as Goodman describes but it is one that, while important to Hobbes' justification of governance, possesses a character of impossibility that is akin to Derrida's 'fabulous retroactivity'<sup>5</sup> in that its evocation is the product of a present production that is projected into the irretrievable past to serve the needs of the present.<sup>6</sup>

4. The purpose therefore of this chapter is to endeavour to explore the impossibility of the bipolar simplicity of Hobbes' legitimating narrative whereby peace was associated with centralised sovereignty and unending turmoil was associated with its absence despite what might have been its use in the daily practice of governance to help ensure daily compliance given the profound irrationality that Hobbes attributed to man. In so doing, I will seek to reveal what might be called the embeddedness of his sovereign into an already existing practice of social existence. I will also endeavour to establish that in so far as social existence was of a disruptive quality, Hobbes' acceptance of individuals' rights to resist sovereign commands in certain circumstances rather than being marginal to his model of sovereignty is in fact significant.

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<sup>4</sup> In the sense that such discourses are regarded as ones against evil and undesirable threats. They are usually posited against the character or characters considered to be the cause of such perils, for example Satan. See Goodrich, P 1995: 49. This idea of descent in relation to governance is of course not unique to Hobbes and was accepted for example by Hegel although he did not accept that the possibility that a war of all against all would break out in the absence of government itself (Pelczynski, Z.A 1971:95).

<sup>5</sup> Derrida, J 1995:10.

<sup>6</sup> The idea of the past as history rather than myth can also be perceived to be an idealisation as suggested for example by Collingwood (Collingwood, R.G 1993).

## *Hobbes' State of Nature*

5. Hobbes' model can be seen as part of the process whereby the secular gains dominance over the spiritual for the purpose of earthly governance and presents a model of sovereignty which, as previously described, is one where the sovereign is regarded as supreme and anterior to the existence of positive law. This law, as developed by or in the name of the sovereign, is the supreme mechanism through which social control is achieved. The spiritual has been absorbed by the temporal and the domain of the sovereign is territorially limited. The model presented is one where the basic separations associated with the practice of sovereign statehood are present, namely the separation between the government and the governed and that between the states themselves evoking Schmitt's friend/enemy distinction. With Cassirer's framework in mind, the symbolic nature of sovereignty is again one that is heavily infused with a mythico-religious character by for example the iconic expression of the sovereign as a god-like creature whose shape, size, attire, majesty set him apart and in a phenomenological sense 'above' the population which he is considered to rule over.<sup>7</sup> There is a further element, consistent with a mythic narrative, in the form of the proclaimed foundation of the community over which the sovereign rules, namely the social contract as a result of which the state of nature is replaced by the creation of a community which is personified by the sovereign. It emerges out of 'the wild' that is characterised by a war torn state of being. This is not the shapeless chaos that Cassirer refers to as that which man attempts to overcome and expel through the development of symbolic forms, most profoundly the mythic form as expressed through language.<sup>8</sup> The mythic stories of creation testify to this

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<sup>7</sup> Onuf, N.G 1991: 435.

<sup>8</sup> The human dread of chaos for Cassirer is provoked by the anticipation and fear which gives rise to mythical thought which 'may be interpreted as a constant and obstinate negation of the phenomenon of death.' (Cassirer, E 1944: 84). Chaos itself can be seen as an expression of death in the sense of the latter representing nothingness when deprived of its religious meaning as depicted by Eliade, M (1960: 237), an unimaginable state which links to the idea of chaos being indescribable as suggested by Cassirer, E (1961: 65). Hobbes himself in explaining the reasons for the state of nature refers to the desire of man to preserve himself, that is 'to avoid that which is hurtful: but most of all that terrible enemy of nature, death, from which we expect both the loss of all power, and also the greatest of bodily pains in the losing...' (Hobbes, T 1994: 79(6)).

process and frequently involve the creation of the world out of chaos.<sup>9</sup> This chaos, for Cassirer, is indescribable and hence constitutes an experience dominated by utter randomness rather than simple unpredictability. That is to say, its indescribability is consistent with a state of being where each moment of its existence is completely independent of its past and hence its unpredictability is total.<sup>10</sup> This is not the case within the state of nature. Here, while the relationships between individuals are constantly changing and are therefore unpredictable in terms of their detail, there are certain continuities out of which such unpredictability arises. There is the underlying desire by each individual to preserve himself which leads him, through the exercise of his own individual judgment, to constantly seek to satisfy his own needs and wants in circumstances where everybody else is engaged in the same pursuit.<sup>11</sup> These constancies arise from the assumptions Hobbes makes about the nature of man and reality. He considered that reality comprised mechanically linked phenomena. The task of understanding it required an application of what has been described as the resolute-compositive method that required that phenomena were analysed by reducing them to their simplest components and then investigating their interrelationships. Hobbes' methodological individualism was an application of this approach and required that the investigation of man's psychology was a precondition

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<sup>9</sup> For example the Pelagian Creation Myth whose first sentence reads, 'In the beginning, Eurynome, the Goddess of All Things, rose naked from Chaos, but found nothing substantial for her feet to rest upon, and therefore divided the sea from the sky...' . In relation to Greek myths, similar references to the creation of the world out of Chaos are made for example in the patriarchal myth of Uranus and Hesiod's Theogony (Graves, R 1960: 27-35). This is also captured by Nietzsche when he observes that 'behind every ground, under every grounding' lurks 'an abyss' (Nietzsche quoted from *Beyond Good and Evil* in Wadenfels, B at p. 66).

<sup>10</sup> This is a conceptualisation of randomness which is adopted by Stewart, I (1997:240). It equates with Cassirer's idea of chaos. Deleuze and Guattari also captured this idea of chaos in their statement that 'Chaos makes chaotic and undoes every consistency in the infinite' (Deleuze and Guattari, 1994:42). Stewart counterposes this state to a chaos where there is a connection between present and past and where unpredictability, characterised by chaos, is not total but occurs within limits which are determined by underlying continuities. This is the chaos conceptualised in Chaos Theory and might be regarded as chaos in a weak sense to differentiate it from Cassirer's chaos. See also Eve, R.A, Horsfall and Lee, M.E 1997: 60-68; 269-274. To capture the dread of chaos, its depiction in mythic terms is diluted so that it becomes describable. So for example, Fitzpatrick describes the creative forces as acting on undifferentiated, formless, limitless and nocturnal chaos (Fitzpatrick, P 1992:19). Clearly the very use of language to describe its contents, even in the idea of randomness, suggests a sense of constancy but here one can see the use of further terms to specify constancies which are capable of evoking dread and the need to avoid it.

<sup>11</sup> This process is substantially captured in Hobbes' assertion that 'the Felicity of this life consisteth not in the repose of mind satisfied. For there is no such...*Summum Bonum*,...Nor can a man any more live, whose Desires are at an end, than he whose Senses and Imagination are at a stand' Hobbes, T 1968: 160. Elsewhere he says that 'I put for a generall inclination of all mankind, a perpetuall and restless desire of Power after power ceaseth only in Death' (Hobbes T 1968: 161). Moreover, 'because the condition of Man, (as hath been declared in the precedent Chapter) is a condition of warre of every one against every one, in which every one is governed by his own Reason...' (Hobbes, T 1968: 189).

to the investigation of social processes.<sup>12</sup> Understanding man required conceptualising him in a pre-societal context, that is in a state of nature.<sup>13</sup> Man therefore constituted the interacting parts of society but in his plurality was likened to the component parts of a watch.<sup>14</sup> Lastly, returning to Cassirer's symbolic forms and particularly language, it is the very use of language through which the state of nature is conceptualised which allows for the undesirable content and constancy of its unpredictability to be communicated and hence to provide the basis for the need and justification for its replacement by a commonwealth, so that it is characterised as a process marked by competition, distrust, hostility, conflict, warfare and short lives.<sup>15</sup>

6. If one looks at the state of nature in the way that Hobbes' has described it, one can see that the unpredictability is not limitless. While it is not possible for there to be stable and peaceful relationships between individuals that are long lasting, it is not impossible for there to be such episodic periods, as a result of domination by one individual over others or even by agreement. However these periods are ultimately doomed to be short lived because of the ever present desire by human beings to satisfy their desires within a world characterised by the rough equality of humans who are competitive in spirit and who engage in a relentless pursuit of their conflicting aims.<sup>16</sup> In so far as such agreements are made, they are unenforceable, as there is no central power to ensure compliance.<sup>17</sup> There is also the continuing problem of each individual insisting on exercising his own judgment as to what the agreement, for example, a defence pact requires.<sup>18</sup> Bearing in mind the hostile context in which agreements are made, they can inevitably also function as tactical devices which are

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<sup>12</sup> This method can be traced back to Aristotle and was introduced to Hobbes by Galileo. See Gordon, Scott 1991:72.

<sup>13</sup> The resolute element comprises the analysis of individual man while the compositive element is the resultant exploration of the origins and requirements of civil society, that is a commonwealth under the control of a sovereign (Gordon, Scott 1991: 72).

<sup>14</sup> Hobbes asserts that 'For as in a watch, or some such small engine, the matter, figure, and motion of the wheels cannot be well known, except it be taken insunder and viewed in parts; so as to make a more curious search into the rights of states and duties of subjects, it is necessary...not to take them insunder, but ...that they be so considered as if they were dissolved....'(Hobbes, T quoted in Hampton, J 1986: 7.). See also Hobbes, T 1968:82.

<sup>15</sup> Hobbes, T 1994: 80.

<sup>16</sup> Hobbes, T 1994: 81.

<sup>17</sup> As suggested by Hobbes when he considers that covenants that are enforceable by a central power are not considered to be void (Hobbes, T 1968: 196).

<sup>18</sup> Hobbes specifically discusses this possibility but considers that such pacts will not endure because there will be no agreement amongst the participants as to what measures will be required to ensure that defence is effectively realised. See Hobbes, T 1998: 70.



subordinated to the overall individual strategy of creating and maintaining domination over others.<sup>19</sup> One can imagine that the inevitable termination of these short periods of stability are caused by those who benefit from them, considering that the disadvantages they bring outweighing the advantages. They might well be also caused by the very complexity of the fluctuating relationships one can imagine existing within the state of nature. Periods characterised by harmonious relationships experienced between certain individuals do not prevent such individuals from also experiencing simultaneously hostile relations with others. Hence, the violence experienced with some individuals might well impact upon the character of the relationships forged with others facilitating or undermining peaceful co-existence with them. What emerges out of conceptualising the state of nature in this way is that one can see within its very operation the possibility of sovereignty as depicted by Hobbes. If one were to freeze frame the state of nature at any given moment in time, a variety of possible worlds are suggested, some of which might be peaceful and comparatively harmonious while others might be conflict ridden, hostile and violent. The short-lived agreement and the short-lived period of domination by one person over another can be extrapolated towards the idea of sovereignty as posed by Hobbes.<sup>20</sup> Hence chaos, in the weak sense, which is conceptualised in this way, as comprising the state of nature, possesses the elements of domination and agreement associated with sovereignty. One can see the relationship of dominance which, if made permanent, begins to resemble the sovereign subject relationship, based on the principle of agreement which is developed to provide the legitimising basis for individuals to submit themselves to the sovereign figure they have agreed upon, and no longer to exercise their individual judgment as to what is required to survive and prosper but allow the sovereign to do this on their behalf.<sup>21</sup>

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<sup>19</sup> Hobbes does not go as far as saying that agreements creating peace might be used in this way but it inevitably would be the case and is implied by his acceptance that man in the state of nature is entitled to take all steps necessary to protect himself.

<sup>20</sup> This domination of one person by another might have occurred through acquiescence or agreement.

<sup>21</sup> There is considerable controversy as to whether the covenant setting up the sovereign involves individuals in transferring their natural law rights or simply requires them not to exercise those rights and allow the sovereign to exercise them on their behalf. This is in part due to the various formulations that Hobbes adopted in his different texts. So for example in *Element of Law* he appears to suggest that such rights are transferred whereas in *Leviathan* he appears to suggest that the sovereign body will exercise the rights of individuals on their behalf, that is to say in a representative capacity. See Hobbes, T 1994: 106 (7), 107(10); Hobbes, T 1968: 228. Interestingly Gauthier considers that Hobbes changes his position from *The Elements of Law* to *Leviathan* and is of the opinion that *On the Citizen* also suggests that rights are transferred. Yet, reading the relevant passage in *On the Citizen*, at the very

7. What this suggests is that when one compares existence in the state of nature which is dominated by hostility and violence and that of sovereign practice where peace and stability are far more dominant, there are significant aspects of continuity.<sup>22</sup> In both, there are individuals with the propensities to seek domination unless prevented by an absolute power in the form of a sovereign. In both, individuals possess the ultimate fear of death and the desire to preserve themselves and in Hobbes' mind it is this desire that provides an important foundation for the creation of the sovereign institution and hence an escape from the state of nature. It is also an existence that suggests a manifestation of social practice in the sense that as described, the territorial reach of the state of nature has no intrinsic limit. The social interaction depicted can potentially be global in character only being separated by physical barriers. The idea of this international state of nature is explored by Hobbes<sup>23</sup> although he accepts that in reality it was unlikely that the world as a whole simultaneously experienced such circumstances.<sup>24</sup> The point is that conceptualising the transition from the state of nature to society through the creation of a sovereign by covenant suggests that prior to society's creation, there was an underlying practice whereby there were lines of demarcation, for geographical or other reasons which separated off zones of endemic conflict so that the latter habitually did not take place across them. The *absence* as well as the presence of conflict between certain peoples along certain lines was central to the giving of shape to the struggles and societies that emerged and hence, it will be suggested central to the creation of sovereign institutions.<sup>25</sup>

Returning to Searle's formulation and applying it to Hobbes' model:

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least it is ambiguous. See Hobbes, T 1998: 72 (5) and (7). For my purpose the dispute is not central as either way the exercise of the substance of such rights is vested in the sovereign.

<sup>22</sup> I am using the idea of 'practice' here to denote actions within a social context that are repetitive in character.

<sup>23</sup> In depicting the global reach of the state of nature Hobbes states that in such a situation there is 'no Culture of the Earth; no Navigation, nor use of commodities that may be imported by Sea; no Commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society...' (Hobbes, T 1968:186).

<sup>24</sup> '...It may...be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so: but there are many places where they live so now' (Hobbes, T 1968:187).

<sup>25</sup> Hobbes' assumption that the state of nature is a condition that is regionally based emerges for example in his description of the meaning of the term 'people' when he states that it means 'no more, but the multitude of those particular persons that inhabit those regions, without consideration of any contracts or covenants amongst them' (Hobbes, T 1994:124).

Institution X (person or collective) counts as sovereign (Y) in circumstances (C term) where each individual within the state of nature between themselves has authorised the actions and judgments of X to be his own for the purpose of living peaceably.<sup>26</sup>

### ***Territorializing Hobbes***

8. By implication, the agreement applies to a specific group of individuals that are likely to be located within a specific territory, given that Hobbes accepts that globally the world comprises of separate sovereigns who rule over specific territories and who compete with one another in an international state of nature. Even if the territory which the individuals occupy is expansive, anything less than being globally applicable means that it is territorially limited. As a result the above formulation which does not express the territorial specificity that many institutions work within needs to be slightly modified to read:

*Within Territory  $T_1$ , institution X (person or collective) counts as sovereign (Y) in circumstances (C term) where each individual within the state of nature between themselves has authorised the actions and judgments of X to be his own for the purpose of living peaceably.*<sup>27</sup>

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<sup>26</sup> Leaving aside the controversy over the exact nature and scope of the covenant between individuals in the state of nature giving rise to the sovereign, I have for the purpose of applying Searle's formula adopted a summary of one description of the covenant which states, 'a Commonwealth is said to be *Instituted* when a multitude of Men do agree and Covenant, *every one with every one, that to whatsoever Man, or Assembly of Men*, shall be given by the major part, the *Right to Present* the Person of them all, (that is to say, to be their *Representative*;) every one...shall *Authorize* all the Actions and Judgments, of that Man, or Assembly of men, in the same manner, as if he they were his own, to the end to live peaceably amongst themselves, and be protected from other men' (Hobbes T 1968: 228-229). Another version states 'I authorise and give up my Right of Governing my selfe, to this Man, or to his assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner' (Hobbes, T 1968: 227). Gauthier suggests that this does not truly represent Hobbes' position regarding the covenant as nowhere else did he equate authorization with the renunciation of rights. It is difficult to reconcile the giving up of a right when Hobbes accepts that in certain circumstances the bond between subjects and sovereign dissolve and the former are perfectly entitled to exercise that right without there having been a transfer back of the right other than perhaps arguably by implication. Hence I have not used this version of the covenant and consider that it is more appropriate to say that individuals covenant in effect to transfer the exercise of their right to self government. However I do not consider that, even if I were to adopt this version of the covenant, my observations below, in substance, would significantly alter.

<sup>27</sup> The territorial specificity of any institution that operates within a territorial state is something that does not explicitly feature within Searle's formula.

9. Leaving aside the possibility of conflict for the moment, the territorial specificity suggests that in addition the very creation of the sovereign institution is accompanied by the absence of any other event that for the individuals gives rise to a sovereign institution whose domain of governance covers them. There is a term implied in the agreement that gives rise to the institution, that no one else counts as sovereign at the time that the sovereign institution is created. In this sense the creation of the sovereign involves the simultaneous selection and rejection of individuals who are all potentially eligible to fulfil this role. Furthermore, returning to the point made above, if one is to conceptualise sovereignty as operating over a specific piece of territory, then the agreement is consistent with an existing practice which precedes it whereby all others who are not part of it either exist within a separate state of nature or alternatively are part of already existing commonwealths. This idea of existing practice preceding the creation of a commonwealth emerges in Hobbes' claim that the emergence of commonwealths is the product of the enlargement of smaller units ultimately derived from 'Familyes' in response to the constant fear of invasion and danger.<sup>28</sup> Here too one can see the possibility of a constantly shifting territorial configuration expressing chronic conflict between social groupings in their bid to ensure their dominance over others.

10. As with Augustinus Triumphus' model, within Hobbes' model one sees mechanisms that can come into play in circumstances that have some similarity with that of the state of exception explored by Schmitt. Clearly the idea of the state of exception is captured by a sovereign's ability to take whatever measures are necessary to preserve his commonwealth against internal or external threat in circumstances where no existing normative framework can predict when such decisions should be taken or what measures should be taken to deal with the danger. However here in relation to each individual who is subordinate to a sovereign, there is also the possibility of a decision taken by her or him to resist the sovereign in circumstances

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<sup>28</sup> Hobbes, T 1968: 224. This does not sit easily with the idea that commonwealths are the product of the unification of roughly equal individuals as it suggests that practice in the state of nature does not simply comprise the actions of atomised individuals but also temporarily cooperating groups. This is also reflected in his observation that in the state of nature, men are capable of forming factions (Hobbes, T 1998: 22). Existing practice is also as mentioned above expressed by the existence of states of nature which are regionally based.

that are akin to a state of exception.<sup>29</sup> This comes about because of Hobbes' acceptance that in certain circumstances individuals, who are taken to have covenanted to obey the sovereign, are released from it and are entitled to resume the exercise of their own individual judgments in order to realise their own natural right to self preservation. In such circumstances, while from the perspective of the civil law of the sovereign, the individual remains bound to obey his commands which are incapable of being unjust, from the perspective of his natural right to preserve himself which exists independently of the sovereign's will,<sup>30</sup> the individual has the right to take all action necessary to preserve himself.<sup>31</sup> As an overall proposition, the subject's obligation to the sovereign only lasts as long as he is able to protect him given that the purpose of obedience is such protection.<sup>32</sup> Hence covenants not to defend oneself were considered by Hobbes to be ones that could be justly disobeyed and so if a subject was commanded by a sovereign to kill himself, he was entitled to resist.<sup>33</sup>

11. At first sight the scope of the subject to disobey the command of the sovereign here appears to be limited and no doubt this was Hobbes' intention. He was

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<sup>29</sup> This is captured by his formula that sovereignty rests with he who decides upon the exception. Schmitt, C 1985:3. This formula will be discussed in more detail below in the chapter on Schmitt. It will be seen that ultimately it comprises a decision to invoke measures to protect a people from an internal or external danger which constitutes a grave threat to their continued existence. Schmitt considered that at the centre of Hobbes' model of sovereignty was his capacity to undertake exceptional measures free of any normative constraints for the purposes of insuring the continued existence of the commonwealth (See Schmitt, C 1996). I use the phrase here in a way not intended by Schmitt since it concerns circumstances where individuals seek to resist the commands of a sovereign on the ground that their preservation is threatened. Hence the phrase captures at an individual level what Schmitt sought to capture at the level of a people, namely that there can be circumstances which constitute an existential threat to either, the nature and circumstances of which cannot be catered for by any existing normative framework.

<sup>30</sup> 'For the right of men have by Nature to protect them, when none else can protect them, can by no Covenant be relinquished.' (Hobbes T: 1968: 172).

<sup>31</sup> In such circumstances the morally obligatory nature of the first part of the first law of nature which states that '*every man, ought to endeavour peace as farr as he has hope of obtaining it...*' falls away leaving the second part which states '*...and when he cannot obtain it, that he may seek, and use, all helps and advantages of warre*' (Hobbes, T 1968:190). This power is matched by a natural right to '*by all means we can, to defend ourselves*' (Hobbes, T 1968: 194). There is some controversy over the meaning of this term. Does it mean that he is entitled to anything or only anything necessary to ensure self- preservation? Malcolm, for example, argues in favour of the narrower version and this would appear fit with the implicit meaning of the term. However, even if one accepts the narrower meaning, it is still open textured in content and at the end of the day, it is the individual exercising it who is the final judge of its appropriateness. See Malcolm, N 2002:445.

<sup>32</sup> Hobbes, T 1968: 272.

<sup>33</sup> Hobbes, T 1968: 199; Hobbes, T 1968: 269. Hobbes in fact appears to extend this right to circumstances where an individual is threatened with 'Wounds, Chayns, and Imprisonment; both because there is no benefit consequent consequent to such patience' (Hobbes, T: 1968: 192).

attempting here to limit the consequences arising out of the disjuncture that exists in his model between what the sovereign may do which has no legal limits and what a subject may do in defiance of such action in pursuance of his independently existing natural right to preserve his life which would be unlawful with regard to the civil law in respect of which the sovereign was supreme legislator, executor and judge. The difficulty is however that in practice given the indeterminate idea of resistance, that it was for each individual to judge as to what that required in circumstances where there was no adjudicatory mechanism to determine what was acceptable that did not involve the sovereign, the way was open for the whole edifice constituted by the commonwealth to be undermined.<sup>34</sup> This acceptability of resistance for Hobbes also extended to individuals forming a defence pact where each of them had been accused, whether justifiably or not, of a crime for which the expected sentence is death.<sup>35</sup> In forming such a pact, Hobbes was in effect recognising that individuals faced with what they would perceive as the unequal power of the sovereign, would seek to negate that imbalance and hence to produce a situation where there was a nearer approximation to the equality that pervaded the state of nature without the chronic disorder associated with it. This scenario clearly suggests that collective resistance was possible by reference to Hobbes' model although not explored and given its indeterminate scope, it was potentially capable of constituting an act that amounted in effect to an ousting of the sovereign's jurisdiction, the partial abolition of the commonwealth at least in the territory occupied by those resisting his will, and the creation of another.<sup>36</sup>

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<sup>34</sup> The lack of certainty about when a subject's life was put in danger by the sovereign was highlighted by Hobbes in his observation that 'a man cannot tell, when he seeth men proceed against him by violence, whether they intend his death or not' (Hobbes, T 1968: 192).

<sup>35</sup> Hobbes, T 1968: 270(113) (*Leviathan*). 'But in case a great many men together, have already resisted the Sovereign Power unjustly, or committed some Capitall crime, for which everyone one of them expecteth death, whether have they not the Liberty then to joyn together, and assist, and defend one another? Certainly they have...' The subversive implication of the individual's right to defend himself was highlighted by Filmer who stated that such doctrines are 'destructive to all such governments whatsoever, and even to *Leviathan* itself. Hereby any rogue or villain may murder his sovereign, if the sovereign but offer by force to whip or lay him in the stocks, since whipping may be said to be a wounding and putting in stocks an imprisonment' (Filmer, 1991: 195).

<sup>36</sup> It is difficult to see what other outcome there could be in the absence of the sovereign withdrawing his threat of death since there would be no incentive for the resisters to cease their resistance which could well escalate as the sovereign became more determined to overcome them. On the other hand if the sovereign did lift the death sentence, this might have been to his short-term advantage at the expense of long term instability. The concession could have acted as a precedent possibly encouraging others to engage in activity contrary to sovereign command as they perceived the sovereign as being incapable of suppressing the exercise of their liberty, hence leading to further social disruption and ultimately the dissolution of the commonwealth.

12. A restriction in the scope of opposition to one of resistance was however removed for Hobbes in circumstances where stability broke down as manifested by the proliferation of murders and robberies which for Hobbes would be caused by the corruption of the judiciary giving rise to the expectation amongst potential wrong doers that they would not be punished. In such circumstances Hobbes considered that there would be a reversion to the state of nature and the commonwealth would be dissolved.<sup>37</sup> Here of course the fundamental difference to the previous scenario was that there was disorder which was created by subjects who had covenanted to obey the sovereign in circumstances where the sovereign's agents, namely the judges were incapable of countering it. However if one imagines Hobbes' model as a living one, in practice, these distinctions could well count for little and the defence pact played out to its logic points to the possibility of a collective voice, existing independently of the existing sovereign, that gives rise to a new sovereign to replace the existing one.

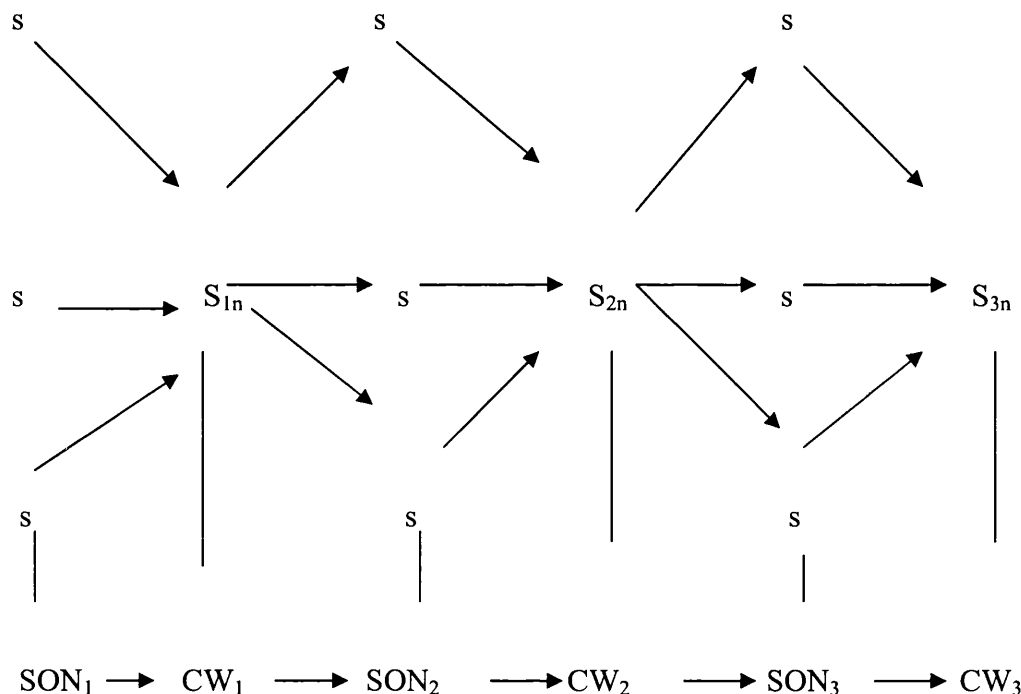
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<sup>37</sup> Hobbes, T 1998: 152.

13. At its most disruptive, the possibility existed for repeated creations and destructions of successive sovereign or sovereign lines. Diagrammatically the operation of Hobbes' model can be depicted as follows:

**Fig. 1**



14. Here is depicted what might be regarded as a series of cycles looked at diachronically, where there are successive states of nature leading to the creation of successive sovereigns or successive sovereign dynasties,<sup>38</sup> if one is contemplating kingship as the prevalent form of governance, at the head of successive commonwealths. The diagram points to the logical outcome of Hobbes' model despite his own belief that the creation of a sovereign through covenant between individuals in the state of nature would provide a permanent escape to the endemic conflict that he generally maintains would otherwise result. Its cyclical nature is underpinned by Hobbes' acceptance that ultimately the obligation of subjects to sovereign only lasted as long as the sovereign was able to protect them.<sup>39</sup> This sets

<sup>38</sup> So that in relation to S<sub>1n</sub> if regarded as a dynasty would comprise S<sub>1n</sub>, S<sub>1n+1</sub>, S<sub>1n+2</sub> etc and S<sub>2n</sub> would comprise S<sub>2n</sub>, S<sub>2n+1</sub>, S<sub>2n+2</sub> etc.

<sup>39</sup> Hobbes, T: 1968: 272.



up a situation where in fact in the final analyses, each individual becomes an independent arbiter of whether he continues to be obliged to obey the sovereign's commands.<sup>40</sup>

15. Added to the cyclical character of social existence is the possibility of conquest which Hobbes accepted would give rise to the ousting of one sovereign by another. In these circumstances, the legitimacy of the conqueror's position as sovereign is founded on a contract directly between him and those defeated whereby the latter submit themselves to the former in exchange for the commitment by the former to spare their lives.<sup>41</sup> It is the covenant rather than the defeat that for Hobbes provides the legitimacy for the conqueror's entitlement to the obedience of the vanquished. Again however the agreement is distinctly conditional as it will last only 'so for as long as his life, and the liberty of his body is allowed him'.<sup>42</sup> If anything, the entitlement to resist the sovereign is wider here since it extends to circumstances where his liberty is under threat. Territorially, Hobbes considered that there would be a dynamic towards larger units of governance given that larger units could utilise larger human resources to defend themselves, but clearly an acquisition event could actually lead to the break-up of an existing unit as part of it was absorbed into that of the victor's existing territory. Furthermore when considering the possibility of a dissolution of commonwealths or part of them arising out of the circumstances described above, one can see the potential for complex changes in boundaries where conflict that is initially internal to a given commonwealth develops into conflict between commonwealths as parts of existing commonwealths split off or are absorbed by other commonwealths.<sup>43</sup>

16. Hence the diagram above does not explicitly portray the potential complexity that will potentially be associated with a world in which the two primary forms of social existence are those characterised by the state of nature and commonwealth. Irrespective of how each commonwealth came into being, in essence the existence of

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<sup>40</sup> The subversive implication of the individual's right to defend himself.

<sup>41</sup> Hobbes, T 1968: 255.

<sup>42</sup> Hobbes, T 1968:255.

<sup>43</sup> One can imagine for example a situation where the individuals in part of a commonwealth that reverts to a state of nature because of an uncontrolled increase in the level of crime as referred to by Hobbes creates a new commonwealth which then enters into conflict with its neighbour of which formerly it was part.

each will be conditional on the extent to which each individual within each commonwealth considers that the sovereign relating to each such unit is protecting his or her life. Referring back to back to Searle's model, bearing this conditionality in mind :

*X (whether individual or assembly) counted as sovereign (Y) only for as long as X is able to protect his subjects (C circumstances).*

17. Clearly one can see here a great deal of scope for dispute about the conditions referred to in the above formulation. The fundamental difficulty is that the way is set for the existence of an irresolvable disagreement over whether X is able to protect his subjects. The dilemma posed at the centre of Hobbes' model generates a multi-perspectival response to this conundrum. To explore this, a return is made to Cassirer's observation that the making sense of human experience involves symbolic forms particularly language whose structure provides an interactive interface between the general and particular and which enables circumstances which are considered to constitute an undermining of personal security to be asserted as well as denied in response to the experiencing of diverse events occurring over time and across space.

18. Different individuals' assessment of the extent to which the sovereign is able to protect them are likely to vary depending upon a number of factors. These might well include: evaluations of the events that each individual experiences, both as to their existence, nature and significance as set against what they perceive to be necessary to ensure their self preservation; the extent, if any, to which such events are regarded as manifestations of sovereign failure to ensure their preservation; and the extent if any to which action will need to be taken in defiance of the sovereign with a view to ensuring their self preservation. The particularities of each experience of each subject will be assessed by that subject against a number of unfolding generalities including what each individual considers necessary to ensure self-preservation and the impression gained by that individual of the extent to which the sovereign is capable of ensuring his protection. This process will not simply concern the experiences of events to which they are subject but also their unfolding evaluations of events they perceive have occurred to others.

19. The result could be that each individual might have differing views on the state of the commonwealth precisely because their experiences or their evaluations of them could well be different and the generality against which they are measured could differ. Hobbes' comment that disorder in these circumstances leads to the dissolution of commonwealth is premised or at least consistent with his dominant idea that ultimately there are only two modes of existence, namely that in the state of nature and that under a sovereign within a commonwealth.<sup>44</sup> His comment therefore that the commonwealth in such circumstances would be dissolved assumes that each subject would adopt the same evaluation of the circumstances despite their differing experiences and limit points beyond which each might consider that he was freed of his obligation to obey the sovereign. Yet the likelihood is that an indeterminate situation might exist where it is neither the case that all continued to obey the sovereign nor that they all disobeyed him. Looked at in a slightly different way there would be a plethora of interpretive 'communities' comprising individuals in their own right and the sovereign himself who might disagree over whether the commonwealth continued to exist. There would be no obvious way of resolving the difference, that is to say there would be no institution whose interpretation<sup>45</sup> of whether or not the commonwealth continued to exist would be binding upon the alleged sovereign and subjects. There would be no sovereign behind the sovereign. Hence one justification for the need for a sovereign, namely the need for an institution with absolute power to provide order and stability resulted in a model that was one sovereign short and a rectification of this apparent insufficiency would only reveal that it would always be so in circumstances where each individual had the inalienable right to take measures independently of the sovereign to preserve themselves in the event that the sovereign failed to do so.<sup>46</sup>

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<sup>44</sup> Hobbes does not reject the possibility of intermediate formations but claims that they will not be stable and will dissolve into a state of nature in the absence of the creation of a commonwealth. So for example he refers to the creation of a defence pact as mentioned above and also elsewhere accepts that in the state of nature men are capable of forming 'factions' (Hobbes, T 1998: 22).

<sup>45</sup> The term interpretation is used to denote that the judgement as to whether the commonwealth existed would take the form of claiming that it did or did not exist and hence it, that is the interpretation has the quality of a performative utterance.

<sup>46</sup> The need for an institution with absolute power as justifying a sovereign has been described by Hampton (Hampton, J 1986: 97-103) as the regress argument and the above dilemma shows that ultimately within the framework of Hobbes' model there is no escaping the intractable dilemma of the infinite regress whereby given human nature as perceived by Hobbes, there is the need for a supreme authority to resolve conflict.

20. In so far as individuals increasingly resist the commands of a sovereign because they no longer consider that he is able to preserve their lives, in accordance with Hobbes' legitimation narrative, namely that the sovereign's authority is based on a social contract between individuals comprising the multitude at the time of its signing, he that is the sovereign is under no obligation to concede to them. Their actions may well be regarded from his perspective as being 'unjust' in so far as they are in conflict with his positive laws from his point of view.<sup>47</sup> From the perspective of the individual, given the sovereign's failure in his view to take the necessary actions to preserve him, the latter will be faced with acts or omissions which are in breach of his natural right to preserve himself and hence will be regarded as evil or iniquitous.

21. If one imagines that the existing sovereign (S1) is the outcome of a social contract between the members of the multitude at a particular moment in time (m1), the legitimacy of that sovereign is fed by that event which can be designated as SC1. If S1 begins to act towards the subjects of his commonwealth (CW1) in ways that they increasingly consider are incompatible with their continued preservation, increasingly they will act in ways that are consistent with the emergence of a state of nature and the dissolution of the commonwealth. As this tendency develops, in response to the emergence of a state of nature, those finding themselves within it may through a second social contract SC2 occurring at moment m2 create a second sovereign S2 and CW2 given that they no longer regard themselves as having any obligations to S1. S1 on the other hand will have no obligation towards S2 and the legitimacy of his position will continue to be fed by the SC1. Practically speaking, there is no possibility for the simultaneous existence of CW1 and CW2 where the populations occupy the same territory in the absence of agreement between S1 and S2 whereby they agree in some way to divide such territory and the population which

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<sup>47</sup> The term 'unjust' is used rather inconsistently by Hobbes. Sometimes he uses it to mean acting in a manner which is contrary to positive civil law contrasting with iniquitous actions that are those that are incompatible with natural law. At other times, he uses the term to include actions which are in breach of natural law. The apparent inconsistency is usefully explored by Burgess. See Burgess, 1994:65 fn.15. However he omits to say that the breach of positive law is at the same time a breach of natural law in the sense that it amounts to a failure to keep his covenants, save where to do so is incompatible with the individual's natural right to preservation (Hobbes, T 1968: 201). It is at least arguable therefore that this point of intersection between obligations of natural and civil law provides the source of 'leakage' whereby at times Hobbes suggests that actions which are incompatible with natural law are unjust. A clear demarcation between 'unjust' actions and 'evil' ones, referred to by Burgess is to be found in Hobbes, T 1994: 88, 98-99. What is important to appreciate is that whatever label is attached to any particular action or inaction whether by sovereign or subject, it will be the outcome of subjective evaluation by one or both.

occupies it between them. Hence the state of nature which the creation of a commonwealth was designed to exclude so that it would reside between rather than within states can be seen from the above to be capable of reasserting itself in the form of strife within territories over which commonwealths exist adding to the complexity of the conflicts existing between individuals and states undermining the boundaries between states.

22. What one can see occurring here referring back to Searle, is that each subject is capable of making his own judgement as to whether sovereign S1 has protected him so that:

*X no longer counts as S1 since he is no longer considered by the particular subject to be protecting him as a result of which by virtue of a new social contract (SC2) to which he was a party Y counts as S2 for as long as he protects him.*

In making this judgement, the subject will inevitably not simply look at what has actually occurred to himself or others but also is likely to evaluate what is likely to occur in the future.

### ***Sovereign Practice and Territorialisation***

23. The suggestion that sovereignty emerges within the context of an existing practice involving states indicates that the multitude out of which sovereignty emerges is already identifiable. The territorialization of the multitude from which sovereignty apparently emerges, suggests that the identity of that multitude is profoundly influenced by the existence of other states or communities, the configuration of their territories, and hence their populations from which the multitude in the case where sovereignty is being considered has been excluded. Hence the existence of the multitude can be regarded as the product of sovereign practices involving adjacent sovereignties and not simply the events applicable to the emergence of the sovereign under study. One has to add that such exclusion as mentioned above might contribute to a given multitude having some sense of collectivity, linguistically, religiously and culturally expressed and a sense of its history all of which suggest some existing degree of governance. This reading which

accords more with historical reality, begins to break down the bipolarity of possible states of existence between those situations defined by an atomised state of being in a state of nature and those where there is sovereign-based governance.<sup>48</sup>

24. The claim that the sovereign was born out of a social contract by a multitude living 'in the wild' potentially has the effect of burying the above explanation with its greater degree of nuance as to the multitude's existence prior to the advent of a sovereign. The pre-existence of a territorially based multitude that exhibits some degree of social coherence suggests the possibility of other forms of governance, including that associated with feudalism and theocratic governance, the very types of governance against which Hobbes was opposed. It weakens the claim that the current sovereign's continuing existence is absolutely indispensable to the continuing preservation of his subjects and might even pose the sovereign as not being so much the solution to civil strife but its potential cause.<sup>49</sup> As a result the fear-factor could be reduced and the likelihood of resistance to the sovereign could be increased. The claimed existence of the social contract, in reality likely to be a founding myth,<sup>50</sup> also helps to overcome a reality where the likelihood was that sovereignty was established by forcible domination and that way of course again strengthens the sovereign's

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<sup>48</sup> It has been argued for example that the state of nature was a construct that provided a depersonalised account of the English civil war that ensured that its memory would remain in individuals' minds without casting blame or any particular side or party. With that kind of reading, although involving the centrality of violence, it takes place within the context of an already existing territorially limited society with its own culture and hence potentially poses the possibility of modes of existence that do not divide simply into those where there is endemic violence and those where there is complete peace with nothing in between.

<sup>49</sup> This is of course the point that Locke makes in his model of sovereignty where its location moves from an executive sovereign to 'the people' expressed through a legislative body with the former possessing the residual right to overthrow the latter. In the process the state of nature is recast as a more benign place with an already existing society.

<sup>50</sup> This ushers in a wide literature including Cassirer (1946b) who proclaims that the social contract is a means by which man, having been exiled from a stable order by virtue of the loss of the fixity of the religious and ethical worlds, refounds such stability in the realm of the community agreement (Cassirer 1946b: 169). One can see from this explanation again the idea of the transcendent in that the agreement lies beyond the immediacy and contingency of existing immanent practices of governance allowing their discontinuities to be 'overcome' by reference to the constancy of an ever present moment of foundation. Fitzpatrick on the other hand locates the social contract in the Freudian explanation that it mirrors the totemic ritual of worship whose significance lies in its representation of the covenant of obedience to the father (Fitzpatrick P, 2001: 24). This too, from a Cassirerian perspective, accords with the need to rebut the threat of chaos by an involvement in the fixity of a relationship around which irresolvable conflict occurs a relationship whose character fundamentally involves an exclusion of others who do not occupy the position of father.

legitimacy. Both the claimed existential need for a sovereign and the choice as to the location of sovereignty are therefore protected more effectively.<sup>51</sup>

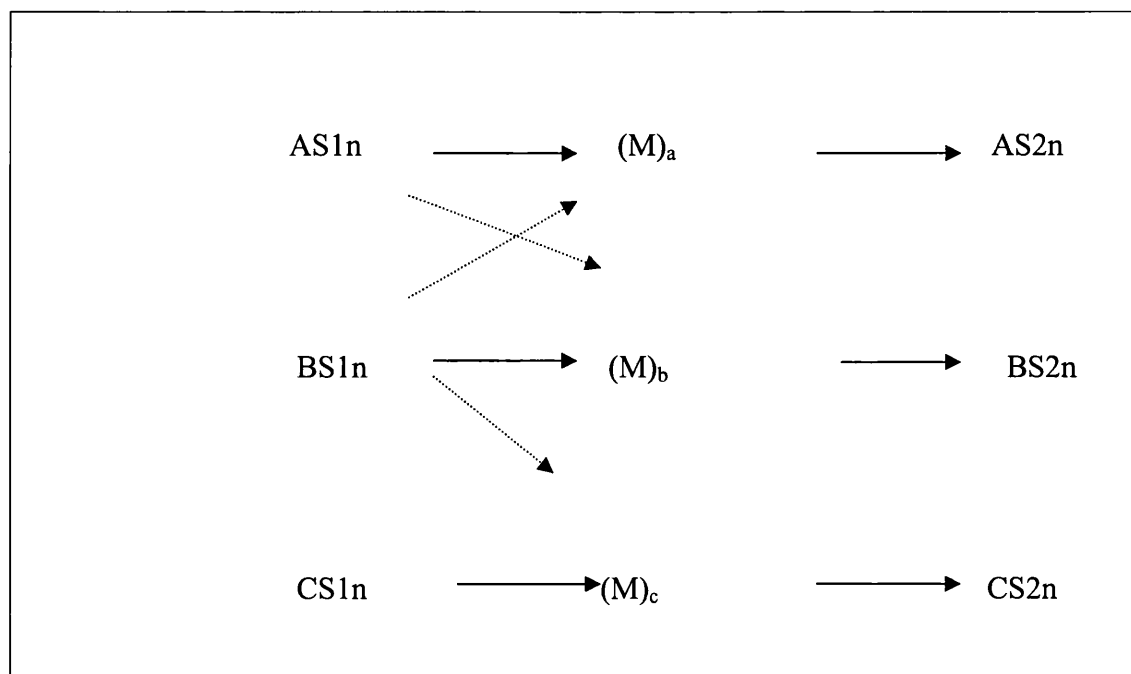
25. The emergence and continuation of a sovereign therefore may well be the product of an already separating or separated population which enters into a subordinate relationship with him. This process may well be intertwined with those in surrounding territories whereby governance occurs on the basis that the regional territorial configuration is accepted willingly or otherwise. Stability might therefore be the product of practices which depart from the founding mythology. There is a sense therefore in which the prevailing practice of the population to the sovereign both generates its own founding and its own explanations which in turn are seen to 'produce' actually existing arrangements. There is complex movement in play which is generated by the actually existing operation of co-ordinated behaviour between subjects and between them and sovereign which can be claimed to be consistent with the legitimating narrative through which governance is justified. Looking at this process from the perspective of adjacent populations one sees the following:

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<sup>51</sup> It is interesting to note that in the concluding chapter of *Leviathan*, Hobbes opines that one of the most effective causes of a state's disintegration is the 'approbation' of a Conqueror's past actions as justifying the state given that there is 'scarce a Common-wealth in the world, whose beginnings can in conscience be justified' (Hobbes, T 1968: 721).

**Fig. 2**



26. Here one sees a stable relationship between three territorially limited and adjacent states A, B, and C. One can see that the integrity of state B is in part contributed by the existence of the surrounding states which contribute towards the creation of the territorially limited multitude b, that is (M)b. The contribution of surrounding states to the integrity and stability of state B is the product of a sovereign practice which involves non-interference by states A and C upon state B. That is to say that the sovereign practices of ASn and CSn must centrally involve an exclusionary dynamic in relation to the territory and population of state B which is in turn reciprocated.

27. Looked at from the perspective of BS1n, assuming that his position is the product of forcible domination, the claim that it is the product of a voluntaristic social contract may be problematic not least because the population or at least much of it will have directly experienced the conquest.<sup>52</sup> However, as one moves beyond this point to subsequent members of the dynasty, namely BS1<sub>n+1</sub>, BS1<sub>n+2</sub> etc., the creation of a

<sup>52</sup> Clearly to classify government as being simply the product of forcible domination is itself to simplify matters in that it may well be the case that there may be sections of the population that were not averse to the conquest and may not regard it in the same way as other parts of the population. This suggests the possibility that, within a given population there may be different histories, some being more dominant than others, whose diversity may allow for the establishment, at least potentially, of a variety of foundation stories.



multitude existing in a state of nature which gave rise to its own sovereign as a means of escaping its own intolerable dilemma becomes possible, being reinforced by the current reality of governance. As each new rupture occurs so that sovereignty is taken by BS2n from BS1n for example, a similar process will occur in which at least initially the legitimacy deficit is not likely to be overcome by the claim that the new sovereign arrangement is based on consent. As the continuity of each new dynasty increases, the claim as to a founding based on consent will be strengthened and will support and be supported by a growth of authority based on longevity and continuity itself.

### *Some Observations on the Place of Resistance in Hobbes' Model of Governance*

28. In discussing the practices associated with sovereignty which, although not explicitly referred to by Hobbes, can be seen by way of extrapolation as the logical consequences of Hobbes' model of governance, the issue of resistance clearly comes into focus. Instances where resistance appears to be justified emerge in Hobbes' writings at various points. In essence, at their core is the proposition which is never abandoned by Hobbes that a commonwealth and the concomitant obligations of subjects to obey a sovereign can only last as long, 'and no longer', as the latter has power to protect them, given that natural right of men 'to protect themselves when none else can protect them'.<sup>53</sup> Furthermore such a right cannot be trumped by any pre-existing covenant to obey the sovereign and is therefore inalienable.<sup>54</sup> This natural right is supported by a natural law which imposes upon the individual in a state of nature the obligation not 'to do that which is destructive of his life, or taketh away the means of preserving the same: and to omit that, by which...it may be preserved.'<sup>55</sup> While the natural right of self-preservation is not handed over to the sovereign, as previously explained in covenanting to create the sovereign each individual hands over his judgment, as to the means needed to ensure such survival to the sovereign, whose single will replaces that of the many and whose commands the individual covenants to obey.<sup>56</sup> This inalienable right of self-preservation however continues to lie at the centre of Hobbes' sovereign- subject relation even though from a

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<sup>53</sup> Hobbes, T 1968:272.

<sup>54</sup> Hobbes, T 1968:272.

<sup>55</sup> Hobbes, T 1968: 79; Hobbes, T 1968: 201.

<sup>56</sup> Hobbes T 1998: 72.

jurisprudential point of view by definition nothing the sovereign does can be held to be unjust even though it can be regarded as iniquitous. Hobbes endeavours to minimise the consequences of the presence of this right by seeking to specify the circumstances in which it can be invoked which have been alluded to above. However the difficulty is that once the 'genie' in the form of the natural right to self preservation is 'out of the bottle', its implications inevitably become potentially far-reaching and contested. Lying behind these scenarios is Hobbes' assessment of man's natural propensities and by what amounts to an unenforceable normative code comprising Hobbes' conceptions of natural law whose overwhelming purpose is to avoid that 'which is hurtful; but most of all that terrible enemy of nature, death, from whom we expect the loss of all power, and also the greatest of bodily pains in the losing'.<sup>57</sup> Hobbes considered that within civil society, the sovereign was the ultimate interpreter of what was publicly to count as natural law.<sup>58</sup> His actions could be measured by reference to such law and hence it was capable of providing a legitimating framework. Hobbes, reflecting this, claims to ground 'the Civill Right of Sovereign both the Duty and Liberty of Subjects upon the known naturall Inclinations of Mankind, and upon the Articles of Law of Nature; of which no man, that pretends but reason enough to govern his private family, ought to be ignorant.'<sup>59</sup> As has already been mentioned, Hobbes accepted that a sovereign's breach of natural law might in certain circumstances result in the dissolution of the commonwealth.<sup>60</sup> What is interesting here is that by implication given that the content of natural right and law are constructs of reason derived from man's inclinations, whether or not sovereign's subjects were aware of the content of natural law as developed by Hobbes, such inclinations themselves could lead to resistance and possibly rebellion.<sup>61</sup>

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<sup>57</sup> Hobbes, T 1994: 79. The character of natural law was such that its normative qualities were always binding internally upon individuals' consciences in a state of nature and hence constituted a system of standards by which each individual could measure his actions, subject to the overriding limitation that any commitment to obey them fell away in so far as such obedience was inconsistent with the continuing 'safety' of the individual (Hobbes, T 1998:54).

<sup>58</sup> Hobbes, T 1968:322. In effect natural law at least potentially occupies the position of what would now be termed the rule of law in providing a set of standards against which the contents of positive law are judged.

<sup>59</sup> Hobbes, T 1968: 725. It is interesting here to speculate whether Hobbes would have been in favour of the outright banning or the restricted availability of his own writings to the population of a Hobbesian commonwealth given that their contents as regards natural law could undermine the sovereign's claim to be entitled to possess monopoly powers to claim the contents of such laws.

<sup>60</sup> Hobbes, T 1998: 152.

<sup>61</sup> Hobbes in fact at one point equates resistance with rebellion in the context of the sovereign-subject relationship (Hobbes, T 1968: 377).

29. It is therefore difficult to see how the constant possibility of resistance does not play a profoundly important role in determining a sovereign's actions and commands to his subjects and it is not surprising, bearing this in mind, that Hobbes devotes considerable space to how sovereigns ought to govern to ensure what he terms 'the safety of the people', an interesting term, because Hobbes make it clear that by that phrase he does not mean 'bare preservation', casting a generous interpretation upon the duty of the sovereign to protect his subjects.<sup>62</sup> The question then arises as to whether in the articulation of the sovereign with his subjects, the collectivity of the latter as a separate entity comes into play as part of that relationship. From a juridical point of view the answer is in the negative as the individuals who handed over power to a sovereign are taken to only express their collectivity through his actions and commands which are taken to be theirs through a process of authorization.<sup>63</sup> As a result, he is incapable of injuring his subjects or being unjust to them as they are incapable of injuring or being unjust to themselves.<sup>64</sup> However, the possibility of collective action remains and a prudent sovereign needs to take it into account when governing. It is captured in Hobbes' acceptance that obedience to a sovereign only lasts as long as he has the power to protect his subjects.<sup>65</sup> By extrapolation, this poses the possibility that every subject of the sovereign might come to the conclusion simultaneously that such conditions pertain and hence obedience to the sovereign ceases.<sup>66</sup> Even if one does not wish to concede the possibility of collective action in opposition to an existing sovereign, the effect of such a development is consistent with that of such action even if it is the product of isolated individuals coming to their conclusions simultaneously. But the possibility of some kind of collective action is not discounted by Hobbes as has already been shown above in an analysis which seeks to show that the character of the state of nature is not as atomised as might first be suggested. Not only is it predicated on the existence of geographically discrete social formations but also as previously mentioned there is

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<sup>62</sup> Hobbes, T 1968: 376. Chapter 30 of *Leviathan* most particularly outlines the measures to be taken to ensure a successful commonwealth.

<sup>63</sup> Hobbes, T 1968: 227.

<sup>64</sup> Hobbes, T 1968: 232.

<sup>65</sup> Hobbes, T 1968: 272 and paragraph 12 above.

<sup>66</sup> This returns us to the impossibility in Hobbes' model of resolving such a clash, other than through violence or possibly agreement because there is no sovereign behind the sovereign. From the sovereign's perspective, such resistance is unjustified. However from the those that are regarded by him as his subjects, a lack of protection means that the commonwealth is dissolved and there is no sovereign. The sovereign has in effect become a usurper and in so doing echoes the position of the heretical pope in the model of Augustus Triumphus. See above.

the suggestion that in the state of nature there is the possibility of small social units where the domination associated with the sovereign-subject relationship is prefigured ultimately in 'families'.<sup>67</sup> He also accepts as previously mentioned the possibility of joint action against the sovereignty within the commonwealth in the form of defence pacts.<sup>68</sup> The idea of action which has a collective quality is also however posed in the very appointment of a sovereign where individuals agree with each other to hand over their rights of self-government to a third party a moment before that individual or assembly becomes sovereign.<sup>69</sup> This momentary expression of collectivity combined to the proposition that subjects only have to obey a sovereign for as long as the latter has the power to protect them, admits of the possibility that the move to create a sovereign can occur in the context of disaffection from a previous sovereign precisely because the latter is regarded by his subjects as unable to protect them pointing towards the possibility of the successive creation and destruction of commonwealths diagrammatically illustrated above.<sup>70</sup>

30. The point here is not that the legal relationship of sovereign and subject ever admits of the justification of resistance or rebellion but that Hobbes never abandons the right of self-preservation and all that flows from it in terms of natural law. The right of self-preservation both justifies the creation of a sovereign and potentially undermines its continued existence as resistance derived from this right can in practice undermine its continuing existence. It is true that within Hobbes' writings, a people can only exist following the organisation of a commonwealth within the body of the sovereign and hence as a separate entity its existence is denied. Despite this, the possibility of resistance, whether or not through collective action, remains a central concern in Hobbes' writings with regard to the way that a sovereign ought to behave.<sup>71</sup> Resistance and even rebellion against a sovereign might be illegal but in

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<sup>67</sup> Hobbes, T 1968:

<sup>68</sup> Hobbes, T 1968: 270.

<sup>69</sup> Hobbes, T 1968: 227.

<sup>70</sup> See paragraph 14 above. The root towards the creation of a new sovereign might have embraced at least initially the setting up of defence pacts in relation to the ousted sovereign or the break down of law and order as a result of corrupt judges referred to above.

<sup>71</sup> The denial of the existence of a people as a separate entity holds for the creation of a sovereign by agreement within a population. However where a sovereign emerges through conquest, as mentioned in paragraph 16, the possibility arises that in such circumstances 'a people' is capable of existing separately from the sovereign. The reason is that the justification for conquest is not based on an agreement between each individual to submit themselves to a third party who is not part of the contract, but directly to the conqueror. In such circumstances, it is at least arguable that in the event the

certain circumstances will be legitimate. That legitimacy is to be found in the tenets of natural law from which Hobbes does not disconnect his model of governance, given that the very justification of sovereignty and the sovereign- subject relation is predicated upon the need for self-preservation and the natural requirement that covenants are to be obeyed. The sovereign's relationship with his subjects is designed to overcome the claimed existence of chronic resistance by individuals against each other in the state of nature. Furthermore the very construction of the sovereign's power and presence is deeply informed by the continuing possibility of resistance against him within the commonwealth itself.

### *The Problem of Attribution*

31. At the heart of Hobbes' model of sovereignty is the requirement of obedience to the sovereign of his subjects. Hobbes appreciated that there was a profound difficulty that he had to overcome, namely how to ensure that individuals would honour the covenant they had entered into to obey the sovereign given their tendencies towards irrationality and their propensity to engage in conflict which might include resistance against the sovereign. He envisioned that the sovereign's primary instrument to ensure obedience was fear. Most frequently, alluded to is the fear of death, as having an essential role in motivating men to form a commonwealth and he also saw it as the glue holding society together as reflected in his assertion that 'the origin of large and lasting societies lay not in mutual human benevolence but in men's mutual fear.'<sup>72</sup>

The task is to ensure that fear coalesced around the person of the sovereign so that it appeared to emanate from him sufficiently forcefully to compel his subjects to adhere to a practice of obedience.<sup>73</sup> To do this would require a multi-layered approach since Hobbes considered that no sovereign could possess sufficient coercive power to generate sufficient fear on its own. Hence the creation of fear of the ruler required a social process whereby subjects were exposed to the teachings of the elite layers that

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sovereign is no longer able to protect his subjects, the former is in breach of contract with his subjects and the latter can then seek to enforce the contract by taking steps to replace what is in effect, from their perspective, a former sovereign. This gives rise to a clash of perspectives in respect of which there is no sovereign behind the sovereign to resolve it. See paragraph 20 above.

<sup>72</sup> Hobbes, T 1998: 24.

<sup>73</sup> The centrality of fear in Hobbes' model also reflected his view that 'good' and 'evil' in the world were not intrinsic properties but were the outcome of individual's personal preferences. See Robin, C 2004: 31-50 for an exploration of the place of fear in Hobbes' model.

impressed upon them in a multitude of ways that the sovereign is all powerful<sup>74</sup> and the consequences of disobedience namely certain punishment and, if necessary, lying behind that the threat of the return of the state of nature with its profound uncertainties.<sup>75</sup> Hobbes' position, namely that the only public access to God's commands and teaching was through the words of the sovereign was also clearly central to this project.<sup>76</sup> These strategies would occur against the backdrop of sovereign action that ensured in the eyes of his subjects who, living in the commonwealth, would be better for him than living in the state of nature. The sovereign's apparently pervasive presence is crucial to the project of ensuring obedience.

32. It is necessary that the generation of meaning through the symbolic forms and particularly that of language are not simply associated with and limited by the meanings which denote objects but that they also become infused with significance when associated with the idea of supreme rulership.<sup>77</sup> These self same particularities also have to be fed by and feed the presence of the all-powerful idea of the immanently transcendent sovereign.<sup>78</sup> The end product needs to be a situation where both physical appearances of the sovereign and his non appearance provoke a sense of all powerfulness in the minds of his subjects. Looking at Geertz's study of three rulerships,<sup>79</sup> he lists the different ways in which this all powerful position is constructed. These include the maximisation of the sovereign's physical appearances through maintaining a high degree of visibility across his territory enhanced by display, ceremonies and formalities.<sup>80</sup> The difficulty is however that the physical

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<sup>74</sup> Robin, C 2004:39. Hobbes recognised the centrality of such elites, for example, in his comment that 'Men may be brought to the love of obedience by preachers and gentlemen that imbibe good principles in their youth in the universities (Behemoth 59 in Robin, C: 2004: 39). Clearly the transmission of the ideology of fear would potentially render each subject to be a messenger of the certainties that would follow disobedience, leading to a mutual and continual reinforcement of the obedience.

<sup>75</sup> The purpose of punishment in Hobbes' view was not revenge but 'terror' (Hobbes, T 1968: 355) Further the power of fear lay in the uncertainty of the consequences of disobedience. See Hobbes T 1968: 120.

<sup>76</sup> Hobbes of course as has previously been mentioned, did not consider that the sovereign could command his subjects internal beliefs( Hobbes, T 1968: 504-5 (Leviathan)). This point for Schmitt provided the origin of the modern liberal ' "neutral" ' state which was incapable of ensuring political stability and of dealing effectively with crisis. See Schmitt, C 1996: 56.

<sup>77</sup> This concerns the iconography used to develop the majesty historically associated with rulership.

<sup>78</sup> See chapter 6 above for a discussion of the place of transcendence in the construction of sovereignty.

<sup>79</sup> Geertz, C 1983: 121-146.

<sup>80</sup> Geertz does not explicitly contemplate the central task of constructing and securing the meaning of non-appearance in the overall project of projecting an all-powerful sovereign.

limitations inherent in the bodily presence of the sovereign had to be overcome not only via the spectacle of his physical appearance but by the marshalling of his physical absences. Constructing the meaning of these absences is therefore crucial to the construction of an idea of an all powerful sovereign and involves the interlocking use of the enhanced appearances by his representatives and by the use of imagery depicting the sovereign which as Wagner-Pacifici has suggested needs to be exchanged and reproduced.<sup>81</sup> Through such mechanisms and associated discursive practices, the dangers are reduced of what amounts to double non-appearances defined by places and times in which he is neither present physically nor are his representatives and the imagery associated with him.

33. Hence the idea of the transcendent unity of the sovereign is fed by a series of diverse particularities whether or not these involve the body of the sovereign himself. However this process does not simply concern the sovereign and the images and discursive practices directly associated with him, including the production of law by way of the sovereign's commands. It also potentially includes a multitude of other practices, each with its own particularities, which go towards the feeding of the idea of the sovereign's simultaneous diversity and unity. Hence to cite one practice, that of the judiciary who are regarded by Hobbes as agents of the sovereign.<sup>82</sup> Clearly in relation to such practices the particularities that are associated with it go towards the feeding of the practice as a whole. So for example, the appointment of each judge is a particular instance of the general process of judicial appointment and each judicial ruling is a particular instance of the general practice of applying the law and so on. One might say the same thing concerning the collection of taxes, the operation of the armies and so on. From the perspective of Searle's formula -X counts as Y in

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<sup>81</sup> Wagner-Pacifici, R 2005:100.

<sup>82</sup> As for example indicated by Hobbes' view that the source of judicial authority is located in the sovereign on whose behalf the judge adjudicates. See Hobbes, T 1968: 323. Furthermore Hobbes considered that as words were capable of endless meanings which could only be fixed by the sovereign, certainty and justice required that a judge's decision was final, subject to direct interference by the sovereign. Judicial decision could not be constrained by nor contribute towards precedent since to do so could result in unjust rulings being followed in other cases. At one level, Hobbes here 'throws the baby out with the bathwater' since a system of precedent involving a hierarchy of courts negates the potential for endless discussion without a final ruling. See Hobbes, T 1968: 326. However this approach is consistent with the requirement for the sovereign's presence to be dominant, pervasive and decisive and yet at the same time enigmatic in that rulings cannot easily be predicted and yet can always open to the possibility of direct sovereign intervention in the event of being unacceptable. Certainty is pervaded by uncertainty as the sovereign's centrality possesses the former quality while what the sovereign may do in relation to specific situations contains the pervasive threat and at times actuality of the latter.

circumstances C- one can see therefore that its application to the creation and maintenance of the idea of a particular sovereign in the way attempted above does not on its own fully capture the processes that would be needed to maximise the possibility of the sovereign's survival which is ultimately predicated upon a population's submission. Most obviously the 'filling out' of 'circumstances C' would require an inclusion of practices having the effect of enhancing or designed specifically to enhance the idea of the sovereign's presence through the mechanisms of ceremony, display, representation and imagery with each such activity itself potentially constituting an instance of a practice to which Searle's formula could apply.<sup>83</sup>

34. The idea of the transcendent unity which is perceived to be immanently manifested in a diversity of form can be seen itself to be a particular example of a generality. That is to say the acceptance of the idea of the existence of a transcendent unity which possesses the qualities of sovereignty can from a Cassirerian point of view be seen as a particular example of a transcendent unity which might be capable of existing in several forms, so that for example Hobbes accepted that sovereignty was capable of exhibiting itself in the form of an assembly. Here however the possibility is increased of the idea of the sovereign's unity being ruptured by the perceived discordance between members of the assembly.<sup>84</sup> The assembly therefore is an expression of sovereignty that fits less stably with the idea of a transcendent unity than that of the idea of a solitary sovereign. It is also possible to perceive sovereignty in a very different way bearing in mind those activities that are perceived to clearly not personally involve the sovereign, in an immanent sense, such as that of judicial practice which are attributed to the sovereign unity.<sup>85</sup> Here one can see the possibility of the authority which legitimates the exercise of power attributed to the sovereign being separated off from those bodies that actually exercise it. The sovereign in such

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<sup>83</sup> This is not to mention the negative view that the creation and existence of a sovereign is predicated upon the existing sovereigns in neighbouring territories in so far as they as a matter of practice do not impose obedience upon the population of sovereign under consideration as suggested in the previous section of this chapter.

<sup>84</sup> Hobbes favoured the solitary sovereign as opposed to the assembly because of the propensity of the latter to split into factions. See Hobbes, 1968: 286.

<sup>85</sup> The attribution of a diverse range of activities associated with governance was also noted in governance associated with Augustinus Triumphus' model of sovereignty given that the sovereign there embodied the entire community (Ecclesia) including those that exercised government, practically speaking on his behalf ( Wilks, M.J 1963: 38).



circumstances is perceived as embodying the authority and unity of the instruments of governance that are associated with it. Hence, the exercise of power by such instruments, are perceived to be sourced by such authority and to be incapable of existence without such authority. The idea of the transcendence therefore of the sovereign unity both continues to feed and be fed by the idea of the immanent activities of such instruments and involves common place transcendence whose specific character points towards the metaphysically transcendent in which the sovereign is posed as god-like overcoming the limitation of time and place.

35. The split is graphically demonstrated in the traditional forms of rule located in the Polynesian Islands such as the island of Tonga. In terms of practice, sovereignty was in essence divided between a monarch called the Tuitonga who was revered and before whom all prostrated themselves. His life was lived apart in meditation, prayer and ritual. Government was actually in the hands of another person, namely the Tuihaatakana. The former reached his position through the principle of inheritance while the latter was the chief who was the winner of a contest, such as one of combat in Mangala, one of the Hervey Islands.<sup>86</sup> The victor of such a combat would have to be invested by the Tuitonga and to do this he would have to approach him on all fours and listen to the instructions the Tuitonga gave him as to how to rule. If the Tuitonga was not satisfied that the chief would carry out his instructions he would refuse to have the sacred drum beaten and undertake the customary sacrifice. Without these, the state of war between the chiefs that gave rise to the victor would not end and fertility to the soil would not be restored. So the victorious chief had to promise to govern correctly in the eyes of the Tuitonga, under threat of constant insecurity, in the absence of such a promise, because of the continuation of war and famine.<sup>87</sup>

36. There are several interlocking features of this arrangement which can be noted. At one level, the existence of government is the product of a social contract between Tuitonga and the victorious chief although in contrast to Hobbes' social contract this does not involve the population at large. The chief's ability to rule is contingent on the authority he gains from approval by the Tuitonga and it is as though the authority and

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<sup>86</sup> This account was originally located in De Jouvenel, B 1997: 116-121 who obtained it from Williamson, R.W (1934) *The Social and Political Systems of Central Polynesia* (Cambridge University Press).

<sup>87</sup> De Jouvenel, B 1997:117.

power associated with governance has been partially split between two individuals with each strengthening the other.<sup>88</sup> De Jouvenel attempts to describe this arrangement as one where there is both a passive and active king. This is clearly a description that does partially accord with the arrangement in a functional sense.<sup>89</sup> However it appears to be the case that the Tuitonga's role, in effect, of being 'the sovereign behind the sovereign', does not create simply a partnership of opposites but a hierarchy which paradoxically is reinforced by his central position as the appointer of the governor and at the same his reclusive existence and disconnection from the daily business of governance. In this way, his immanent manifestations come to feed the idea of his transcendence which provides a unifying framework and reference point against which government is legitimated, gathers its meaning and is tolerated by the population. The impact of the Tuitonga's role in this regard is highlighted by the fact that in Samoa where the authority of the equivalent of the Tuitonga has vanished, civil war was endemic, government was unstable and uprisings frequent.<sup>90</sup>

37. Looking at Hobbes' model in the context of this arrangement, one can construct a different reading whereby the site of power and authority is effectively split with the idea that the sovereign's role as an individual becomes the authority for the government's power and the point of unity and continuity which provides the point of reference and explanatory framework for the diverse manifestations of government activity. The sovereign's disconnection from the day to day activity of government, if anything, reinforces the idea of his transcendent position as it suggests the potential manifestation of immense power which is capable of manifesting itself in a diversity of forms and events which overcome the physical limitations of the monarch's body, and as a result appear capable of threatening the existent normality. With this reading of Hobbes' sovereign, one sees the possibility of the idea of a sovereign unity providing the explanatory frame of reference for the diverse activity of governance, little of which actually in a direct causal sense directly involves the sovereign. In this sense therefore one can see very clearly a conceptualisation of sovereignty whereby the sovereign possesses a mythico-religious role which provides meaning and stability

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<sup>88</sup> I say 'partially' because the act of appointing the governor or active king represents a point at which power and authority fuse.

<sup>89</sup> I say 'partially' here too for a similar reason. He is not completely passive and indeed his action in the appointment of the governor or active king is an act upon which the entire system of governance is predicated.

<sup>90</sup> De Jouvenel, B 1997:118.

to what would otherwise be perceived as the uncertainty, unpredictability and alienating quality of government impositions.

38. The question of the attribution of the activities and presence of the diverse forms of government attributed to the transcendent unity of the sovereign institution therefore involves a series of diverse and multiple practices within the context of a powerful legitimization narrative which provides such practices with meaning. From Hobbes' perspective at the heart of this legitimating narrative are essentially two features. Firstly there is the foundation myth which explains and justifies the existence of the sovereign. Secondly there is the continuing threat that without such a central institution, society would disintegrate to the uncertainty and disruption associated with the state of nature which the sovereign is perceived to ward off by, *inter alia*, controlling wayward subjects.

39. By seeking to tease out aspects of Hobbes' explanatory narrative for the creation of a sovereign, we have sought to show that in fact there is a different Hobbes lurking in the background which at least implicitly accepts the impossibility of the state of nature as posed by him in the foreground, and that the existence of his sovereign, despite his claim that it alone is responsible for the creation of meaningful society, is in fact embedded in a wider practice that spatially and temporarily transcends the existence of the sovereign in question. This was done by reference to units of governance pre-existing the commonwealths subsequently created, the existence of common linguistic practices and territorial specificities which while making the state of nature meaningful as the territorially limited pre-cursor to the creation of social contracts giving rise to territorially limited commonwealths, also undermines its claimed chaotic content. Moving back to Cassirer's model and the idea of mythic symbolization, one can see that the existing practice of government and the needs generated by existing legitimating narratives based for Hobbes around the fear of death or damnation themselves provide for the construction of historical pasts. These can be experienced as constituting the irretrievable past which appear to provide points of causation of the present governmental practice and the needs for them. In this sense the move towards the uncertain and contingent future contributes towards the construction of a stable past which provides a reference point and a 'guiding hand' for the facing of that uncertainty through the agency of the sovereign. The

elimination of the existential uncertainty captured by the idea of the state of nature driven by the need for self-preservation both justifies the creation of Hobbes' sovereign and potentially points to the latter's destruction given Hobbes' refusal to abandon the right associated with that need.

## **Chapter 9: A Re-Examination of Austin**

1. From the previous chapter on Austin's model of sovereignty, it can be seen that there are three key elements of the model. Firstly that sovereignty is located in a supreme determinate body that is not subordinate to any other determinate body, secondly that its position as a sovereign institution is conditional upon habitual obedience by the bulk of the population within its jurisdiction and thirdly that the population in question is not habitually obedient to any other sovereign body.
2. Absent from Austin's model is any explicit claims as to the existence of a social contract as providing a reason or justification for the creation of the sovereign and as to the fundamental purpose of the sovereign as for example indicated by Hobbes as

the preservation of his subjects. It does not preclude government preceding consent by the population.<sup>91</sup> Lying at the heart of his model is the fact of habitual obedience by the bulk of the population rather than its causes. No definition was supplied for the term ‘habitual’ or ‘obedience’ or ‘bulk’ for that matter and even if it were there would still remain the difficulty of determining who would be the final interpreter and arbiter of whether the condition was met.<sup>92</sup> There is an implicit acceptance that sovereignty emerges out of an existing practice whereby societies can be demarcated prior to the imposition or emergence of a sovereign.<sup>93</sup> Hence for example in his exploration of the occupation of France by allied armies in 1815, he explores the question of whether or not the sovereign of the French nation as a result were the ‘allied sovereigns’.<sup>94</sup> In so doing he accepts the possibility that the French might have been an ‘independent society in a state of nature’ prior to the invasion. Unlike Hobbes however, he appears to accept that while such a society is not a ‘society political’ since that only comes about through having a sovereign, it does not need to be anarchical and hence he accepts that the ingredients of a civil society can exist in such circumstances. He does not explain how this might be but one can infer such an existence from the typology of rules he adopts whereby social organisation can also involve the adoption of rules of positive morality and the laws of God. These laws unlike the commands of positive law are enforced not by sanctions imposed by a sovereign or his delegates but by approbation.<sup>95</sup> Such rules might therefore form the basis for a self-regulating society.

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<sup>91</sup> In the sense that sovereignty’s creation does not have to be preceded by the expression of consent by the population over which the former comes to have jurisdiction, it has a similarity with the models of Triumphus and natural law models including that of Aquinas, Dante and early modern models such as that of Bodin and Machiavelli, not to mention the vast majority of political practice until the modern era and the advent of democracy. It also fits in with Hobbes’ reflection at the end of *Leviathan* that 213 commonwealths are rarely created through prior consent by the affected population (Hobbes, T 1968:721-722)..

<sup>92</sup> See chapter 4 paragraph 15 above.

<sup>93</sup> Austin does not discount the possibility of sovereignty emerging in an institution which defines the territorial extent of the population, the bulk of which is considered to be habitually obedient to it. This possibility emerges from Austin’s non-reliance on social contract theory involving a pre-existing population as a justification for the creation of a sovereign, and has some similarity with Hobbes’ explicit approach to the imposition of a sovereign following conquest of territory that would also result in the definition of a population that goes on to form the subjects of that sovereign.

<sup>94</sup> Austin, J 1832: 168-170. Austin differentiates between societies in a state of nature ‘or anarchy’, political societies that are not independent and those that are political and independent. The latter were characterised by the sovereign-subject relationship.

<sup>95</sup> Austin, J 1832: 19-21.

3. The purpose of this chapter will be in particular to explore further the nature of habit and rules and suggest that reasons for undertaking behaviour that appears to be consistent with the commands of a sovereign are complex and dynamic and may or may not embrace a commitment to follow such commands particularly in the light of the diversity and episodic nature of the commands or their application that emanate directly or indirectly from the sovereign. This exploration both provides a more illuminating explanation of the Austinian sovereign-subject relationship and also points to the potentiality for rupture which will be explored in Chapters 11 and 12 below.

### ***Habits and Rules***

4. One of the central features of Austin's model of sovereignty is that the relationship between sovereign and subject is based on habit. Could one say that obedience is ultimately rule-governed, thus profoundly contradicting Austin's assertion that the hall mark of a sovereign relation the domain of governance is habit-based?<sup>96</sup> Ultimately not, since one then moves into the problem of the infinite regress since where is there a pre-existing rule that the constitution ought to be obeyed and if that existed, where is the rule behind that one? This is not to say that individuals particularly may not consider that they are bound by the terms of the constitution. But that is moving into, as Hart would put it, the internal aspect of rules whereby individuals may have reasons for obedience which subjectively they consider motivates them to obey the rule. From this perspective, individuals may consider their behaviour is rule-governed and one can say using Hart's phrase that there is a social practice that 'constitutes the 'acceptance of a rule'.<sup>97</sup> However as a matter of logic, given that rules are not self implementing, explaining behaviour as the outcome of obedience to a rule does not fully explain it. Why is there such a social practice? Of course Hart in his critique of Austin rightly considers that Austin cannot explain why a population in the habit of obedience to one monarch will upon his demise, obey his successors. This for Hart is explained by the existence of rules that enable the right of the first king to legislate to transfer to his successor through the vesting in the latter

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<sup>96</sup> Let us assume for these purposes the Austin's sovereign has 'enacted' a constitution which might simply have one clause which declares that all the commands of the sovereign must be obeyed by all members of the population within the sovereign's jurisdiction.

<sup>97</sup> Hart, H.L.A., 1961: 58.

of a continuously existing title which had previously vested in his predecessor. This idea of the continuing title, referring back to the symbolic forms of Cassirer, points to an explanation<sup>98</sup> for the continuation of the social practice of obedience to the prevailing monarch to be explained by conduct which is orientated, amongst other things,<sup>99</sup> towards a unity with a transcendent quality associated with the title with its continuing quality and history vested in the former monarch's successor. The office of monarchy that accompanies the title therefore contributes toward its inhabitant possessing a transcendent quality which is fed by the immanent manifestations of its inhabitant and associated imagery already mentioned.<sup>100</sup> That is not to say that individuals might not have differing attitudes towards obedience to what or who they perceive to be the sovereign. The criminal will selectively obey the commands of the sovereign but it is suggested that even then, it will not be every command that she or he disobeys but only certain ones and indeed his criminal strategy will be reliant upon predictable patterns of social behaviour which may well be considered to be rule-bound by others for its formulation and implementation.<sup>101</sup> Even the rebel who might not consider that she or he is obliged to obey the sovereign's commands will develop his strategy of opposition in the expectation that others currently obey them and the purpose of his opposition may well be aimed at the obedience to a sovereign unity but not the one currently *in situ*.

5. Yet the idea of social practice constituting 'acceptance of a rule' suggests the possibility of its behavioural manifestations being consistent with the rule that the commands of the sovereign will be obeyed and yet are not motivated by it. It is possible, despite Hart's essential thrust to the contrary, that the habitual obedience required by Austin's model will involve rule-governed behaviour from an external perspective and that therefore from that point of view the term 'habitual' is not

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<sup>98</sup> This is a point I go on to qualify below by raising the possibility that in fact individuals may conduct themselves in manners which are consistent with the commands of the sovereign but who are at the same time not particularly conscious or conscious at all of the sovereign's existence.

<sup>99</sup> The attraction of the transcendent unity expressed by the monarch who possesses the title will also be fed by the expectation based on past experience that obedience to the monarch results in predictable patterns of social behaviour – a point made by MacCormick, N in his exploration of Hart's internal aspect of rules. See MacCormick, N 1978: 289.

<sup>100</sup> The point here is that the immanent continuity of the institution of monarchy which is 'occupied' by successive monarchs helps feed the relative transcendence of each occupant.

<sup>101</sup> So for example, the burglar or thief takes advantage of the exclusionary qualities of property contractual law by physically obtaining property and then endeavours to take advantage of such laws by behaving as if he was vested with ownership of the property he has stolen.

necessarily misplaced.<sup>102</sup> The idea of habitual behaviour as Hart indicates suggests non-reflective conduct that exhibits regularity and predictability of conduct.<sup>103</sup> The way that Hart poses the idea of habit is that it can be differentiated from that of the following of rules in that the individual in the latter circumstances has an internal state of mind in which he or she consciously follows the rule as opposed to the non-reflective state of mind associated with habitual behaviour. There is of course a lot that has been written about Hart's differentiation between habitual and rule-following behaviour. One recent commentary is that of MacCormick who along with others makes the claim that habitual behaviour can also amount to behaviour which is consistent with the following of legal rules and that in fact much rule-compliant behaviour is habitual in quality.<sup>104</sup> In reaching this conclusion he refers to the works of various commentators who point in that direction including that of Krygier,<sup>105</sup> Tamanaha,<sup>106</sup> Bourdieu<sup>107</sup> and Luhmann.<sup>108</sup> MacCormick makes the point that individuals frequently engage in conduct that is consistent with legal rules even though they may not be aware of them or at least their detail.<sup>109</sup> While this may be true, where his ideas are underdeveloped is in an exploration of the relationship between the two different types of behaviour. There is a sense in his writings in which individuals engage in behaviour in an either/or state. That is to say, they either are reflective in the way they undertake their behaviour or they are not and they either know the rules that indicate the necessity of their behaviour or they do not and that looked at diachronically, an individual's behaviour either falls into the realm of habitual behaviour or it does not. It is as though the basic framework of Hart namely that there are two kinds of behaviour, continues to manifest itself, but these are

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<sup>102</sup> Hart does accept that the individuals can acquire the habit of complying with particular laws such as driving on the left hand side of the road although they will not acquire the habit of paying taxes. See Hart, H.L.R 1961: 51.

<sup>103</sup> The idea of regularity of conduct is captured by dictionary definitions so that for example the *Concise Oxford Dictionary* defines habitual behaviour as something done 'constantly' or as something that is 'regular' or 'usual'. The idea of 'habit' also suggests a 'practice that is hard to give up' (*Concise Oxford Dictionary* 1995: 609). The non-reflectivity emerges in the analysis by Barnett, H of the difference between habits and constitutional practice. See Barnett, H 2006:27-28. The idea of 'habit' does not suggest that the repetitive quality of conduct associated with it is the product of a normative order.

<sup>104</sup> MacCormick, N 2007: 61-74.

<sup>105</sup> Krygier, M 1982: 155-180 cited at MacCormick, N 2007: 62.

<sup>106</sup> Tamanaha, B.Z. 1997: 180-181 cited at MacCormick, N 2007: 61; Tamanaha, B.Z. 2001: 145-6 cited at MacCormick, N 2007: 69.

<sup>107</sup> Bourdieu, P 1977: 2 cited at MacCormick, N 2007: 68.

<sup>108</sup> Luhmann, N 2004: 60-62 cited at MacCormick, N 2007: 68.

<sup>109</sup> MacCormick, N 2007: 69.



separated diachronically. At one point he refers to the findings of cognitive scientists and how the brain habituates itself to new skills and that therefore the initial conscious learning of such skills ultimately leads to the position where the rules associated with such skills and which have hitherto been used as props are discarded. It is as though Wittgenstein's ladder once climbed up is thrown away so that the skills come to transcend the rules.<sup>110</sup> While clearly in the application of mastered skills, the rules that are associated with it no longer have the importance they once had, to say that the ladder is simply thrown away suggests an irreversible separation of skill from rule and that somehow in the process of mastery of the skill the rule is utterly eliminated from the minds of the applicator. This is an overstatement and it is suggested that rather than the ladder being thrown away it is put down. That is to say, the awareness of the rules which provide the explanatory and justificatory framework for the development of the skill is residualised but not eliminated, at least not completely.<sup>111</sup> This too substantially applies to behaviour which appears to be consistent with rule-governed requirements.

6. Before proceeding further, it is worthwhile stepping back to develop a number of matters not considered by Hart or McCormack. Firstly it is worthwhile considering the kind of consciousness that does accompany behaviour. Adopting Giddens's model, consciousness can be divided into a number of different categories that include practical and discursive consciousness. The former is engaged while an individual is undertaking activity in the sense that one is aware of what one is doing and one reflexively responds to the unfolding situation without necessarily 'thinking' about it. Discursive consciousness on the other hand involves the individual being able to explain the reasons for her or his actions that might well involve justification.<sup>112</sup> Using these two variants one can immediately see that all-conscious behaviour whether or not it might coincide with certain rules is capable of being seen in this way. Furthermore, looked at diachronically, it poses the possibility of a given individual constantly moving into and out of the different states of consciousness and indeed potentially possessing a state of consciousness that embraces both ingredients

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<sup>110</sup> MacCormick, N 2007: 66.

<sup>111</sup> The point of symbolic reference by which the person who has mastered the skills will continue to be located in the rules which are conceived to be fixed points of certainty contributing towards ontological security.

<sup>112</sup> Giddens, A 1984: 49.

to varying extents, that are in flux. What is suggested here therefore is that rule-consistent behaviour is no different from any other form of behaviour when it comes to the kinds of conscious states involved. Closely associated with these different forms of consciousness are varying degrees of reflection.<sup>113</sup> Practical consciousness does not involve reflection while discursive consciousness does. Added to these and returning to idea of chaos as depicted by Cassirer, the need to avoid it and indeed its weaker varieties stems from a desire for ontological security.<sup>114</sup> Within the domain of the social this desire can be seen to be reflected in the idea posed by Giddens of routinization. Much of individual behaviour in a social context is routinized<sup>115</sup> so that certain behaviour is taken for granted- it is what one does.<sup>116</sup> The idea of routinization does embrace the notion of habit but what it also suggests is a dynamic process involving a social setting in which 'taken for granted' behaviour occurs. Clearly there are some forms of behaviour that are more easily explained in this way than others. One routinely drives on the left hand side of the road in what is a form of social practice involving many other vehicle users. One routinely, even if one is hungry, avoids going into a shop and taking some food, that is to say that it might well not occur to such a person that there is that option available. Even in relation to the payment of tax, one routinely does so without necessarily thinking that it is one's legal obligation to do so. The idea of routinization in which it is most likely that a practical form of consciousness is engaged suggests as with habit a lack of reflection and at the time one is undertaking it, a lack of need for explanation associated with discursive consciousness. Taking the idea of reflection and that of routinization, one can see that existence involves states of being which involves travel along both axes.

ROUTINIZATION

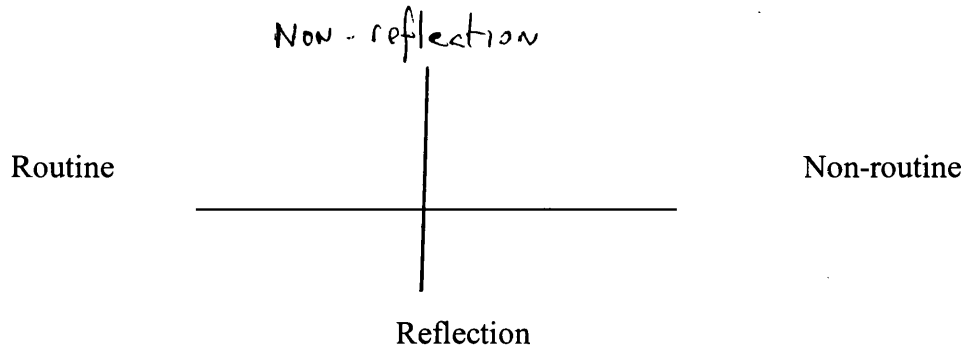
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<sup>113</sup> By reflection is meant here the process of actively thinking about one's situation which might involve thinking through the different options that are posed by one's position.

<sup>114</sup> See chapter 8 above for a discussion of the different forms of chaos..

<sup>115</sup> Giddens defines routinization as 'the habitual, taken-for granted character of the vast bulk of activities of day-to-day social life; the prevalence of familiar styles and forms of conduct, both supporting and supported by a sense of ontological security' (Giddens, A 1984:376).

<sup>116</sup> Giddens, A 1984: 64.



7. It is difficult to think of any domain of human social existence where routine and non-routine are completely disconnected from one another. Returning to the payment of taxes, the general activity of payment might involve the filling out of tax forms which involves a considerable amount of routinized behaviour with regard to the mechanical way one fills out a form. Responses to the questions will involve varying degrees of reflection from those that require one's identification details to those which involve careful reflection and non-routinised action, for example the identification and location of particular documents from which relevant information can be gleaned in the light of the information requested. Even here however it is not necessarily the case that the critical reflection associated with considering what ought to be done in the light of what is understood by the individual to be the legal requirement is undertaken.<sup>117</sup> It is even the case that what is critically reflected upon in the sense of what the individual considers ought to be undertaken does not constitute a normative requirement found in the relevant legal regulation so that it is perhaps the imagined existence of a rule that the individual considers he ought to followed but this does not coincide with common standards associated with such activities or the legal regulations that are expected to be followed. Come what may however, it is the very routinization that provides the security and sense of fixity that provides for the channels along which non-routinized action and reflection, which may be associated with it, can proceed.<sup>118</sup>

8. It is therefore quite possible that the individual undertaking behaviour is not conscious of the rules that require that behaviour at the time he undertakes it

<sup>117</sup> If undertaken this would amount to the reflection associated with the internal aspect of the rule developed by Hart (Hart, H.L.A 1962: 56).

<sup>118</sup> The routine clearly as a matter of outcome narrows down the endless possibilities of action and reaction to a few and in the process foregrounds what remains so that social co-ordination is enhanced through non-reflective routine and a concentration on activity, the non-routine scope of which is effectively agreed between involved parties. The narrowing effect of routinized or habitual behaviour is also alluded to by Berger and Luckmann. See chapter 6 above.

particularly if such behaviour is carried out in a non-reflective way. Even where reflection is involved, it might not happen to revolve around the relevant legal rules that might be associated with the need for such behaviour. So for example as mentioned by MacCormick, the use of credit cards is likely to be undertaken by individuals without the knowledge or awareness of the existence of some or all the technical legal rules associated with their use and capacity to trigger the transfer of capital from one place to another. In relation to each transaction undertaken with the credit card, the particularities will be unique in terms of the details of the transaction even if for no other reason than its timing will not be repeated and the specific object or service will not be purchased again.<sup>119</sup> In relation to each transaction there will both routinised and non-routinised elements associated with it. The basic structure of the transaction in terms of the way the credit card is used to effect the transfer of capital will be a repeated one but the object or service bought may only be done once or a few times in that person's life.<sup>120</sup>

9. Reflection may well be undertaken but not necessarily about the legal rules that are considered to underpin the action's social acceptability. On the other hand it may be that the individual might, at the point of transaction, be conscious of certain but not necessarily all the rules comprising legal obligations that underpin it. Furthermore, it may be that, from transaction to transaction, the extent to which the individual is aware of the rules varies and finally that even if aware of the rules, it is not that which actually motivates her or him but rather the desire to purchase the object in question. In all these varying states, the external behaviour may well be regarded as consistent with the 'following of' a rule and yet from an internal perspective, there are a variety of shifting states of mind which may or may not embrace the obligatory nature of the rule as a motivational and standard-setting ingredient. Even if a rule constitutes a conscious reason for the individuals' behaviour, there may or may not be a non-reflective aspect to the thought in that while the individual is thinking that rule requires him to obey it, there is no reflection on whether there is a requirement that rules must be obeyed. Hence even if the individual has consciously deliberated over

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<sup>119</sup> Rather than type of object or service.

<sup>120</sup> This points to a difficulty with Giddens' positing of routine behaviour. It is as though behaviour falls into one category or another. In fact not only might different elements of given behaviour separate out into routine and non-routine particulars, it is also the case that there may be elements which could be placed into either suggesting that the boundary between routine and non-routine behaviour is blurred and potentially shifting.

whether or not to obey the rule, this may well take place against the non-reflective tacit assumption that rules generally ought to be obeyed matched by routinized behaviour which reflects this state of mind.

10. Returning to the two states of consciousness posed by Giddens, the individual might when moving from practical to discursive consciousness, explain what he or she is doing with or without reference to the legal rules that are involved and the explanation may vary from credit card transaction to credit card transaction. The extent to which the rules are mentioned, if any, may alter as might their description, so much so, that it might be that the descriptions provided might bear varying resemblances to the rules that are actually engaged in such transactions. The fundamental point here is that routinized behaviour is intertwined with non-routine behaviour and reflection will co-exist with non reflection. The claim therefore that there exists a rule obeying habit on its own says very little about the variety of circumstances which may exist within an individual who is behaving consistently with the requirements of a rule.

11. Moving back to Austin's model, the idea of habit is not explored by him in any depth. When perceived in terms of routinized behaviour which is non-reflective. It provides a potential state of being between population and sovereign which is highly desirous since the less reflection on whether the sovereign's commands are to be obeyed, the less likely the possibility of fundamental disruption leading to the demise of the existing sovereign institution, whatever form it might take. This is a point that Austin appreciates in his view that it is desirous that individuals have a habit of obedience to the law.<sup>121</sup> This may, as previously mentioned, express itself for example in relation to the payment of taxes. However even when the individual questions whether tax needs to be paid, it may be that the answer is supplied by the idea that, using the language of Austin, the command by the sovereign to pay tax has to be obeyed. There is regular behaviour which might be considered to be day-to-day conduct associated with routine but now it is subjectively considered to be motivated

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<sup>121</sup> A point noted by MacCormick, 2007 at p. 64 derived from Austin's *A Plea for the Constitution* (London 1859). Austin is by no means unique in his appreciation of this. Kant for example considered that citizens should be actually discouraged from reflecting on the need to obey laws which he considered, not surprisingly to be a pre-condition for an effectively functioning state (Kant, I 1991: 85,143).

by a different certainty, namely the continuing existence of a rule.<sup>122</sup> Pressed upon this point the individual might then resort to the justification that the reason why this particular commandment is obeyed is the general requirement that all the commands of the sovereign have to be obeyed- that is to say the command that taxes have to be obeyed is considered to be a particular instant of the general command contained in the constitution that all the commands of the sovereign must be obeyed. Clearly there one is still in the domain of social practice that is expressed by a regularity of behaviour or routine. This time it is being motivated by another certainty, namely the general requirement that the commands of the sovereign must be obeyed. Therefore one can see that moving back to Cassirer's proposition that social practice is constructed around perceived certainties, again one remains under the 'gaze' of one, that is in this case the general rule.<sup>123</sup> One could say that coming to the 'end' of the chain of explanation reflects an unreflective practice of assuming that the 'end' chosen is the only end or indeed the end at all.

12. What is suggested therefore is that the commitment to behave in a manner that is consistent with the sovereign's commands, can take place at a multitude of levels that may or may not, from a conscious perspective, directly implicate the commands themselves. These are varying states into and out of which individuals can move. In any social group, it is possible that there will be varying motivations between individuals when the group is looked at synchronically and the motivation of each individual may vary when the same group is looked at over time. To this is added the possibility, as described above, that the motivation while subjectively derived from the existence of a command or rule may not be considered to be that of the sovereign institution but may in fact be subjectively perceived to emanate from other executive

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<sup>122</sup> Referring to Wittgenstein, there is nothing inherent in a statement purporting to be a rule such as a command that requires obedience in a particular way and that both the obedience and the form it takes are in effect the outcome of a social practice. "[O]beying a rule is a practice" (Wittgenstein, 1998:para 202) There is no inevitability that a particular course of conduct accords with obeying of a command issued by the sovereign more than any other course of conduct as suggested by Wittgenstein (para 201). This reflects what Williams has characterised as the Regress argument, namely the possibility that a given command could be given a multiplicity of interpretations and the Paradox of Interpretation argument whereby a given action could be made out to accord or conflict with the interpretation that is applied. See Williams, M 2005: 185.

<sup>123</sup> I have not here attempted to look 'above' the explicit detail of Austin's model to ascertain whether there might be any justification outside the rule which might subjectively justify obedience but this is something that considered when the relatively transcendent concept of 'the people' is introduced.

organs of state for example, those that exist locally or from the judicial branches of government.

### *Unity and Diversity*

13. One can see in his model as with Augustinus Triumphus and Hobbes, the idea of a unity characterising the locus of sovereign whether it be an individual or a multi-membered 'determinate body'<sup>124</sup> as he described it which is consistent with a mythico-religious idea of unity which Cassirer posits as being existentially necessary for man's well-being or as Giddens suggests his ontological security. The essence of this body as possessing a unity which is fed by a diversity of activity and decision-making is accepted in the process of describing a particular body as sovereign. By doing so, one immediately attributes to it a continuity of activity in the form of decision-making, even though each decision is unique in its particular way. The idea of unity expressed by diversity, as with Hobbes' model, will inevitably manifest itself in what is perceived to be the enforcement of the will of the sovereign locally through delegation of his powers. The idea of such delegation is central to Austin's model<sup>125</sup> and is a reflection of his top-down model of a centralised state which would be managed according to the principles of utility. Hence, for example, judges were regarded as delegates, whose authority rested on the authority of the sovereign whether expressly conferred or by acquiescence.<sup>126</sup> As with Hobbes however, the indirect relationship perceived to exist between subject and sovereign which is now more extensive and more explicitly developed leads, at the very least, to an ambiguity of attribution. The particular manifestation of a judge is capable of being perceived as either simply a manifestation of the sovereign body in the form of a delegated activity or alternatively a particular manifestation of the seemingly independent activity of the judiciary. Clearly Austin's approach is to highlight the former and to explain the independent activity of the judiciary in the development of customary law as being an

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<sup>124</sup> As for example in his description of determinate body as exemplified by the British Parliament at Austin, 1832: 127.

<sup>125</sup> '...by every actual sovereign (whether the sovereign be one individual, or a number or aggregate of individuals) some of those powers are exercised through political subordinates or delegates representing the sovereign author.' The exercise of sovereign powers through political subordinates or delegates, is rendered absolutely necessary, in every actual society, by innumerable causes' (Austin, J 1832: 191).

<sup>126</sup> Austin, J 1832: 35.

expression of the sovereign's will characterised by acquiescence.<sup>127</sup> However the absence of a positive expression of the sovereign's will allows for the importation of a conceptualisation of the judiciary's activities as being independent of the directly expressed sovereign will. The potential disconnection of attribution of activities of what might broadly be regarded as state officials with the sovereign body directly clearly goes beyond the domain of the judiciary and also will involve diverse executive activity at a national and local level.<sup>128</sup> The paradox therefore as with Hobbes' model is that the extent to which there is a diversity of imminent manifestations to feed and be fed by the perceived unity of the sovereign institution and to therefore 'empower' its transcendent quality makes the suggestion that sovereignty is manifested by the habitual obedience by the bulk of the population as potentially problematic. One cannot say that such obedience is to the sovereign from the shifting perspectives of each individual, but rather, if at all, to the institution or institutions that Austin considers are delegates of it.<sup>129</sup> There is therefore the potential for disruption if for any reason the bulk of the population within a particular area regard the activities of the 'local state' or parts thereof as having greater acceptability than that of the state itself.<sup>130</sup> In Austin's model unlike Hobbes, even taking into account his idea of the motivation for obedience being the fear of sanctions imposed, there are more numerous possibilities for the disruption of the state's coherence. Rather than simple preservation being the fundamental driving force for the creation of a Hobbesian commonwealth, in Austin's case, the much more indeterminate category of utility is in play, whose satisfaction is not an explicit precondition for the

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<sup>127</sup> Austin, J 1832: 35-36.

<sup>128</sup> For example activity at county and borough level. This does not of course render the local leader as being sovereign since the region is subservient to the centre. This is a point made by Austin when he poses the example of the viceroy that has the habitual obedience of the population of a region but is not sovereign as through the viceroy, the population has habitual obedience to the viceroy's superior to whom the latter is beholden. Here one can see the assumption operating that the habituation to one superior means that the population of that region habitually obeys the sovereign. However outward behaviour which can be regarded as consistent with Austin's assertion actually may be motivated by obedience to a regional leader, namely the Viceroy and not the sovereign body and hence the bulk of the population is not in fact habitually obedient *to* the sovereign, although its behaviour is consistent with such as inference. Here is an example of what was alluded to in the chapter of Austin regarding his method whereby his interpretation of the empirical evidence is determined by his existing model of sovereignty and simply reinforces it in a tautological process.

<sup>129</sup> This is a further manifestation of Austin interpreting the empirical through an *a priori* framework regarding sovereignty which was explored in the earlier chapter on Austin.

<sup>130</sup> For example, where there is a schism between centre and part of the periphery which is caused by the alienation of the population of the latter to the activities of the former on the basis of regional, ethnic or religious differences. Such schisms can also occur where a local population identifies the local state with the national state and rejects both.



existence of a legal system constructed around what is perceived to be the presence of a sovereign institution.<sup>131</sup>

### *The Illumination of Austin's Sovereign Practice Using Searle*

14. Returning to his formula, *X counts as Y in C circumstances*, regarding the creation of sovereignty, one can see here that X counts as sovereign in circumstances where the bulk of the population habitually obeys X, a determinate and common superior<sup>132</sup> who or which does not habitually obey any determinate or common superior.

Conversely, X ceases to count as sovereign in circumstances where he ceases to be obeyed habitually by the bulk of the population. This denotes a practice that may be motivated by a desire to follow certain rules but cannot be explained by the rules alone. However this practice that concerns territorially limited sovereignty is the product of a network of practices whereby in surrounding territories, governing practices do not encompass that of the territory where the sovereign is located.

Looked at in this way, to simply summarise a specific sovereignty, as though it is an isolated domain of practice using Searle's formula is inadequate. As with Hobbes' model, to endeavour to capture it more completely requires the application of his formula to the governmental practices that surround the territory of X. Hence along with the above formulation one would have to apply Searle's formula to other governmental practices so that one develops a picture whereby the circumstances are consistent with sovereignty appearing to amount to an ordering principle that governs both what is interior and what is exterior to states.<sup>133</sup>

Hence capturing this practice using Searle's formula in a way that attempts to capture this practice one can state that :

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<sup>131</sup> In the sense that there is no such contractual condition which provides the justification for the sovereign's existence although desires to obtain benefits considered to be deliverable by the sovereign might provide the motivation for habitually obeying which would include the desire to be protected from conquest, etc. This is of course formulating motivation as having a positive character and does not discount a simultaneous motivation being one of fear of sanctions being imposed in the event of breach of the sovereign's commands

<sup>132</sup> Austin, J 1832: 166.

<sup>133</sup> The idea of sovereignty as an ordering principle, as for example emerging from a sociological perspective out of the writings of Giddens (1996:281-282) is manifested in the materials associated with international law.

X counts as sovereign

in circumstances where:

- (a) the bulk of the population (P) locatable within a particular territory (T) habitually obeys the commands of X ; AND
- (b) X is a determinate and common superior who or which does not habitually obey any determinate or common superior; AND
- (c) The bulk of the population (P) in territory (T) does not habitually obey any other determinate or common superior who or which does not habitually obey any determinate or common superior.

15. One can see looking at sovereignty in this way that its disruption whereby X is no longer habitually obeyed by the bulk of the population, can occur in a number of ways by reference to the requirements stipulated in (a) to (c) and give rise to the demise of X or the persistence of X but within a reconfigured territory. So one example might be that X may after disruption only have the habitual obedience of the bulk of the population (P<sub>1</sub>) within T<sub>1</sub>. Y may now have the habitual obedience of the population (P<sub>2</sub>) within T<sub>2</sub> which as with T<sub>1</sub> was formerly part of T.

**[Please turn over]**

16. Hence the shift in sovereignty in this way might be described in the following way:

**Fig 1**

X no longer counts as sovereign S over population P in territory T

as circumstances (a) to (c) no longer apply, AND

(1). X counts now counts as sovereign  $S_1$  over population  $P_1$  in territory  $T_1$

in circumstances where:

(a) the bulk of the population ( $P_1$ ) locatable within a particular territory ( $T_1$ ) habitually obeys X ; AND

(b) X is a determinate and common superior who or which does not habitually obey any determinate or common superior AND

(c) The bulk of the population  $P_1$  in territory  $T_1$  does not habitually obey any other determinate or common superior who or which does not habitually obey any determinate or common superior; AND

(2). Y counts as sovereign  $S_2$  over population  $P_2$  in territory  $T_2$

in circumstances where:

(a) the bulk of the population  $P_2$  ( $P-P_1$ ) locatable in territory  $T_2$  ( $T-T_1$ ) habitually obeys Y; AND

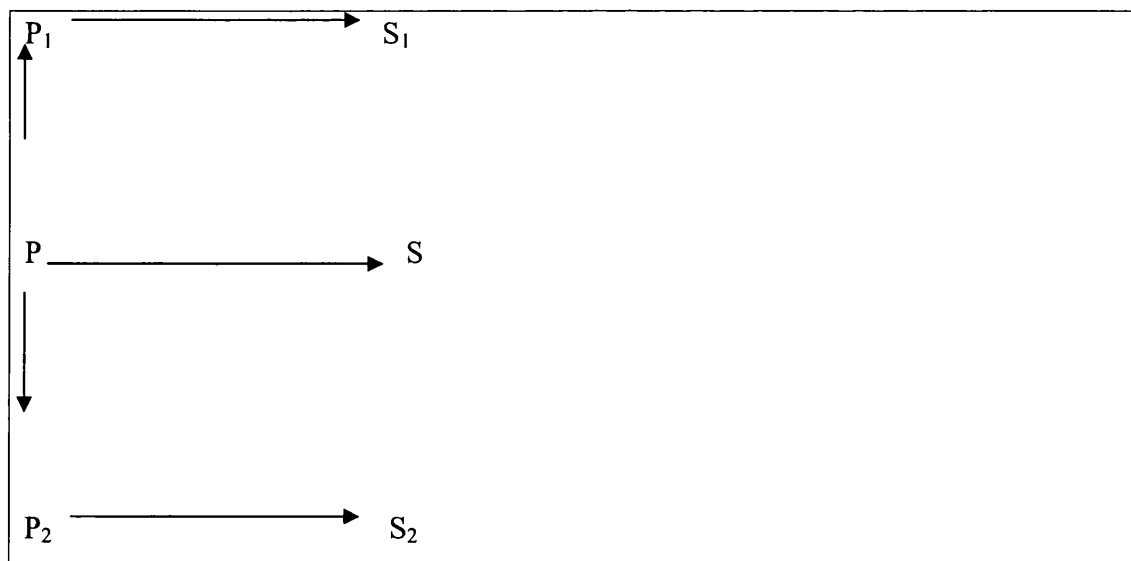
(b) Y is a determinate and common superior who or which does not habitually obey any determinate or common superior; AND

(c) The bulk of the population  $P_2$  in territory  $T_2$  does not habitually obey any other determinate or common superior who or which does not habitually obey any determinate or common superior.

17. The legitimating narrative that is used to justify this rupture might take several forms. At one level, X and the population that he is left with might consider that Y's regime is illegitimate and amounts to an unlawful breakaway in breach of X's commands prior to the split. X therefore might continue to consider that he is sovereign over the entire population P and territory T. X might therefore not 'recognise' Y and his or its new regime even though from Austin's perspective, it clearly is now a separate one. Y and its population on the other hand might consider the new regime is perfectly legitimate claiming for example that it is an expression of a just claim by a people for independence from X's regime. Clearly one could develop variations where for example two (or more) regimes are created out of one by agreement as for example occurred in the division of the Czechoslovakia into the Czech Republic and Slovakia.

Diagrammatically one can depict Austin's model in the following manner

**Fig 2**

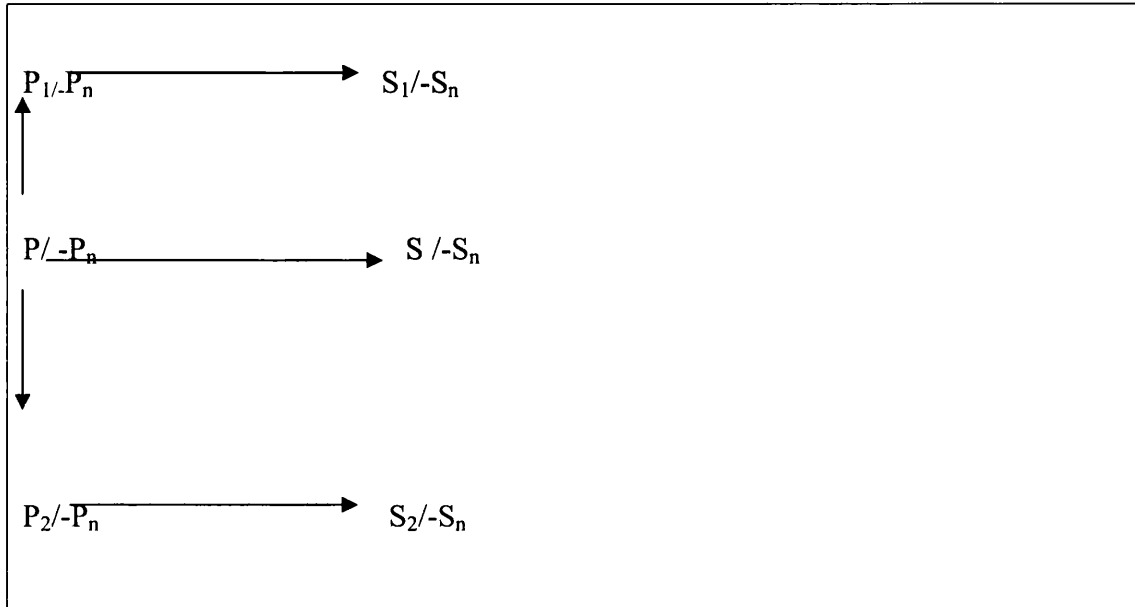


18. Here in terms of the elapse of time, one can see the reconfiguring of territorial sovereignty so that one state fractures with the possible reconfiguration of borders and populations. As with Hobbes, viewing sovereignty as a practice in which there is an interdependence between states in the sense that the positive expression of sovereignty as depicted above is accompanied by a correlative negative expression in the sense that sovereign institutions whose domains are constituted by the obedience

of the bulk of other populations do not receive the obedience of the populations referred to above.<sup>134</sup>

Looked at in this way the above diagram can be amended in the following way:

**Fig 3**



As with the Hobbesian model, one can see from this the large potentiality for disruption whereby existing sovereign entities secure the obedience of the bulk of populations not formerly exhibiting such conduct. This does not take into account the possibility of other power centres emerging within a given population and ultimately displacing the existing determinate body as the sovereign entity.

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<sup>134</sup> Austin recognises that 'political and independent societies', characterised by the sovereign-subject relation are in part dependent upon a condition of non-interference being satisfied. See Austin, J 1832: 171.

## Chapter 10: A Re-Examination of Schmitt

1. The positivist model of sovereignty developed by Austin, unshackled by any higher system of law, points as does Hobbes' model to the possibility of the existing legal order being suspended by the sovereign in the face of crises in order to protect it, leaving what Schmitt referred to as a juridical state. Austin's model hence at least implicitly contains a decisionist idea of sovereignty developed by Schmitt whereby ultimately the decision to suspend a legal order cannot be subsumed under any existing system of already existing norms. The idea of overriding the existing positive legal order or elements of it in the face of crisis was also seen to potentially operate in the case of the model of Augustinus Triumphus. Here as the pope was regarded as above the law, he could override it and in that sense therefore was capable of operating what might be called a state of exception. This ties in with the basic doctrine of necessity developed for example by Aquinas who stated that in the face of crisis a ruler could override existing law on the grounds of necessity 'because necessity is not subject to the law.'<sup>135</sup> In this model also, however, as we have seen there were circumstances where the location of rulership could be temporarily transferred to pre-determined institutions, these being the Council of Bishops in the case of Augustinus Triumphus.<sup>136</sup> These were also circumstances of crisis but the triggers were determined by what was considered to be heretical action. With regard to Dante, the position is complex. The thrust of *Monarchia* is against the idea of the exception as for example revealed by his comment that those who seek the purpose of right must seek it with right.'<sup>137</sup> An underlying doctrine of necessity is recognised in the writings of Aquinas although it is not explored by Dante in *Monarchia*. There is, despite the overwhelming claim of *Monarchia* that spiritual jurisdiction stands independently from temporal jurisdiction, an unresolved quality about the relationship between the two. He states towards the end of the work, when affirming that the authority of the emperor does not come from the pope but from God directly, that that conclusion should not 'be taken so literally as to mean that the Roman Prince is not

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<sup>135</sup> Aquinas, T 1988: qu. 96 a.6. It is important to note however that unlike the positivist models of sovereignty, in the case of Aquinas, natural law could not be overridden. And hence unlike the modern state of exception the application of the doctrine of necessity only allowed the ruler to free himself from the requirements of positive law to the extent that this did not contravene the requirements of natural law (Aquinas, T qu. 97 a.4).

<sup>136</sup> Wilks, M.J 1963: 507. See chapter 7 above.

<sup>137</sup> Dante, 1996: 45.

in some sense subject to the Roman Pontiff, since his earthly happiness in some sense is ordered towards his immortal happiness.’<sup>138</sup> The implications of this comment are unexplored. Does this mean that where the pope considered laws produced by the emperor to be a spiritual threat, he, that is the pope could override such laws? This is not explored but the comment can be said to raise the possibility of the holder of the papal office declaring what is in effect a state of exception where he considers the emperor’s laws amount to an unacceptable spiritual threat.

2. In Hobbes’ model, the sovereign was empowered to suspend the existing legal order in the face of crisis as solely determined by the sovereign institution. In addition, the possibility of a shift in the location of sovereign power in the face of crisis was also posed where the existing sovereign could no longer ensure preservation of his subjects in the face of such crisis. However here the shift, if it occurs, is to each individual who from the sovereign’s perspective is under his jurisdiction as the state of nature which the sovereign’s role was designed to exclude, reasserted itself. This in turn might provoke the creation of a new sovereign whose location is not predetermined within Hobbes’ model and is not intended to be temporary. Such shifts can be explained by reference to the pre-existing right to self preservation which constitutes a point of connection between Hobbes’ model and the domain of natural law and rights, which is either actively pursued by each individual within the state of nature or in terms of its application is transferred to the sovereign whose location is not pre-determined.<sup>139</sup> Again in the case of Austin, one can see a similar scenario unfolding in that the demise of one sovereign as a result of the bulk of the population no longer habitually obeying his commands could be the outcome of crisis as perceived by the population and result in the emergence of an alternative site of sovereignty. Here like Hobbes, the potential transfer of the location of sovereignty was not required to be temporary and its location was not pre-determined. Unlike the circumstances in Hobbes, the trigger for such a rupture could not be explained by reference to an existing natural right but justification might involve resorting to the secular and more elastic domain of utility. These observations are consistent with the

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<sup>138</sup> Dante, 1996: 94.

<sup>139</sup> Hobbes’ attitude towards the right to self-defence does not expressly go as far as Aquinas. In relation to dealing with the problem of tyranny, Aquinas argues that one is allowed to defend oneself meeting force with force which if required can be lethal in its effects and hence suggests a right of defence which extends to tyrannicide (Aquinas, T II-II qu 69. a 4c. referred to in Finnis, J 1998: 289). See chapter 8 above for an exploration of the place of resistance in Hobbes’ model of sovereignty.

idea that Schmitt's proposition that the sovereign is he who decides upon the exception objectively possesses a duality of meaning whereby it is possible that the point of rupture associated with the decision to suspend the existing legal order can either be accompanied by a continuity or a disruption as to the location of sovereignty.<sup>140</sup>

3. If one conceptualises sovereignty as a practice with a diachronic existence, one can see that rupture is capable of playing a part in each of the models so far discussed. Discontinuity and continuity co-exist so that even where there is rupture, it occurs within a wider ongoing practice of sovereignty. At first sight, the idea of rupture, in so far as it is expressed within the explanatory framework of the model at all, in these models is expressed in a marginal manner. What the above accounts have sought to do is to de-marginalise such ruptures, which flow from the relational character of sovereignty, to suggest that viewed in a diachronic sense, these models are constructed with the possibility of rupture present within narratives that tend to emphasise continuity. In contrast to the above models, the place of rupture in Schmitt's model is at its centre. The purpose therefore of this section will be to further explore the nature of his model from this perspective. In the process, an exploration of the relationship between norm and exception will be undertaken. Following this, the models already covered will be briefly re-examined in order to locate the nature of the rupture present in them within Schmitt's model.

4. For the purpose of this exploration, the definition of sovereignty used will be that formulated in *Political Theology*, that is to say that it is possessed by he who decides on the exception.<sup>141</sup> The idea of sovereignty posed in *Political Theology* is

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<sup>140</sup> This emerges below in the differentiation between commissarial dictator and sovereign dictator.

<sup>141</sup> Schmitt, C 1985: 3. I am mindful in so doing that in later writings, for example in *Verfassungslehre*, he locates formal sovereignty with constituent power in the form of the German people who expressed their sovereign power through the agency of the Constituent National Assembly which produced a constitution through which the content and the exercise of the people's political decision was formulated. The promulgation of the constitution ended the sovereign dictatorship of the assembly. However given the elusive nature of the political which cannot ultimately be predicted or defined by any normative structure, Schmitt's model even with this modification does not break from the possibility of a sovereign dictator emerging in the form of a dominant individual who engages in dictatorial rule to preserve the essence of the people's interests proclaimed by that dictator in its name.. That is to say, that although in later works he rhetorically relocated sovereignty to 'the people' from the monarch, because of the formless nature of 'the people', the sovereign dictator emerges as a concrete institution, the qualities of which had historically been possessed by the sovereign monarch. See Cristi, R 1999: 188-192.



consistent with the concrete manifestations of dictatorship which Schmitt explores in *Die Diktatur* whereby the commissarial dictator is classified as someone who endeavours to restore order so that the existing constitution can be implemented normally. A sovereign dictatorship on the other hand brings about the abrogation of the existing constitution so that a 'condition whereby a constitution [that the sovereign dictator] considers to be a true constitution will become possible.'<sup>142</sup> The decision made by both is an absolute decision not itself determined by any legal norm and of course in relation to the latter type is made by someone who is outside the existing system of such norms altogether.<sup>143</sup> The term 'sovereign' will be ascribed to both types of individuals unless otherwise stated although it is appreciated that one could argue that the commissarial dictator, in so far as he is accounted for by the constitution, has a quasi-sovereign quality about him in the sense that he can be seen to be the product of a constitution rather than its originator. In both cases the nature of exceptional circumstances are impossible to predict as are the steps that need to be taken by the sovereign to resolve the crisis.<sup>144</sup> In relation to the decision of a commissarial dictator, the rule of law, if it exists prior to the decision in its thick sense, at the moment of the sovereign decision is superseded by a rule of law in its thinnest to vanishing sense, namely rule by law. The legitimacy of the decision is primarily located for Schmitt in the claim that the sovereign expresses the fundamental interests of the people by reference to requirements that flow from existential friend/ enemy distinction which he alone has the capacity to define in response to the concrete circumstances that confront him.

### ***Norm v Exception***

5. Schmitt's ideas of the decision and the exception form a central place in his explanation of juridical systems, as for him any legal system rests on a concrete decision and the rules of a system prove nothing and the exception proves everything.<sup>145</sup> The idea of the exception provoked by exceptional or emergency circumstances, however cannot be divorced from and indeed is intimately intertwined

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<sup>142</sup> This quote is obtained from Schwab's introduction to *Political Theology*. See Schmitt, C 1985: xix.

<sup>143</sup> Although as will be seen, the judgment as to whether a sovereign dictator as opposed to a commissarial dictator is operating, can be unclear and contested.

<sup>144</sup> Schwab, G in Schmitt, C 1985:xx.

<sup>145</sup> Schmitt, C 1985: 10,15.

with normality. It is the sovereign's perception of that normality in its diachronic existence, namely both with regard to the past and future, that will lead to an evaluation of what kind of circumstances will amount to exceptional ones which require exceptional measures to quell them. Schmitt does not explore the specifics of this process but the centrality of the political and the evaluation of friend/enemy inevitably for him must lead to an identification of social qualities within and around a given society that constitute that normality associated with that society.

6. In aid of his analysis of the exception's relationship to the norm, he cites Kierkegaard's observations on the relationship of the exception to the 'general'.<sup>146</sup> What Schmitt quotes however is not so much about ontological priority but about the epistemological relationship between exception and norm and that the exception is a gateway to understanding the norm. Kierkegaard is quoted by Schmitt as saying that 'the exception explains the general and itself... If they [exceptions] cannot be explained then the general also cannot be explained.'<sup>147</sup> This suggests that the way to understand the general or norm is through appreciating the nature of the exception. It is also consistent with the privileging of the exception at the expense of the norm and the suppression of the dialectical relationship between them, a relationship highlighted by Kierkegaard in which the exception springs out of the general and the interaction between the two impacts upon the character of both.<sup>148</sup> This dialectical relationship may at first sight not be considered something of notable importance but it is suggested that this can have a profound impact upon a conceptualisation of a sovereign's role regarding responses to perceived crises.

7. How can the circumstances amounting to an emergency situation be assessed other than against the qualities associated with normality? If one takes the qualities that might comprise an emergency suggested by Rossiter for example, external attack, rebellion and economic depression, each one of these is predicated in crude terms

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<sup>146</sup> This is the term used by Schmitt in his quote from Kierkegaard. In the publication translated by Walter Lowrie the term used is the 'universal'. For the sake of consistency I will use the term 'general'.

<sup>147</sup> Schmitt, C 1985: 15.

<sup>148</sup> Kierkegaard S 1941: 132-133. The idea of the exception emerging from the general is captured by Kierkegaard stating that '[t]he earnest and resolute exception (which though in conflict with the [general] is nevertheless a scion from its root' (Kierkegaard, S 1941: 133). He characterises the relationship between the general and the exception as of one strife which is 'exceedingly dialectical' (Kierkegaard, S 1941: 132).

upon a conception of normality that, *inter alia*, embraces peace from external and internal attack and a tolerable economic performance.<sup>149</sup> The extent to which toleration and reluctance to move from a normal mode of government to an emergency mode will also depend in part upon perceptions about the impact of the use of emergency powers upon the prospects of returning to normality. This is perhaps brought out by Abraham Lincoln who had been forced to take emergency powers at the beginning of the American civil war and asked whether a government must 'of necessity be too strong for the liberties of its people or too weak to maintain its own existence?'<sup>150</sup> At a certain level therefore the exception is clearly structured by the norm and not vica-versa. Ulmen in line with this suggests that 'a constitution without gaps necessarily presupposes a normative utopia wherein there is no exception. By definition the norm precludes the exception whereas the exception presupposes the norm and is bound by its definition. The exception cannot decide for the exception, it can only decide for the norm.'<sup>151</sup> This is also supported by the idea that the sovereign entity existentially is not going to have had experience of circumstances constituting an exceptional state of affairs other than against the context of what it perceives to be normality as it exists and possibly an alternative normality as the sovereign desires it. If he is a commissarial dictator his very existence is a product of the norm which only meaningfully operates within an operational normality. If he is in Schmittian terms a sovereign dictator whose existence is not the product of any constitutional arrangement, his creation will be as a result of a reaction to what is perceived by him to be an unacceptable threat to his perception of normality. There is therefore an intimate relationship between what is perceived to be normality and crisis, between what is required to protect such normality and hence between normality and what is likely to constitute a state of exception requiring measures to overcome the crisis. Crisis, preparations for it, and consequent declaration of a state of exception or emergency hence contributes towards the crystallisation of perceptions about what comprises normality and towards its unfolding in a diachronic sense.<sup>152</sup>

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<sup>149</sup> Rossiter, C 1948: 6.

<sup>150</sup> Rossiter, C 1948: 3.

<sup>151</sup> Ulmen, 1991: 244 as quoted in McCormick, J.P 1997: 226-7.

<sup>152</sup> This impact of crisis upon the development of a state's normality, as captured by its constitutional configuration, is for example explored by Bobbitt in his investigation of the role of war amongst other features which contribute towards the development of states and their constitutional forms (Bobbitt, P 2002). Locke poses the role of war quite explicitly as the expression of conflict over the location of

8. However, at a deeper level the relationship between the two is more complex. To appreciate this requires an investigation of normality. For these purposes certain assumptions will be made about the nature of man and his relationship to the process of social organisation. It is arguable that man has no specific environment, that is to say that the operation of his instincts is not dependent upon any particular kind of physical environment. The result is that in contrast to animals, man's relationship with his environment is characterised by world-openness.<sup>153</sup> His instinctual organisation may be described as under-developed compared to that of higher animals. Biological world openness is transformed by social order into world closeness.<sup>154</sup> The idea of normality, therefore, is typically characterised by order and stability arising out of social relationships which are considered to be predictable in content. It is this state of affairs which is characterised by a hierarchy of enforceable norms with associated institutions. However the reality is that a mode of normality and the norms around which it is structured represent one of many possible ways of social organisation. Each mode of normality represents not only a continuing decision to adhere to a certain kind of social organisation and set of values but also gives rise to the continuing exclusion of other kinds of (ab)normalities. Thus, for example, the practice of liberal democracy represents a commitment to that mode of governance and also amounts to a continuing exclusion of other kinds of governance for example monarchical dictatorship.<sup>155</sup> Therefore a given normality and set of norms is the product of one or many positive decisions leading to the existing mode of governance with the result that other incompatible normalities are excluded possibly by positive decisions but at any rate by incompatible practices being consistent with such a decision.

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sovereignty when he states that '[t]he great question which in all ages has disturbed mankind, and brought on them the greatest part of those mischiefs which have ruined cities, depopulated countries, and disordered the peace of the world, has been not whether there be power in the world, but who should have it' (Locke, J 1993: 73).

<sup>153</sup> Berger, P and Luckmann, T 1991: 65.

<sup>154</sup> Berger, P and Luckmann, T 1991: 69.

<sup>155</sup> The precise features of the liberal democracy which are regarded as contributing towards a particular normality will be historically and culturally specific but will embrace a cluster of values as for example claimed by Freedon to include liberty, individualism, progress and democracy. See Freedon, 997:140-177.

9. The adoption in substance of one kind of normality to the exclusion of others may well be a complex cumulative process which reflects choices connected with national, social, economic, religious, cultural and moral priorities. However society is structured, participants will consider other methods of social organisation as being unacceptable. The society exhibiting a laissez faire economy might regard a communist method of economic organisation as being completely unacceptable. A secular liberal democratic society might regard a proposal to change to a fundamentalist religious society as out of the question. The alternative normality to the members of that society thus may not be regarded as such at all but as an abnormality to be avoided. The point is that what in a substantive sense will be regarded as “normal” will be determined by the prevailing preferences motivated and reinforced by particular legitimation or ideological narratives .<sup>156</sup>

10. The idea of the exception is most easily fed by the idea of chaos or disruption whose threat entitles a state to invoke exceptional measures. In positing the need for exceptional measures in this way, Schmitt provides an example of an antirrhetic form of discourse<sup>157</sup> whereby what is highlighted is an expression of evil, which is most threatening including to ontological security. From a Cassirerian point of view this is captured by the idea of chaos<sup>158</sup> perhaps behind which lies proclaimed features of what amounts to an alternative normality whose claimed characteristics are most likely to be constituted by what are considered to be its most repugnant features that can comparatively easily be focussed upon, identified and imagined and united against. In so doing, in effect the claimed features associated with ‘our’ normality are prioritised, are clearly differentiated from the prospect of chaos and the alternative normality and in so doing are given an added grounding by being posed as the antithesis to these alternatives. By positing ‘chaos’ against claimed attributes that amount to ‘our’ normality against a background where the claimed features of the ‘other’ normality or normalities are distorted, simplified or suppressed, the relativising of our own normality by the invasion of our imaginations by the possibly

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<sup>156</sup> Clearly what the members of a community consider on these points is likely to be marginalized where dictatorial powers are in play.

<sup>157</sup> This is a form of discourse characterised by negation and rejection. See Goodrich, P 1995.

<sup>158</sup> Here I refer to chaos in its weak sense, for example in idea of unpredictable and devastating violence which is said to emanate from a continuing source, for example al Qaeda.

complex features of other normalities is obstructed.<sup>159</sup> The perception of alternative normalities can be infected by the idea of chaos and the brutalities that might be associated with them, which in turn allows for the idealisation of the claims concerning our normality and a sense of its fixity and legitimacy so that it can be differentiated and contrasted from the formers' unpredictability and repugnance. It also allows for the imagining of the continuities of our normality, whereby the uncertainties that pervade it are marginalised in favour of its apparent certainties which can be set against the perceived uncertainties of what it is perceived to be threatened by.<sup>160</sup> These variables are 'revealed' in the Schmittian model by the sovereign decision-maker. The claimed features associated with the normality under protection strengthens the legitimacy of the decision to declare the state of exception and the measures to be posed which emanate from the identity of the sovereign decision-maker. The identity of the decision-maker together with the reasons for the decision contribute towards the security of the population faced with the fundamentally disrupting character associated with events that threaten or constitute what is perceived to be unacceptable disruption.

11. Schmitt's assertion that norms require a pre-existing normality and that the decision to declare a state of exception cannot be subsumed in any given framework of legal norms can be seen in this light. While it can be said to be a logical inference, what it constructs, namely a normality without any norms is an oxymoron if one uses the term 'norm' in its wider sense, that is to say constituted by social norms. Even if used in its narrower sense as simply referable to law, one has to ask how it is that a society that does possess non-legal norms cannot also possess legal ones. While the idea of the political does not necessarily alight on any particular feature of society as has been previously described it is predicated around the idea of a homogeneous people and while Schmitt does not explicitly commit himself to any particular set of features which provide the basis of such a quality, inevitably they will be predicated on some form of identity that involves a combination to varying degrees of language,

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<sup>159</sup> The suppression of alternative normalities is reflected in the discourses in which threats to the existing normality are posed. So for example the depiction of the conflict in Northern Ireland as 'the troubles' undertaken by 'terrorists' rather than as a war of liberation undertaken by republicans in response to the illegitimate occupation of part of Ireland by the British state.

<sup>160</sup> The perceived uncertainties provide a point of unity around which action can be formulated and justified and hence possess a symbolic quality.

culture, religion, race and economics.<sup>161</sup> Imagining a society that has such commonalities means imagining one with norms of some description including legal rules. So one returns, as with Hobbes, where the idea for the justification for sovereignty was the aversion of a state of nature, to the idea that the power of these ideas do not lie primarily in their historico-empirical accuracy but in their points of unity in response to which decisions by the sovereign institution can be justified. In both of their foundational discourses, the antirrhetic lies in the idea of disruption potentially amounting to chaos which one way or another is to be excluded. Schmitt, concentrates on the features associated with the existing normality and the requirement to protect it from other potential normalities. He perceives the world as comprising a pluriverse of states each expressing the requirements of the political as apparently generated by their specific populations.<sup>162</sup>

### *A Grammar of Normalities*

12. Augustine observed that war is waged to create a peace of one's own choosing.<sup>163</sup> This is capable of casting a revealing light on the relationship between the exception and normality.<sup>164</sup> Firstly, the idea of conflict between 'friend' and 'enemy' can be conceptualised as a clash between competing normalities and the idea of exception, as constituted for example, by the prevalence of conflict and ultimately violence which must be seen in relation to such a clash. Secondly, it is possible to consider normality in two different ways which will be designated N<sub>1</sub> and N<sub>2</sub>. The idea of peace namely the absence of violent conflict and the existence of repetitive social practices is designated as N<sub>1</sub>. In Augustine's mind peace is associated with order and the idea of order at its most abstract has been conceptualised as a regulated connection between

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<sup>161</sup> See Chapter 5 above.

<sup>162</sup> Schmitt, C 1996c: 53. It should be observed that the idea of a pluriverse of states where apparently there are no *a priori* criteria to determine each state's existence appears as a liberal theory of group autonomy. However this is more apparent than real. Particularly, when bearing in mind Schmitt's allegiance in the 1930s to the National Socialists, what groups were accorded community status with the entitlement to statehood was anything but liberal, as for example demonstrated in Hitler's attitude towards the Poles and the effective obliteration of the country with the absorption of about half of it into the Third Reich.

<sup>163</sup> 'Indeed even those who wish to disrupt an existing state of peace do so not because they hate peace but because they desire the present peace for one of their own choosing' (Book XIX:12:934.). '...the peace of a city is an ordered accord, with respect of command and obedience of its citizens' (Book XIX:13: 938 (Augustine, 1998)).

<sup>164</sup> Augustine's observation is echoed by others. For example, Clausewitz states that war 'is an act of force to compel our enemy to our will' (Clausewitz, C. von, 2007: 13). Foucault considered that 'war is the cipher of peace' (Foucault, M 2003: 269).

one thing and another, suggesting repetition.<sup>165</sup> This suggests predictability *most clearly* captured by the existence of a series of identifiable social practices regulated by a normative framework which itself is applied and developed in an orderly way and it is against such background that the norm/exception division is posed. Peace however can be the outcome of different forms of governance and hence can be different in character between one society and another. Hence the substantive social characteristics associated with the idea of peace can vary from one society to another. N<sub>2</sub> therefore captures these social characteristics and includes norms, both legal and non-legal and the social institutions which produce such peace and give it its specific characteristics and in turn which are generally dependent upon it for their functioning.<sup>166</sup> The democratic secular republic or the fundamentalist theocratic state are both capable of being perceived as exhibiting peace and hence of exhibiting N<sub>1</sub>. However they are likely to differ fundamentally in certain substantive senses for example in connection with the different perceptions and emphasis based on individual liberal freedoms, the place of religion in the structure and organisation of society and the role, substance and operation of law in the process of social regulation. These differences are captured by N<sub>2</sub> which can be specifically allocated to different societies by use of the designation (a), (b), (c)...etc. So in relation to the above societal examples by way of illustration they could be designated respectively as N<sub>2(a)</sub> and N<sub>2(b)</sub>. Returning to Augustine's above-mentioned quote the idea of 'a peace of ones own choosing' captures both N<sub>1</sub> and N<sub>2</sub> in that generic idea of peace is present as well as its specificity.

13. An undermining of N<sub>2</sub> will constitute an undermining of N<sub>1</sub>. Activity regarded as violently terroristic for example will disrupt aspects of N<sub>2</sub> and hence will weaken the existence of N<sub>1</sub>, that is to say the undermining of the prevailing peace. Such attacks will require the effective mobilisation of the state to protect N<sub>2</sub> and in the process ensure N<sub>1</sub>. Violent attack itself, by reference to normalities can be perceived as a form of anti-normality in that, if allowed to become established, it will destroy existing peaceful relations without necessarily replacing them with another normality, albeit one that from the perspective of those committed to the existing normality is

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<sup>165</sup> Waldenfels, B 1996: 85.

<sup>166</sup> I use the term 'generally', as there are certain institutions most obviously the military and to a lesser extent the police which are constructed to operate in the absence of peace and obviously can come to the fore in times of exception.



unacceptable. Hence the disruption itself can be characterised as giving rise to the threat of  $-N_1/-N_{2(a)}$ , that is to say constant violence and the undermining of any peaceful recognisable normality.<sup>167</sup> By conceptualising normality in this way, its relationship with the exception can be developed. Hence if one takes the circumstances of the Weimar Republic in 1920, it had experienced a number of communist uprisings,<sup>168</sup> which attacked institutions severely undermining  $N_2$  and hence  $N_1$  posing an alternative  $N_2$ , namely the imposition of communism to replace the existing social democracy and hence restoring  $N_1$ . The Reich President declared states of exception and instigated the introduction by the government of various means such as the suspension of civil liberties and widespread arrest and detention<sup>169</sup> with a view to protecting  $N_2$  and restoring  $N_1$ . In these circumstances there were a number of normalities pertinent to  $N_2$  which might be relevant. For the sake of completeness there is the normality that the Weimar republic overrode namely the constitutional monarchy,<sup>170</sup> the present normality that was being protected by the institution of emergency measures which can be designated as  $N_{2(a)}$ ; and the potential normality, if any,<sup>171</sup> that the emergency measures are designed to prevent, for example a communist republic which can be designated as  $N_{2(b)}$ . However there is a further potential normality  $N_{2(c)}$  that could emerge as a result of the permanent institution of the state of exception itself and thus the permanent prevention of the resumption of the normality  $N_{2(a)}$  it was designed to protect.<sup>172</sup>

14. What can be gathered from the above, is that the very decision to declare a state of emergency and to impose measures to resolve the crisis at hand can be conceptualised as intimately connected with the existence of the normality being protected  $N_{2(a)}$ , the potential normality being opposed  $N_{2(b)}$  and the extent of disruption to the existing normality  $N_{2(a)}$  by those perceived to be agents of  $N_{2(b)}$  by

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<sup>167</sup> One can see such circumstances prevailing currently in Iraq and also since the early 1990s in Somalia and in terms of the degree and chronic character of the violence expressed in Hobbes' state of nature.

<sup>168</sup> Rossiter, C 1948: 38.

<sup>169</sup> Rossiter, C 1948: 38.

<sup>170</sup> For the purpose of this exercise, the normality that has ceased will not be designated as it is not necessary to what will now be developed.

<sup>171</sup> In the case of potential disruption by what might be perceived to be terrorists organisations the emphasis may well be on the disruption on the existing normality rather than its replacement by an alternative one.

<sup>172</sup> Generally, the differences between  $N_{2(a)}$  and  $N_{2(b)}$  are likely to exist in the domains of one or a combination of matters pertaining to nationality, ethnic identity, culture, religion and economic organisation.

the actual imposition of emergency measures associated with the state of exception. The idea of the exception suggests that whatever measures are imposed will be for as long as they are needed. Their purpose is to overcome the crisis that triggered the state of exception and allow a continuation of the normality protected by such measures namely  $N_{2(a)}$ .<sup>173</sup> Hence the idea of the exception raises the expectation that the potentiality of such measures being imposed permanently and as a result creating a new normality ( $N_{2(c)}$ ) will not be realised. This occurred in effect following the accession of Hitler to the chancellorship under the Weimar constitution. A series of emergency decrees were issued under the authority of Article 48 of the Weimar Constitution which contributed towards the process of decline of the normative state and left the Weimar constitution as nothing more than a shell. The most important were a presidential decree suspending a large number of fundamental rights ostensibly made to defend the state against 'Communistic, state-endangering acts of violence.'<sup>174</sup> Following this, an 'Enabling Act'<sup>175</sup> was enacted by the Reichstag which vested the cabinet in effect with unlimited power to legislate with the power to depart from the constitution with the agreement of the Reichstag and Reichsrat.<sup>176</sup> While the measure

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<sup>173</sup> The term 'continuation' rather than 'return' can be used as the existing normality has the capacity through having a normative framework that allows for its own temporary suspension through the declaration of a state of exception.

<sup>174</sup> This was declared in the introductory paragraph of the decree entitled 'Decree of the President of the Reich for the Protection of the People and the State' (Fraenkel, E 2006: 241).

<sup>175</sup> A decree entitled 'The Law Concerning the Solving of the Emergency of the People and the Reich' (<http://web.csustan.edu/History/Faculty/Weikart/enabling.htm> accessed on 3<sup>rd</sup> September 2007.)

<sup>176</sup> Article 2 of the decree. Whether this article breached the terms of the constitution depended on the interpretation given to article 48. Section 2 of Article 48 stipulated that the '[i]f, in the German Reich, public security is considerably disturbed or endangered, the Reichpresident may undertake necessary measures in order to restore public security and order, and if necessary intervene with the aid of armed forces. For this purpose he may suspend, temporarily, in part or entirely, the basic rights as provided in Articles 114, 115, 117, 118, 123, 124 and 153' (Schwab, G 1989: 37). Schmitt argued that this provision did not prevent the Reichpresident from introducing measures under the authority of Article 48 which extended beyond the abrogation of the specific rights stipulated in that article. Even here, however, Schmitt considered that there were limits to what could be legislated under Article 48. For example he considered that Article 48 could not be used by the Reichpresident to turn a republic into a monarchy and given that the operation of Article 48 required a basic institutional minimum. Hence according to Schmitt, Article 48 assumed the continued existence of the Reichpresident, the government and the Reichstag. One could argue that while Article 2 of the 'Enabling Act' allowed for the overriding of provisions of the constitution and appeared to have no limit and hence went beyond a strict interpretation of Article 48 which only allowed for certain rights to be suspended, it too implicitly did not allow for measures which removed those institutions which were required to implement it. These would have included the cabinet and both legislatures. In any event, Schmitt was of the view that Article 48 only allowed for the introduction of measures temporarily and this was clearly not the case with regard to the 'Enabling Act'. While Schmitt's 'latitudinarian' approach to Article 48 was rejected by other jurists such as Hugo Preuss and Richard Grau, it accorded more with the way that Article 48 had been used in the 1920s and early 1930s prior to Hitler's rise to power. A number of provisions other than those stipulated in Article 48 were contravened by presidential decree including for example the imposition of special courts despite Article 105 which explicitly stated that special courts were

stated that it would only remain in force for the duration of the then government. Article 5 was ignored and the measure remained in force until the destruction of the regime. With this breach in mind, the measure enabled the cabinet to permanently override the constitution, and it was turned into a statute that marked the end of the Weimar constitution and marked the founding measure of the national socialist system.<sup>177</sup> In effect here the substance of a new normality but without a meaningful normative structure was imposed initially using the language of the exception.<sup>178</sup>

15. This idea of competing normalities can also be applied in reverse. That is to say taking the example of the Weimar Republic and looking at the situation from the perspective of the insurgents in the 1920s who were engaged in attempting to introduce communism<sup>179</sup> by using violent means. Here the communists' agenda was to gain power so as to initiate an economic transformation, that is to say to transform  $N_{2(a)}$  into  $N_{2(b)}$ . In order to achieve that they had to gain control of the repressive apparatus of the state, a process which would undermine  $N_1$  and facilitate the replacement of  $N_{2(a)}$  by  $N_{2(b)}$  whereupon  $N_1$  would be re-established. As it happens they were unsuccessful and therefore they were never able to gain continuing control of the state instruments of repression. Hence they were never able to overcome the imposition by the state of emergency measures designed to protect  $N_{2(a)}$  and hence could not progress to establishing  $N_{2(b)}$ .<sup>180, 181</sup>

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illegal and totally forbidden. (Rossiter, C 1948:69; Schwab, G 1989:37-43; Neumann, F 1966: 41-61; Noakes J and Pridham, G 1998 ).

<sup>177</sup> Neumann, F 1966: 53.

<sup>178</sup> In 1941 Hitler issued an edict empowering the Reich Marshall independently to enact any legislation or administrative decrees that he considered necessary for air-raid protection (Neumann, F 1966: 58). In 1942 a decree was passed by the Reichstag giving to Hitler's word the force of law, (Stone, N 1980).

<sup>179</sup> The Spartacists led by Karl Liebknecht and Rosa Luxembourg was the most prominent revolutionary left-wing organisation (Finn, J.E 1991:152).

<sup>180</sup> The government's ability to suppress communist insurrection was not just dependent on the use of Article 48. To be able to impose order, Ebert the Reichpresident had to ensure that the army was on side and so, he managed, notwithstanding his socialist past, to secure an alliance with the Reichswehr which was a profoundly conservative organisation (Finn, J.E 1991:152-3).

<sup>181</sup> One can say that the relationship between norm and exception has become more complex and contested because of the growth of asymmetrical conflict and the globalisation of normalities by the emergence of environmental, economic and religious conflicts that transcend state boundaries. This has increased scope for dispute over the nature of conflict where the priorities of nation states which are essentially based on defined territories and units of governance are not necessarily matched by their antagonists who are not necessarily confined to given territories or are committed to territorial control in a way associated with states. For example 'al Qaeda', an organisation claimed to exist by many western states but whose political agenda is not necessarily agreed upon. There is a growth in emphasis upon the idea that such 'terrorist' organisations are not interested in territorial gain but are far more interested in ensuring a chronic state of insecurity in certain western states which undermines

16. All these normalities are imagined by reference to constructing the generality of each one through the particularities of their manifestations which may be experienced directly or indirectly or speculated upon.<sup>182</sup> Added to that is an assessment about the extent to which events have occurred which create an emergency necessitating the use of ‘measures to restore public security and order’ that might include the suspension of basic rights. In the terms of this one can see a focus by reference to public security which directly relates to the requirements of peace represented by  $N_1$  as seen through the prism of  $N_2$ . On both levels such judgments are always capable of being contested and the idea of Schmitt’s sovereign as depicted in *Political Theology* whereby the decision to declare a state of exception and the measures needed to deal with it are merged in the same individual, is to foreclose on that debate.<sup>183</sup> The sovereign’s judgment on what is under threat, the nature of the threat and the kinds of steps that need to be taken to avert it is final. It too will be based on a set of estimations based upon the particularities that the sovereign takes into account and from which the existing normality and those that might be threatening it are inferred.

### *The Relationship between Commissarial and Sovereign Dictatorship*

17. However, to protect the existing constitutional settlement is in fact not the last word. As previously explored, as the political lies at the heart of Schmitt’s model, ultimately the decision to declare an exceptional situation may in fact pass out of the hands of the existing institution which is exercising the functions of a commissarial dictatorship by means that may or may not be constitutional, into the hands of an institution, whether individual or aggregate, that is committed to changes that are associated with sovereign dictatorship, namely the creation of an altered normality

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their socio-economic and political systems leading to their withdrawal from what are considered to be illegitimate occupations in the middle-east and, among some elements associated with al Quaeda of establishing global Islamic supremacy (Burke, J 2004).

<sup>182</sup> We return here to the idea posed by Cassirer that meaning involves a synthesis of the particular and general. An alternative normality may not be experienced directly from the perspective of those determining governmental action including the Schmittian sovereign but indirectly in the sense of it being perceived perhaps via the media and intelligence etc. through the prism of the normality under threat.

<sup>183</sup> In Schmitt’s earlier writings in *Die Diktatur*, he adheres to the classical definition of dictatorship wherein there is separation between the institution that declares the state of exception and the dictator who is appointed directly or indirectly to make decisions on the measures that need to be taken to resolve the crisis and who remains accountable to that institution. See McCormick, J.P 1999: 217-251.

that is characterised by a new constitution that more fully in its view reflects the true essence of the people.<sup>184</sup> Alternatively the same shift between 'old' and 'new' constitution can in effect be undertaken by the same institution which shifts from a commissarial to sovereign dictatorship role. For Schmitt both forms of dictatorship are capable of being legitimate, even if acting unconstitutionally, as they seek to protect the people from its enemies in circumstances where existing constitutional arrangements are considered to be inadequate.<sup>185</sup> It is also the case that the move from restoring the existing constitution to one where it is in effect abrogated does not involve a clear break between decisions associated with the functions of a commissarial dictators and those associated with the functions of a sovereign dictator particularly where there is no change of personnel. What starts out as a claim to restore the effective operation of the existing constitution might develop into a process of decision-making by the same individual that in effect gives rise to the imposition of a new constitutional settlement.

18. Working through the relationship between the two types of dictatorship, the distinction between the two types of dictatorship may be problematic but it is not inevitable. Where a dictator emerges by unconstitutional means who is committed to the taking of steps which result in the replacement of existing constitutional arrangements by new ones, this would accord with Schmitt's idea of the sovereign dictator. However, the dictator might initially appear as a commissarial one, polemically committed to the restoration of the constitution rather than the creation of another but may take measures which in effect dispose of the former and give rise to the creation of the latter or nothing that would amount to a constitution in the democratic-liberal sense as for example in the case of Hitler.<sup>186</sup> In such

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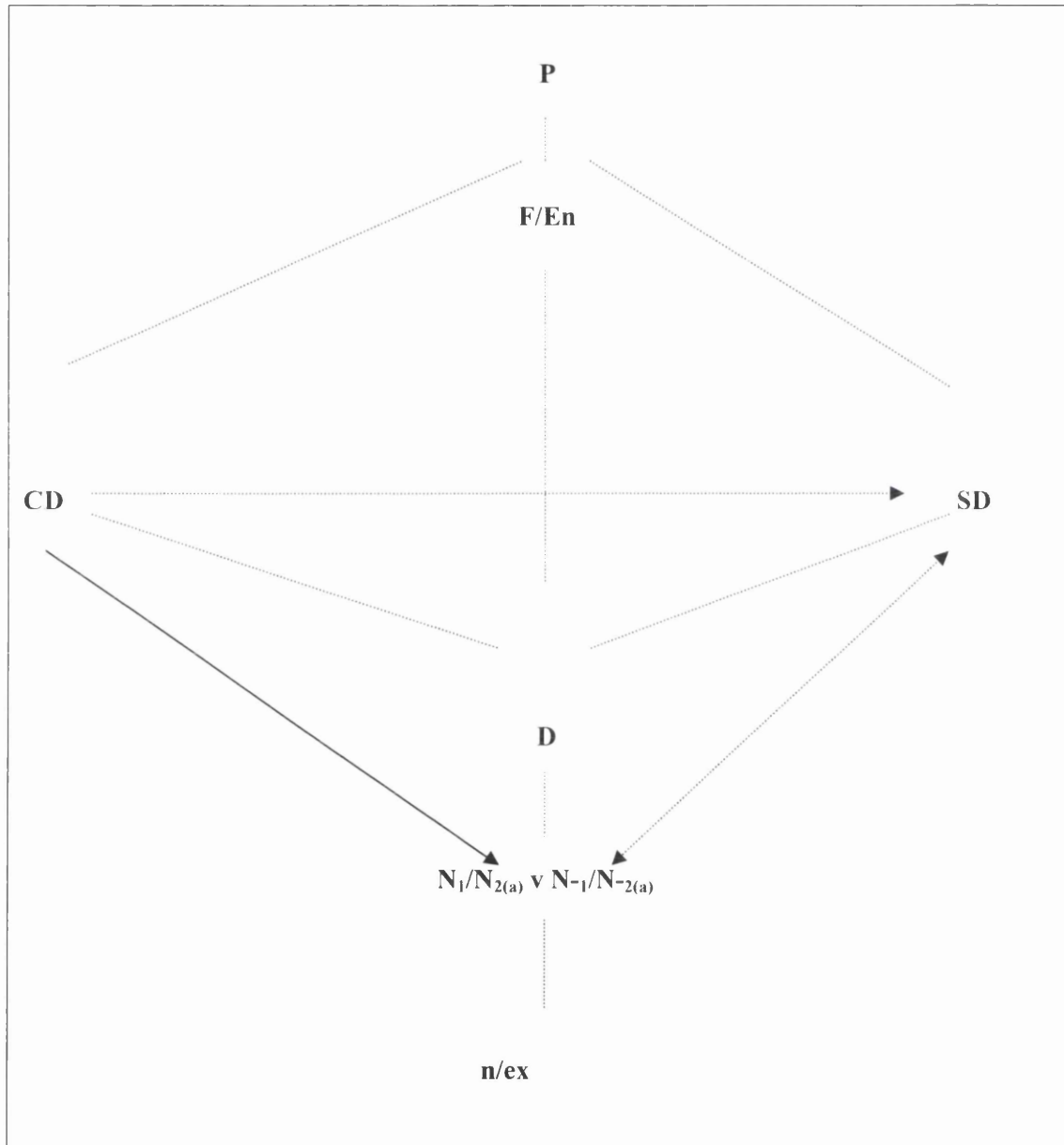
<sup>184</sup> Schwab, G in Schmitt, C 1985::xix.

<sup>185</sup> The possibility for governmental action being legitimate and justified despite being unconstitutional flows from a number of themes or positions in his writings. These include his understanding of the political and the existence of the pre-constitutional essence of a people, his exploitation of Weber's hesitancy over legality constituting a thick rather than a thin form of legitimacy, his claim that legality was subservient to legitimacy, his commitment to the administrative state over that of the legislative state, his idea that legitimacy primarily derived from the authority of the decision-maker and his idea of the consent of the population to the authority of the decision-maker being expressed through its passive acquiescence. The relationship between legitimacy and law is particularly explored in *Legality and Legitimacy* and is commented upon for example by Schwab and particularly by McCormick (McCormick, J 1997 and 2004; Schwab, G 1989: 125 and Schmitt, C 2004).

<sup>186</sup> This gives rise to the issue as to whether an amendment clause in a constitution, assuming it has no explicit restrictions, can be used to amend the existing constitution out of existence. Schmitt himself rejected this contention and claimed, reflecting his idea about the centrality of the friend/enemy

circumstances, one would not necessarily be clear as to which type of dictator one was confronted with other than retrospectively. Even then, there could well be room for contention over whether or not the original constitution had been restored, assuming that was the claim, depending on what one identified as the terms of the original constitution.<sup>187</sup> The movement from commissarial dictator to sovereign dictator can be diagrammatically represented in the following way:

**Fig. 1**



distinction, that amendment provisions did not provide unlimited authority to 'recast the structure of the constitution fundamentally' (Schmitt, C 2004: 96). This also conforms to his attitude towards Article 48 described above.

<sup>187</sup> In this analysis, one sees once again the 'fabulous retroactivity' posed by Derrida in the creation of a 'new' constitutional arrangement.

19. Looking at this diagram, one can see that the emergence of the sovereign dictator is not dependent on the prior existence of the commissarial dictator although the action or inaction of the former might provoke the creation of the latter.<sup>188</sup> In the case of the commissarial dictator, the nature and interests of the people, the nature of the events considered to constitute or threaten a crisis in the light of their perceived or threatened impact upon the people and its institutions, the extent to which exceptional measures are needed and their nature are capable of becoming pivotal points of reference around which each sovereign judges whether a state of normality or exception exists and the measures required in the event of the latter.<sup>189</sup> The existence of the model is predicated upon a practice that is captured in the Schmittian idea of the pluriverse, that is the idea of a multitude of states, each with its own population whose perception of the world, upon what is acceptable and unacceptable, upon what might arouse it to engage in conflict and ultimately violence cannot be reduced to a statement of universal reason but is particular to that population and ultimately as with any other state is expressed in the idea of the decision that is underivable from any universally accepted normative condition. At the point of the exception, the stability of a particular state, in the opinion of that state's sovereign, is threatened in a way that is unacceptable to that sovereign. A condition of crisis, as declared by the commissarial dictator, calls forth the need for exceptional measures while the absence of crisis results in him withdrawing from the daily political process depending on the constitutional arrangements in play. And yet, assuming for the moment that the daily process of governance does not actively involve the commissarial dictator, the very

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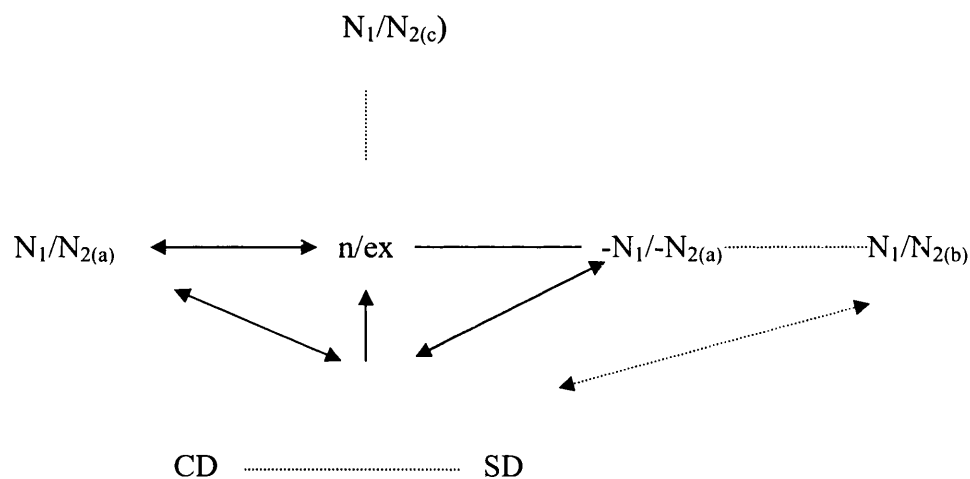
<sup>188</sup> The notation of the diagram above comprises the following: **CD** and **SD** are commissarial and sovereign dictator respectively; **P** denotes the people as the symbolic pole of unity, on whose behalf the sovereign claims he is undertaking the decision to declare the exception; **F/En** denotes the friend/enemy distinction in the light of the fundamental qualities attributed to the people by the sovereign decision-maker and the threats being experienced. **D** denotes disruptive events that have occurred which threaten or undermine the existing order and institutions;  $-N_1/-N_{2(a)}$  denotes the threat that such events pose to the existing order  $N_1/N_{2(a)}$  which the **CD** seeks to protect. Their significance and seriousness will be inferred from their nature and their implications for the existing order and the extent to which they pose another undesirable normality  $N_1/N_{2(b)}$ ; **n/ex** denotes a state of normality where norms **n** are applicable and the potential to declare measures under the authority of a state of exception **ex**, where such norms are no longer considered to be applicable, which the dictator has sole, and from Schmitt's point of view, unchallengeable authority to decide upon.

<sup>189</sup> The categories by which the justification of the need to declare a state of exception might disguise the articulation of other interests such as the class, race or other divisions of society which are not explicitly regarded as the points of unity that are proclaimed by the sovereign to define 'the people'.  $-N_1$  suggests a state of affairs which lacks social stability and embraces the idea of chaos captured for example by Hobbes' state of nature.

maintenance of what is perceived by the government in normal times to be necessary for the production of that normality can fundamentally determine his perception of the boundary between normality and exception. It is therefore the case, bearing in mind the dialectical relationship between normality and exception, that sovereign practice centrally involves the activities of governmental institutions in times of normality which are concerned with both social peace and disruption.

20. Breaking down  $N_1/N_{2(a)}$  v  $-N_1/-N_{2(a)}$  one can see the following normalities:

**Fig 2**



Here one can see that the objective of the sovereign in declaring a state of exception is to introduce measures so as to return to the state of normality ( $N_1/N_{2(a)}$ ) under attack or to protect it so that it is not fundamentally undermined. In evaluating the circumstances confronting him, the commissarial dictator will evaluate disruptive events as they present themselves to him and from these infer the extent to which  $N_1/N_{2(a)}$  is undermined as constituted by  $N_1/N_{2(a)}$ . In evaluating that, it may well be that an evaluation of the disruptive events will not only involve the extent to which, in his view, they undermine the normality he aims to protect but also the nature of the forces that are considered to be the cause of such events and the normality for which they stand.<sup>190</sup> In all this, while normalities can be described as having specific features that provide the impression of finished entities, they are in reality constantly

<sup>190</sup> For example a theocratic or communist society.



unfolding through the agency of events, many of which will be chronologically separated. A process of continual interpretation by the commissarial dictator therefore takes place whereby individual events are fitted into an overall conception of such normalities, particularly that which he is engaged in defending. That process of interpretation will develop around his normative prescriptions of how society ought to develop, through which events are given meaning and prioritised in terms of significance, and as a consequence the character of the crisis and the steps that need to be taken. The particularities of individual events feed into and are seen in the light of the generalities of the normality under protection and its needs. In the idea of normality rests the idea of exclusion of other normalities. The norms, whether legal or not, which contribute towards structuring a particular normality in the form of institutions, customs, rights and obligations suggest the exclusion of other norms which go towards the construction of other normalities. In order to return to that normality, the measures taken by the commissarial dictator are clearly a response to the crisis as he perceives it. <sup>191</sup>

21. For Schmitt, however, the distinction between commissarial dictator committed to restoring the existing constitution and sovereign dictator committed to abrogating it, is deeply problematic. The scope of the measures that the commissarial dictator can take to restore normality by reference to the constitution are uncertain not least because Schmitt's position was not a consistent one. In his examination of Article 48, he considered, as we have seen, that it allowed the taking of virtually any measure to cure a crisis, subject to the requirement of the institutional minimum associated with the constitution, namely the maintenance of the Reichpresident, the government and the Reichstag.<sup>192</sup> Furthermore, he considered that the role of the Reichpresident under Article 48 allowed him to operate both as lawmaker and law applicator, as legislator and executive in his role of overcoming crisis.<sup>193</sup> However more ominously

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<sup>191</sup> The relation of commissarial dictatorship to law is captured by Schmitt's description of its role: 'A dictatorship therefore does not have the purpose of making itself superfluous is a random despotism. Achieving a concrete success however means intervening in the causal path of events with means whose correctness lies solely in their purposefulness and is exclusively dependent on a factual connection to the causal event itself. Dictatorship hence suspends that by which it is justified, the state of law and imposes instead a rule of procedure interested exclusively in bringing about a concrete success ...[a return to] a state of law.(Schmitt, C 1989: xvi).

<sup>192</sup> Schwab, G 1989: 40. This is reinforced by his assertion that the 'President is free to intervene in the entire system of existing statutory norms and use it for his own purposes (Schmitt, C 2004::71).

<sup>193</sup> Schmitt, C 2004:71.

in later writings, he claims that the decree making powers of the Reichpresident was superior to the law making powers of parliament hence pointing to the possibility and desirability of a permanent decree state.<sup>194</sup> This was reinforced by suggestions that constitutionality was ultimately linked not so much to the constitution itself but to the pre-constitutional will of the people, a point of transcendent symbolic reference, expressed through the decisions of the Reichpresident who was not infected with what Schmitt considered to be the bargaining, compromise and factionalism present in parliament characterised by endless party conflict.<sup>195</sup> The disunity manifested in parliament because of the absence of a unified politics expressing a unified people pointed logically to the possibility of itself becoming the cause of crisis. For Schmitt, this constituted a kind of Trojan horse displaying a chaotic lack of resolve that echoes the idea of the ever threatening state of nature which for Hobbes could be glimpsed even inside a commonwealth in the phenomenon of criminality. Hence the idea of the commissarial dictator having the role of dealing with episodic crisis becomes absorbed by the idea of a permanent crisis which could only be catered for by a sovereign dictator. Part of his function was to abrogate the existing constitution which itself had become an obstacle to the process of acceptable governance based around the people's unity of will as expressed by the dictator through the agency of plebiscitary democracy. Therefore from the dictator's viewpoint, normality could be 'restored' by the exclusion of the existing constitution and associated institutions. N<sub>2(a)</sub> within such a framework is likely to require abrogation of the existing constitution, thus in effect turning the idea of the commissarial dictator into a rhetorical device through which the actions of sovereign dictatorship are realised. Looked at in this way, the normalities referred to above need to be modified to include the 'creation' of a new normality. This normality reflects an anti-liberal authoritarian perspective and is considered to be under threat not simply because of hostile events but because of what is perceived to be the incapacity of existing liberal constitutional arrangements to counter them. It emerges out of N<sub>2(a)</sub> and hence

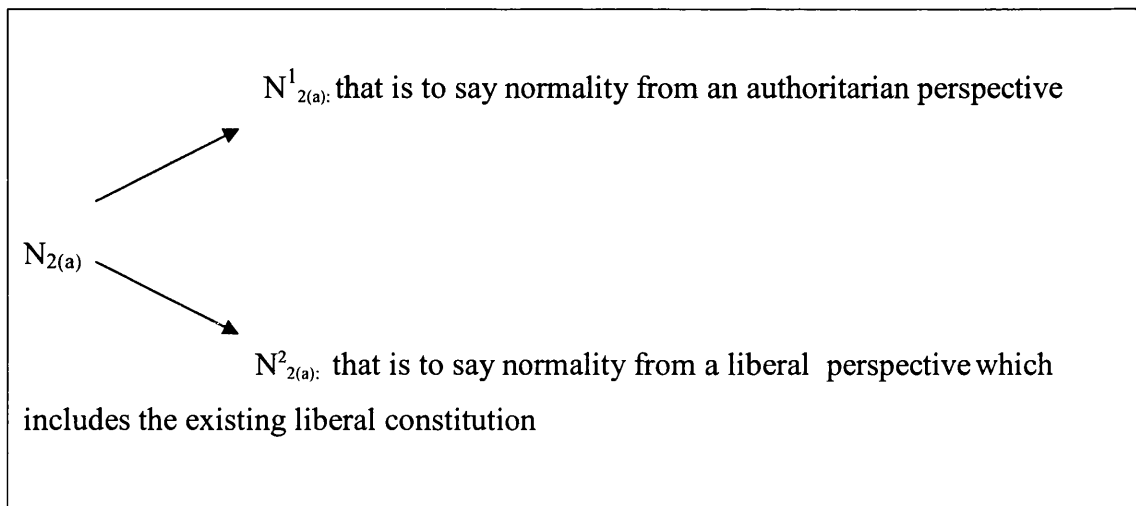
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<sup>194</sup> Schmitt, C 2004:74.

<sup>195</sup> Behind the marginalisation of parliament and the identification of the Reichpresident's positions with those of 'the people' is the assertion that 'every democracy rests on the presupposition of the indivisibly similar, entire, unified people...' (Schmitt, C 2004: 28). Schmitt's reliance upon a pre-constitutional will allowed him to beat a path towards protecting bourgeois privileges, including property rights to which he was committed, in circumstances where he considered that at the heart of liberalism there lay a contradiction in that such demands could not be protected by bourgeois liberal institutions most particularly parliament (See Maus, I 1998:196-216).

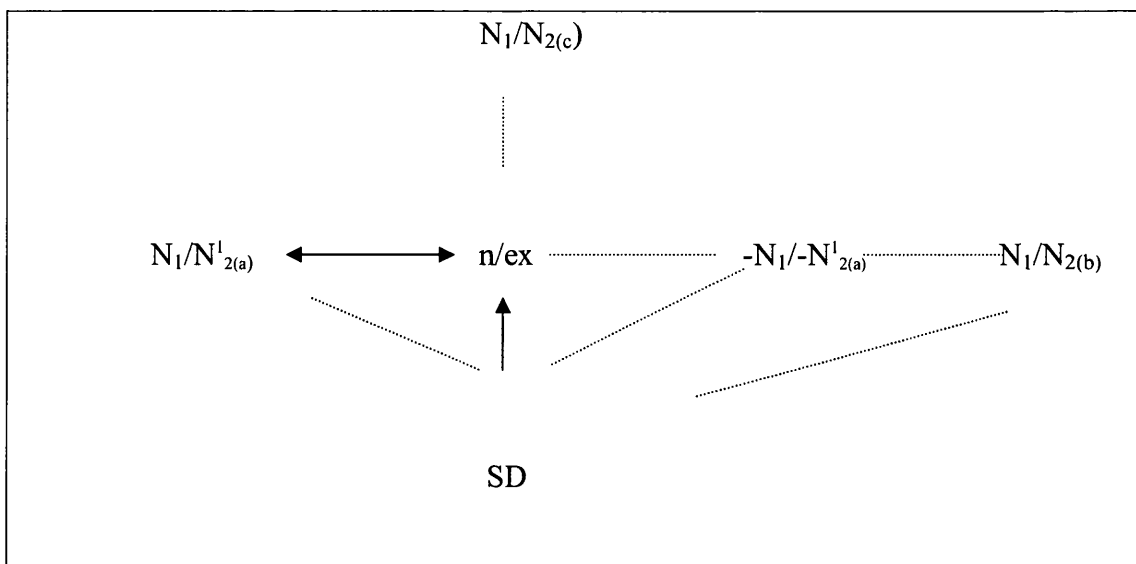
looking at  $N_{2(a)}$  from both an authoritarian and liberal perspective , with the former constructed around the idea of the pre-constitutional will, (although it may rhetorically be claimed to be associated with the normality of the constitution,) and the latter constructed around the constitution, one can in fact discern two normalities namely  $N_{2(a)}^1$  and  $N_{2(a)}^2$ :

**Fig. 3**



This leads to a modification of the above diagram concerning the relationship of normalities (**Fig. 2**) when drawing out the logic of Schmitt's authoritarian perspective:

**Fig. 4**

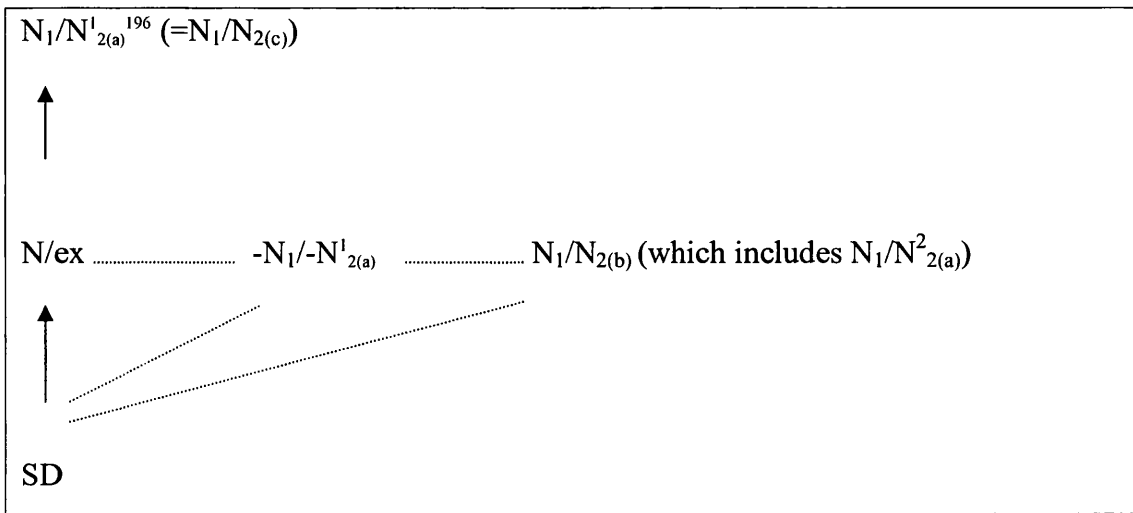


22. One can see here that  $-N_1/-N_{2(a)}^1$  now absorbs  $N_1/N_{2(a)}^2$  into its embrace since the latter, standing for the liberal institutions such as parliament, contribute from the perspective of the authoritarian dictator towards the destruction of the idea of the

people's unity of will which lies at the centre of  $N_1/N_{2(a)}^1$ .  $N_1/N_{2(b)}$ , the alleged unwanted normality that exceptional measures are designed to avoid is now capable of being seen at the very least to be assisted by the normality denoted by  $N_1/N_{2(a)}^2$  associated with the constitution and particularly the rights protected under it that a commissarial dictator would be expected to restore. . Given the sovereign dictator's position as being the sole determinant of the people's will, with the liberal law-making processes centred around a multi-party parliament being seen as an obstacle to the expression of that will, the possibility is increased of the exceptional measures temporarily introduced under the guise of an orthodox commissarial function becoming permanent in order to ensure the protection and continuation of the normality rhetorically associated with the people's will, namely  $N_1/N_{2(a)}^1$ . Hence the requirement for recasting the relationship between the potential normality that might occur if the exceptional measures become permanent, namely  $N_1/N_{2(c)}$ , (a situation to be avoided from the perspective of liberal democracy), and the normality desired by the sovereign dictator, namely  $N_1/N_{2(a)}^1$ . In the light of Schmitt's authoritarian approach, the normality,  $N_1/N_{2(c)}$ , can be justifiably equated with the one that the sovereign dictator seeks to protect, namely  $N_1/N_{2(a)}^1$  in the name of protecting the peoples' existence and unity. With these alterations in mind, the relationship of normalities now appears as follows:

**[Please turn over]**

**Fig. 5**



23. What one sees here from the dictator's perspective is in effect the fusion of normal and exceptional circumstances. The former now comes to be permanently absorbed into the latter and in effect a new normality is created born out of the need by the dictator to permanently exclude all or key aspects of the democratic liberal form of governance associated with the normality which he now seeks to suspend. These features including the protection of civil rights and the primacy of parliament in the legislative process, which he opposes as being incapable of expressing the people's will that he alone proclaims to understand, give expression to and protect. In doing so, he may justify his actions as being appropriate to his alleged commissarial function but in fact in substance they will be those of a sovereign dictator. The condition of the permanent exception is established and this describes the nature of Hitler's Third Reich whose coup d'état was initiated by the Decree of 28<sup>th</sup> February 1933. If one traces through the various measures that were introduced by the National Socialists, one can see clearly the systematic destruction of the liberal constitutional order at play. This became most apparent with the 'Enabling Law' referred to above and the discarding in practice of Article 5 which rendered the measure permanent.<sup>197</sup> Other measures taken were also in breach of the 'Enabling Law' and had the effect of permanently concentrating power in the hands of the government and ultimately in

<sup>196</sup> Peace as associated with  $N_1/N_{2(a)}^1$  historically manifested itself most starkly in what Agamben refers to as the sovereign space, that is a space where individuals are completely abandoned to the unfettered actions of the state as most starkly expressed by the concentration camp (Agamben, G 1998).  
<sup>197</sup> Article 5 of 'the Enabling Law' declared the validity of the law would cease on 1<sup>st</sup> April 1937 or if the Reich Cabinet in office on the date that the law came into effect was replaced by another.

Hitler's. These included the abolition of the federal council by statute on 14<sup>th</sup> February 1934 and the merging of the posts of Chancellor and President.<sup>198</sup> To echo Marx, while Hitler rhetorically identified himself with the cause of the German people, in effect the latter became identified with the cause of the former.<sup>199</sup>

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<sup>198</sup> The 'Enabling Law' ostensibly preserved the position of parliamentary institutions and the federal council. See Neumann, F 1966.

<sup>199</sup> Marx, K 1891.

## PART 4

### Chapter 11: Routine and Rupture

1. The creation of a model of sovereignty is inevitably the outcome of a hermeneutical exercise that seeks to generalise in two senses. It may seek to express in generalised terms a description of the process of governance as observed by the creator of the model.<sup>1</sup> It may also be the outcome of a construction of normative frameworks of how governance ought to occur propelled by moral, social and instrumental considerations. The latter concern can be said to be prominent for the principal creators of models of sovereignty including the ones covered in this thesis. The former concern appears perhaps more prominently in Austin's model than the others covered but even here as suggested in the first reading of his model, his normative concerns cannot be divorced from what at times appears to be an observational tract. Schmitt's model taken in the context of his other writings also is presented at least in part as a description of existing and past practice although once again there is a normative theme running through it linked to his authoritarian prescriptions for the maintenance of national unity. In the construction of the models the symbolic character of the term 'sovereignty' or 'sovereign' manifests itself in constant competition between variants as to its meaning and nature. The foregrounding of the elements associated with sovereignty as depicted in a given model is inevitably constructed against the context of a background which comprises a range of considerations including metaphysical assumptions about the way knowledge and humans exist, the nature of the human condition both individually and collectively in terms of their propensities, the assumed character of human society and its organisation in terms of its perceived actuality or assumptions about the way it ought to exist and the underlying moral and ethical consideration around which the process of governance needs to be constructed.<sup>2</sup> The range of considerations, the character being given to each one, the relationship between them and the weighting given to each one will clearly vary. Triumphus' model is dominated by a metaphysical assumption predicated upon the supremacy of the spiritual world over the temporal. Hobbes on the other hand is committed to a very different metaphysical construct. Dante, in the shadow of Aquinas perceives the human condition as essentially cooperative. Hobbes believes in the opposite. Sovereignty

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<sup>1</sup> This is captured by the idea of theory as defined for example by Harre who describes it as 'a representation of the structure of the enduring system in which those events occur which as phenomena are its subject matter and by which they are generated' (Harre, R, 1970 14 quoted in Manicas, P.T 2006: 27).

<sup>2</sup> For example putting it simplistically whether humans are essentially solitary or cooperative beings, the former being exemplified most clearly by Hobbes.

located in the idea of the people has as its background the centrality of democracy in marked contrast to the early models of sovereignty as depicted in Triumphus and Hobbes for example. Austin's attitude to democracy is less than wholehearted and is consistent with an idea of sovereignty which does not locate it squarely with the people but with the supreme institutions of governance whose position does not need to be the outcome of some democratic process. Similarly Schmitt's route to sovereignty does not require as a pre-condition, sovereignty's location being the outcome of democratic procedures. In so far as democracy is admitted, ultimately his move is to hollow it out in the form of the plebiscite. Order and freedom constantly interact with one another in the considerations used to construct and justify the idea of sovereignty which is derived historically from a commitment to a centralised form of governance that is territorially based.

2. The process of the production of models of sovereignty, suggested above, leads to the conclusion not surprisingly that the idea of sovereignty is deeply connected to a series of other ideas that have the capacities to assert, shape and justify its existence.<sup>3</sup> However the concept of embeddedness immediately raises the query as to within what does such embeddedness occur? Here the idea of practice emerges as applicable to an explanation of activities within the social domain. The idea of practice is captured at least in part by its dictionary definition which includes 'habitual action or performance', a 'habit or practice.'<sup>4</sup> This suggests the possibility of action which is repeated and undertaken without thinking so that in so far as it is artificial and learnt, the proceeds of such learning having possibly been forgotten or possibly even repressed. Another explanation of practice is to be found in Foucault's writings where he describes them as 'places where what is said and what is done, rules imposed and reasons given, the planned and taken for granted meet and interconnect.'<sup>5</sup> He therefore highlights that practices consist of both things said and done, that is to say action and discourse. Foucault of course engages in an extensive analysis of such practices based on the proposition that such practices constitute the social order that has a degree of coherence although not for the reasons necessarily given by those that engaged in it.<sup>6</sup> In his exploration of social practices he seeks to reveal how social power operates and how truth

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<sup>3</sup> This idea of the embedding of ideas amidst others with which they are interconnected in the political domain is usefully explored by Freeden, M 1998.

<sup>4</sup> The Concise Oxford Dictionary (9<sup>th</sup> edition):1995: 1072.

<sup>5</sup> Foucault, M 1991:75.

<sup>6</sup> Barron, A 202: 959.



and power are mutually reinforcing.<sup>7</sup> His notion of power does not equate with institutions that might be associated with it and more generally he de-centres the subject as agent in his explanation of it.<sup>8</sup> Yet of course neither does he reject the role of such institutions in the transmission of such power. What he rejected was the claim that the sovereign institution was the primary source of a social order's intelligibility and that it was the primary source of such power.<sup>9</sup> Furthermore it is through the operation of power that the subject is constituted. Power then manifesting itself through a series of practices which are also manifested in the governmental process gathers its expression through the constitution of the 'subject' and the institutions associated with governance.<sup>10</sup> The idea of government is hence in Foucault's mind constituted by a series of practices through which power circulates. In conceptualising power in this way however, he does not explicitly capture the experience of participants within such practices, who will inevitably conceive of governmental power emanating from the institutions associated with it and such institutions will be experienced as having a 'solidity' derived from repeated instances of their decision making and activities.<sup>11</sup> This brings us back to Giddens who as stated in the first part of this thesis considered that social systems are reproduced social practices that exhibit 'structural properties' captured by the idea of 'commonplace transcendence' previously explored above in chapter 6 and that this links in to Berger and Luckmann's point that institutions take on an objectified point when they are transmitted beyond those that created them and hence appear to participants as unchallengeable realities beyond the possibility of change by human action.<sup>12</sup>

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<sup>7</sup> Quoted in Faubion, J.D 1994: xvi from 1973 interview, "Interview on the prison: the book and its methods" collected in volume 1 of *Dits et écrits* p. 752.

<sup>8</sup> Foucault states that by power he does not 'mean "Power" as a group of institutions and mechanisms that ensure the subservience of the citizens of a given state.' (Foucault, M 1979: 92)

<sup>9</sup> Foucault, M 1979: 92-93. He considered that power 'comes from everywhere ...[and]...in so far as it is permanent, repetitious, inert, and self-reproducing, is simply the overall effect that emerges from all these mobilities...no doubt power is not an institution and not a structure: neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society' (Foucault, F 1979: 92-93).

<sup>10</sup> For example Foucault states that the form of power that applies itself to immediate everyday life categorises the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him that he must recognise and others have to recognise him. It is a form of power that makes individuals subjects' (Foucault, M 1983: 212).

<sup>11</sup> The reason for this is that individuals will not experience themselves or the practices with which they are engaged as being the outcome of the circulation of power.

<sup>12</sup> See Giddens, A 1984: 17-24; Berger P and Luckmann T 1966: 76. See also chapter 2 paras 6 and 7 above and chapter 6, para 8 above.

## *Routine*

3. What will now be suggested is that the idea of the embedded agent whose experience of the world is enabled through the operation of a background, within the context of social practice, can be used to bring together a variety of themes explored in this thesis. At the centre of this exploration will be an endeavour to link within the context of sovereignty, the symbolic with the idea of practice and that of habit.

4. The idea of the symbol providing the possibility of endless meanings and contested sites of meaning, together with the existence of social practice in which the meaning of language is inter-subjectively fixed and the operation of embeddedness, as previously explored with its association of foreground and background, will be used in a form of synthesis to explore how sovereignty should be conceived.<sup>13</sup> Before doing so, however, one more ingredient needs to be briefly developed and that is the idea of practical and discursive consciousness posed by Giddens and initially raised in the second reading of Austin when considering the idea of habitual obedience.<sup>14</sup> This needs to be placed in the context of foreground and background posed above. From the perspective of a given action, the idea of foreground can clearly include Giddens' ideas of practical and discursive consciousness.<sup>15</sup> They suggest a degree of focal awareness of what one is doing but that does not always necessarily involve reflection in the sense of being able to express what one knows about the deed in words at the time of its undertaking or even if it does, it does not necessarily involve critical reflection.<sup>16</sup> It can therefore be seen that the foreground associated with conduct being undertaken can involve non-reflective or reflective thinking and that the latter category can involve uncritical and critical thought. However from the perspective of a consideration which from an external point of view might be associated with a given action, for example the need to follow a particular law, the idea of practical consciousness suggests that at most, from an internal

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<sup>13</sup> See chapter 6 above.

<sup>14</sup> Chapter 9 para 4 above.

<sup>15</sup> Giddens, A 1984: 49. Practical consciousness suggests recall while an action is undertaken without the person being able 'to express what he "knows" while discursive consciousness involves recall where the person can give expression verbally.

<sup>16</sup> Here the suggestion is that what Giddens describes as discursive consciousness can be sub-divided into two forms of reflective thinking, namely uncritical reflection which will be primarily descriptive in nature and critical reflection that involves analysis and evaluation. The use of Giddens's classification of practical and discursive consciousness helps to enrich Taylor's idea of foreground.

individual perspective, the law will not be in the individual's foreground but in his background, or possibly not even part of his background at all.<sup>17</sup> Even the possession of discursive consciousness in relation to a particular action does not mean that the law that relates to such action will inevitably be part of the foreground. The individual will probably be uncritically aware of his conduct or at least aspects of it, in the sense of being able to express its contents or critically aware of it in the sense of being able to analyse it or part of it. However even though the law may not be included in the foreground of such awareness, it might be in the background although not inevitably. If in the background, in the sense that the individual is not conscious of it at the time of the conduct, it may come to the foreground upon further reflection of the reasons for his conduct, in that the individual may allude to the law which therefore travels at that point from background to foreground.

5. Looking at Austin's idea of sovereignty necessitating habitual obedience by the bulk of the population to the commands of a determinate superior, one can clearly see that such obedience may involve, from the perspective of the individual and legal requirements, a number of different states of mind.<sup>18</sup> Within the time period surrounding the action, these range from practical consciousness where law may be in the background or possibly outside the individual's consciousness altogether to discursive consciousness where law may, although not inevitably, be in the foreground and if it is, either being thought about uncritically or critically both of which may involve a range of detail as to the law's nature and implications.<sup>19</sup> Even when thought about critically, it is still possible that the individual may uncritically follow that law because he considers himself (uncritically) bound to do so.

6. The sense of routine suggested by Austin's claim of individuals' habitual obedience to the law with its association of uncritical compliance, without excluding the possibility of critical compliance at times, fits overall into a behaviour of repetitive obedience that characterises his

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<sup>17</sup> This does not mean that the existence of the law in such circumstances is no longer part of the stage setting in the sense that the effects of the operation of the law, namely broad compliance by others provides the background for the individual.

<sup>18</sup> Austin, J 1832: 117.

<sup>19</sup> The same individual may 'transit' from one of these states to the others or either of them over a period of time in relation to the particular action or group of actions of a similar nature. On the face of it, someone who is 'unconscious' of the law at the time of the action associated with it from an external point of view, cannot incorporate it into his background or foreground unless he is subject to an input, whereby for example he is told about the law, whereupon it may well move straight into his foreground and then possibly as time goes by recede into the background to become part of Wittgenstein's stage setting (Wittgenstein, L 1998: para 257).

conception of the sovereign-subject relationship.<sup>20</sup> However this has to be cast wider reflecting the fact that territorially based sovereignty is embedded in international practice characterising the existence of and relationships between territorially based states as associated with international law.<sup>21</sup> This sense of territorially limited sovereignty being inextricably inter-dependent with international social practice was suggested in the second readings of Hobbes and Austin. Such routine also can be seen to operate within Schmitt's model since the decision to declare a state of exception, at least in its commissarial variant, is predicated upon an existing social practice that, *inter alia*, includes the terms of any constitutional settlement and the configuration of the sovereign borders of the state under examination. The idea as Schmitt proclaims that the sovereign is both inside and outside the domestic political order, derives from his authority to suspend much of the very constitutional order through which his institutional presence is seemingly structured. Schmitt claims that this way of looking at sovereignty means that the definition of sovereignty 'must therefore be 'associated with a borderline case and not with routine.' <sup>22</sup> Yet is this really the case? Has routine behaviour no part to play in the decision of a particular governmental office holder to decide that there is a state of exception and upon the measures needed to counter it. The fact that such an office holder makes the decision as opposed to others might well be consistent with taken-for-granted behaviour, that is routinised compliance with the prevailing constitutional requirements that, *inter alia*, identify that particular office holder as the decision-maker and the procedures that must be satisfied for such decisions to be made validly made. The measures decided upon to counter the threat constituted by the state of exception might also be consistent, for example, with routinised compliance with existing international borders. Both adherence to existing constitutional requirements and international borders might also constitute part of the background against

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<sup>20</sup> The idea of routine suggests habitual taken-for granted- activity. See Giddens, A 1984: 376 and Chapter 9, para. 6. Habitual behaviour in the sense of behaviour that is regular and hard to give up (as defined by the Concise Oxford Dictionary – see Chapter 9, para 5). may therefore not be taken for granted and so by reference to these definitions, it could be argued that all routine behaviour is habitual but not all habitual behaviour is necessarily routine. For the purpose of this chapter I will equate them save where the difference becomes significant.

<sup>21</sup> The inter-relationship between the domestic and international is the subject of controversy, with varying emphasis placed on the former and latter as primary drivers for the development of the system in its totality and its elements. While there are a variety of emphases within each school of international relations, neo-realists and institutionalist liberals for example tend to place primary emphasis on the international domain as defining the characteristics of individual units while others in the liberal tradition emphasise developments in domestic units as being the primary drivers in the system as a whole. These differences interlink with differences over conceptions of how the relationships between domestic and international domains are structured with the most obvious but not the only factor being the juridical construct of state or sovereign borders and legal regulation more generally but also involving cross-border political, economic and social processes (Sorenson, 2001: 5-23).

<sup>22</sup> Schmitt, C 1988: 4.

which the decision to declare a state of exception is made in the sense that those concerned with the decision may not consciously, even in an uncritical way, reflect upon them as part of the decision-making process. That is not to say that these matters might not come to the foreground in the form of non-critically or critically reflective thought involving analysis, evaluation and judgment so that the elements of the decisions concerned with these matters might no longer be said to be routine.<sup>23</sup> In such circumstances, elements of the decision concerned with these matters will supplement other key non-routine elements that are concerned with the nature of the threat and the steps needed to counter it.<sup>24</sup>

### ***Routine and Rupture***

7. Implicit within the above discussion about practice is the idea of habit, most obviously captured by the process of routine associated with practical consciousness, and uncritical thinking associated with discursive consciousness. The idea of habit as initially suggested by Austin and expanded in the above manner points to a potentiality that provides for a rather paradoxical conclusion. It is that routine can play a significant part in the *rupture* of the very sovereign subject relationship which Austin proclaims is constituted through it. To explore this further requires an appreciation of the interconnectedness of social practices through which activities occur. This is graphically exposed by the character of the bus queue which Sartre uses in his exploration of groupings.<sup>25</sup>

To begin with, it should be noted here that we are dealing with a plurality of isolations: these people do not care about or speak to each other and, in general they do not look at one another; they exist side by side alongside a bus stop. ....This man is isolated not only by his body...but also by the fact that he turns his back on his neighbour, who moreover has not even

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<sup>23</sup> This would be the case where the thoughts associated with the behaviour is critically reflective in character.

<sup>24</sup> A territorial threat by one state against another reflecting a territorial dispute will inevitably mean that the location of the borders will come to the foreground and provide a focus of reflection and contested assertion leading to a number of possible decisions by the government of the threatened state including, but not necessarily limited to the seeking of mediation through international adjudication potentially based on competing notions of external sovereignty. This has been explored for example by Koskenniemi who he seeks to show, partly by exploring the way territorial disputes have been approached, that the pure fact and legal approach to assessing the existence of state sovereignty dissolve into one another (Koskenniemi, M 2005: 224-302). The complexity of how sovereignty is ascertained internationally is captured by Brownlie's observation that the issue of territorial sovereignty or title is often complex and involves applications of various principles of the material facts. The results of this process cannot always be ascribed to any rule or 'mode of acquisition' (Brownlie, I 2003: 127).

<sup>25</sup> Sartre, J-P 2004.

noticed him...The practical conditions of this attitude of semi-unawareness<sup>26</sup> are, first his real membership of other groups ( it is morning, he has just got up and left home; he is still thinking of his children who are ill etc., he is going to his office; he has an oral report to make to his superior; he is worrying about its phrasing, rehearsing it under his breadth etc.)...<sup>27</sup>

8. One can see here immediately the interlocking of activities, whereby the waiting at the bus-stop not only relates to the practice of travelling to and from work and potentially a variety of other activities for which the bus is needed such as those relating to educational, consumer and leisure-orientated pursuits but also the practice of waiting for buses. It is juxtaposed in the case of the above individual to activities associated with being a father and perhaps, in the case of other individuals, waiting-in-line to travel in order to undertake other family roles. In this queue as in any other queue, the terrorist, bank robber, priest, accountant, school-child, judge and civil servant could have all lined up together. All of them to cite Giddens, require their ontological security. All engage in routines. Even the terrorist, who in the development of his plans of destruction, may have developed them around certain routines of actions and thought relating to his way of life which may involve conscious obedience or compliance with certain law. The judge, who may have tried suspected terrorists, will have engaged in routines with regard to the procedures through which such trials are undertaken. The civil servant, a member of the executive branch of government, who might be involved in the drafting of legislation to counter terrorism, is likely to engage in certain routines that do not involve critical thought. These might include engagement with certain internal organisational procedures constituting the stages by which legislation is developed. These legislative activities will operate in the context, in the case of the United Kingdom for example, of the operation of parliamentary sovereignty which provides the civil servant with part of his background and certainly stage-setting against which his foreground concerns derive meaning and are acted upon. Routines hence pervade the activities of the individuals mentioned and while they wait at the bus-stop for the same bus, or for that matter different ones, they all engage in the activity of queuing for a bus which also has a routine

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<sup>26</sup> The idea of 'unawareness' at first approximation chimes in with the idea of Taylor's background but more poignantly points to the difficulty of clearly describing the latter and points to the zone of indistinction that exists at the imagined boundary between foreground and background since it can be seen to have ingredients of both.

<sup>27</sup> Sartre, J-P 2004: 256-257.

element. These individuals also belong at least potentially to a variety of groupings in the sense that they engage in collective behaviour in a variety of circumstances including that of the bus queue itself which might be defined for example by reference to work, profession, organisations such as trade unions, pressure groups, leisure and sports activities.<sup>28</sup> Clearly here by reference to common activity, some groupings may be episodic in character, while others such as that related to professional associations, may have considerably more permanency and may well be organisationally structured through a series of rules which may or may not be expressed legally. Routine therefore co-exists within different activities that may interlock and which may be associated simultaneously with a variety of groupings, the combinations of which are likely to differ for each individual and may change over time.

9. Considering permanent organisations to which individuals belong, for instance trade unions or political parties, the idea of agreed social practices, expressed for example in Wittgensteinian terms in a variety of language games, is likely to mean that reflexive cooperation is achieved both from an internal point of view with regard to the perception of each individual in the collective and externally from the perspective of the detached onlooker. However there always remains the possibility that disruption and breakdown of the collective may occur. The reasons for this include that ultimately the idea of collective activity manifesting collective intentionality occurs through individuals with all their potential differences as regards personal histories, capacities, circumstances, belief structures and priorities.<sup>29</sup> There always remains the possibility that in the face of new and perhaps unexpected developments that impact upon the collective, the latter *in extremis* will break down. Referring back to Schmitt, the potentiality for this is at least in part caught by the observation that in relation to any normative structure, concrete decisions cannot be fully determined by it.<sup>30</sup> The exercise of the relevant language game through which such decisions

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<sup>28</sup> By way of observation, such groupings might exhibit features Sartre associates with 'collectivities' and groups. The former are characterised by passivity and lack of reciprocity while the latter are characterised by reciprocity in contrast to a bus queue which he refers to as a 'series' (Sartre, J-P 827-828). I have not adopted Sartre's schema of meaning for terms such as 'collective'.

<sup>29</sup> It is recognised that collective and individual identity are affected by each other and can be said to be co-constituted and capable of being mutually reinforcing and hence reproduced. Druckman for example in a survey of the literature on in-group biases observed that membership 'in a clan, religious group or ethnic group becomes part of the individual's self identity and is crucial to a sense of self worth' (Druckman, D 1994: 49-50). This leads to loyalties to the group which in turn leads to differentiation between who to support and who to avoid leading to the group reproducing itself and continual inclusion and exclusion. However there always remains the possibility for rupture for a variety of reasons related to the individual's particularities, interests and history within the collective and relationship to other groupings of which he is part. See Kratochwil, F 1989; Bloom, W 1990.

<sup>30</sup> See chapter 5 above at para 7.

are arrived now may become the site for conflict and ultimately the disruption of the organisation. Specific features of the organisation perhaps relating to finances, representative structures, regulatory procedures might become pivotal points around which such conflict is engaged. Uncritical thought and taken-for-granted activity for example might operate to reflect the assumption that compliance with the regulatory structure of the organisation and the possession of viable finances might well determine and structure the conflict around them.<sup>31</sup> Within the context of such conflict not only might there be taken-for-granted agreement between the protagonists as to the importance of such matters but there will have to be what might be called ‘pre-contractual’ agreement in the form of inter-subjective language games that make meaningful communication possible and hence provide the possibility of disagreement.<sup>32</sup> Even in the splitting apart of the organisation, a language game between antagonists will continue to operate and unreflective assumptions and consequential actions will continue to operate regarding the need to maintain the existing organisation or the desirability to create a new one. The creation of a new one, although not necessarily a frequent occurrence, might well involve routine behaviour as to the mechanisms of doing so, based on non-reflective or uncritical reflective thought.<sup>33</sup> This analysis will provide an interesting insight with regard to sovereignty which will be explored below.

10. However to limit the above analysis to the domain of practice inter-subjectively driven is on its own inadequate to capture the subjective experiences of those participating in such an event. The embeddedness of each individual in the practice of a collective carries with it the operation in the minds of such individuals of conscious processes that will embrace both uncritical and critical thinking pivoted around justifications for the practices that are undertaken. If for example certain practices are undertaken in order to ‘follow’ a series of rules, one can argue as Wittgenstein does that such behaviour cannot be explained as being a product of the interpretation of the rule and that such a manifestation is the product of a

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<sup>31</sup> Taken-for-granted activity is routine activity. See above.

<sup>32</sup> The language game can be seen to be a manifestation of routine in the sense that it is taken-for-granted behaviour. From a detached perspective, it can be said to be part of an individual’s background. However looking at background and foregrounds from Taylor’s embedded perspective, it is very likely that individuals engaging in language games will be completely unaware as to their existence and hence they exist ‘beyond’ the background and are incapable of becoming part of the foreground from that domain. Seen in this light, the behaviour manifested in a language game is consistent with the idea of taking-for-granted behaviour associated with routine. However from an embedded perspective, the individuals concerned will probably not be aware that they are engaged in routine behaviour which separates it from other routines, for example that of obedience to the law in respect of which he may well be aware as a foreground or background matter.

<sup>33</sup> For example, the founding conference, involving the choice of officials based on accepted electoral procedures reflecting underlying democratic principles.



technique.<sup>34</sup> One can argue as Tully does that a general rule cannot ‘account for precisely the phenomenon we associated with understanding the meaning of the general term: the ability to use a general term as well as to question its accepted use, in various circumstances without recursive doubts.’<sup>35</sup> The implications of the infinite regress helps to lead to this conclusion. Yet from the individual’s experience, this is not how it seems. Wittgenstein’s approach looking at it from Taylor’s structuring of the experience of existence into the foreground and background rears up its head and swallows Wittgenstein’s point in the sense that the idea of an inter-subjectively generated technique that explains communication and social action is very unlikely to be part of an individual’s foreground as he engages in such activity, nor likely even to be part of his background and is far more likely to be completely outside the consciousness of the individual although remaining as part of Wittgenstein’s stage-setting. The experience of the embedded agent may be explainable in such terms but is unlikely to be experienced in such terms.

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<sup>34</sup> Wittgenstein, L 1967.

<sup>35</sup> Tully, J 1995: 105-106

## Chapter 12: Symbols, Transcendence, Embeddedness and Routine

1. In this chapter I will bring together a series of pervasive qualities previously revealed and applied to varying degrees in the second readings of the models under examination in this thesis. These comprise the symbolic, transcendence, embeddedness and routine that can be seen as the metaphysical fabric of sovereignty's articulation and out of which, with particular reference to the symbolic form of language and transcendence, emerges a framework, namely the secularised chain of being, within which such articulation occurs. In so doing, I will initially refer to Lindahl's model of sovereignty which is significantly influenced by Cassirer's symbolic forms in order to point out its strengths and weaknesses. I will suggest that the latter results from his failure to overcome the shortcomings of Cassirer's model of symbolic forms. I will then identify the secularised chain of being as central to an understanding of the metaphysical domain in which ideas of sovereignty exist. I will then seek to use it together with the ideas of the symbolic, the transcendent, embeddedness and routine to illuminate the dynamics of political and military conflict through which the location of sovereignty is determined.

2. Within the process of democratic governance with which Lindahl is particularly concerned, sovereignty is located in 'the people' as a transcendent absent unity in contrast to the particular, present and diverse features of the individuals that make up society in its immanent actuality.<sup>1</sup> A political order is achieved through the exercise of political power by government representing the sovereign in whose name such exercise is undertaken. In so doing resolving the conflicting interests of society is achieved by government by reference to the overall interests of the transcendent absent sovereign entity which are constantly unfolding.<sup>2</sup> Hence, the sovereign provides the ultimate point of unity and reference for governmental action and by these means government endeavours to legitimate its actions.<sup>3</sup> Lindahl's characterisation of sovereignty is persuasive and reflects what I will later refer to as a secularised chain of being. More immediately however, it will be argued that the complexity of the triadic relationship between sovereign, government and individuals of society posed by Lindahl's model is not fully captured.

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<sup>1</sup> Lindahl, H 1997: 347-371.

<sup>2</sup> Lindahl, H 1997: 366-367.

<sup>3</sup> Lindahl, H 1997: 358.

3. The exploration of the inadequacies of this model will take place from two perspectives, namely that of the disembedded and the embedded. From the first perspective, it will occur through investigating the transcendent nature of the people. It will in the process draw on the proposition that the division between transcendence and immanence posed by Lindahl is miscast in that transcendence and immanence cannot be completely separated from one another. From the second perspective, it will be argued that reducing the characterisation of sovereignty to the Cassirerian symbolic form is helpful but inadequate in that this does not bring out the centrality of routinization for the operation of sovereignty. In so doing, a synthesis of the symbolic form and routinization will occur to provide a model of sovereignty which better explains its complexities.

### *Perspectives*

4. If one takes the idea of transcendence as presented in Lindahl's formula as one in which the separation of the general and particular are marked by the differentiation between the transcendent and the immanent, it is the case that, as used by him, neither completely escapes from qualities associated with the other. Looking at transcendence attributed to God and 'the people' a number of comments can be made. The conceptualisation of the idea of God in Derridian terms denotes the qualities of pure transcendence. However in religious terms the idea of God attributes properties to Him such as goodness associated with Man, and even though in their imagined perfection they are not immanently experienced, the result is the movement away of the idea of God from the realm of pure transcendence. The point is that in describing what is considered to be transcendent, one cannot in the absence of completely negating all categories associated with immanent presence, completely escape from the immanent and immanence itself embodies commonplace transcendence.

5. When it comes to the idea of 'the people' the position becomes more complex which a simple substitution of 'God' by 'the people' does not reflect. The idea of 'the people' is a problematic one from a variety of perspectives.<sup>4</sup> From an external perspective, that is to say

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<sup>4</sup> Hegel for example reflected on the difficulty of conceptualising the people when he claimed that 'opposed to the sovereignty of the monarch, the sovereignty of the people is one of the most confused based on the wild idea of the "people".' However he also captures the necessity for it to be represented when he then went on to say that '[t]aken without a monarch...the people is a formless mass and no longer a state' (Hegel, GWF 1967: 279). At the centre of this need for representation is the impossibility of the people or constituent or sovereign power to express itself unconditionally (Lindahl, H 1997; Christodoulides, E 2007: 191). It can only express itself in a conditioned manner, that it is to say in emergent or settled constitutional form. However even

from one that is located at a point outside a specific people in question, one is already removed from its pure expression as displayed by Derrida since this is an idea provoked by a physical presence of human beings rather than nothing. As with the model of Hobbes, with regard to the multitude in the state of nature, there is an operating but implicit assumption reflecting an acceptance of an ongoing practice that the extent of the multitude and in this case the people is finite and territorially limited. Since if one regards 'the people' as potentially embracing the population of the world in what would be a global conception of sovereignty, in contrast there is a specificity attached which reflects a practice involving a division into peoples who are geographically located and separated from one another which are each likely to have attributed to them specific histories, cultures and socio-political organisations. To cite Anderson, at the very least, a nation, which for these purposes is to be regarded as synonymous with a people, possesses the generic qualities of geographical limitation, sovereignty and the idea that it constitutes a community.<sup>5</sup> The idea of a particular people in this sense therefore involves the foregrounding of one people at the expense of others, in what amounts to a double movement of inclusion and exclusion, whereby in relation to a given people a separate sovereignty is attributed, namely ( $P_1$ ) which clearly implies that in so far as other sovereign peoples exist, they are excluded ( $-P_n$ ).<sup>6</sup> This double movement of sovereignty we saw in particular when considering the models of Hobbes and Austin but could clearly also be applied to Schmitt. The idea of a people hence from a perspective that is external to any particular people, potentially posits all peoples as co-existing in what can be regarded as a plane of immanence with no particular people occupying a transcendent position in relation to any other people. However such immanence is not divorced from transcendence since the very classification of populations in this way involves a synthesis which involves a category of collective being, namely that of 'peoples' which transcend the individuals that constitute them, a reflection of a political metaphysic

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its representation is problematic not least because those summoned in the 'we' that denotes a collective such as the people are summoned despite themselves (Christodoulides, E 2007: 202). I seek above not to engage in these difficulties which have been done elsewhere but to explore the transcendent nature of 'the people'.

<sup>5</sup> Anderson, B 1991: 7. The relationship between people and nation is a complex one and at times the terms are used synonymously and at times differently. Yack for example distinguishes between 'a people' and 'a nation' by claiming that the 'a people' are a community that exists in space and 'a nation' is a community that exists in time (Yack, 2001: 520-521). While a nation may be specially dispersed as for example the German people and a given people by reference to statehood such as the Spanish people comprise a political unit of a number of nationalities, the separation of space-time into its components in this way can lead to the erroneous conclusion that a 'people' has no history and a 'nation' has no spatial presence. For my purposes the term people is used to denote a political unity which may comprise of a single nationality or a number.

<sup>6</sup> There is no inevitability that those excluded from a particular people's sovereignty are in fact recognised by that people and its government as possessing sovereignty and this is historically captured by the process of colonization.

that embodies the idea of sovereign equality. The above analysis, in contrast to Lindahl's model, leads to the foregrounding of international practice, in which the seeming transcendence of a given people, from the perspective of the state through which they realise themselves through domestic governance, is replaced by what amounts to the immanent practice which characterises the relationship between a multitude of peoples expressed through a multitude of states and governments.

6. The question that has to be asked however is the perspective from which Lindahl's model is constructed. Its conceptualisation of 'the people' is detached in character and is unlikely to accord with the perspective of individual participants. It is true looking at Lefort's observation that democracy is predicated on the idea that ultimately the power of the people belongs to no one in the sense that while a government's actions can be attributed to the will of the people, that will is perceived to transcend any particular expression of it, unfolds diachronically and can never be fully appropriated. Its numerous and at times contradictory divisions point to a perceived existence that as a transcendent unity overcomes such divisions. The idea of the people's transcendence cannot be equated particularly from a diachronic point of view with any particular attributions as they constantly mutate. Flowing from this is the idea that attributed to that transcendence is the idea of the people as a common space and as its power appears to emanate from no one, popular sovereignty can be likened to an empty place.<sup>7</sup> But this description also amounts to a disembedded view, from the perspective of individual participants through which an endeavour is being made to capture the situation they experience. From a particular individual's or government's point of view, qualities will be attributed to a people, which may well be regarded as possessing varying degrees of permanence and in so far as mutation occurs, such changes are perceived to be expressions of a set of constancies with regard to language, culture, political priorities and other matters. Such attributions may well be a projection of the individual's or government's unfolding conclusions from his or its own experiences of how society operates which will be constructed though an operating set of assumptions relating, *inter alia*, to the moral, economic and cultural domains as to how a society ought to operate. There is therefore subjectively, an experience of degrees of fixity about society which, from a disembedded and diachronic perspective, can be seen to amount to a process of change of

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<sup>7</sup> Lefort, C 1986: 279; 1988: 225.

which the individual might become aware by comparing past with present and even then may well relate past to present through a set of constancies.

7. However even from a detached point of view, the people as a common space and power being akin to an empty place, needs to be viewed with care. Both space and place suggest limits, most obviously those associated with the existing geographical configuration of a state which links into the international practice concerning the articulation of stable borders. But the common space and empty place are also predicated upon the continuing unity of the political community whose realisation is through government. That unity inevitably has its limits, determined by a variety of factors including socio-economic, cultural, religious, historical and political ones. Where such limits lie is likely to be a matter of ongoing controversy and dispute. Although they may not easily be determinable does not mean they do not exist. In reality they are only likely to be revealed, after the event, that is to say after the fracture of a political community into two or more and/or where democracy has been replaced by an authoritarian regime<sup>8</sup>

### *A Secularised Chain of Being*

8. The character of transcendence however needs to be unpicked further. As we have already seen, transcendence can be thought about in two inter-related senses: firstly in the metaphysical sense associated with the need to attribute life's causation and character to that which lies beyond it, most obviously exemplified by religion, and secondly in the commonplace sense attributable to the need to make sense of daily experience including that which involves social structure. Concentrating on the first sense, it is captured by the chain of being which developed in Christian theology prior to the rise of the nominalistic approach to conceptualising the relation of God and nature, in which the world is perceived as being an outflow of God. So that in the conception of sovereignty present in Triumphus' model, God remains tied to the immanent order and so is not freely transcendent.<sup>9</sup> Nominalistic thought provoked a re-conceptualisation of the relationship between God and the cosmos whereby the former became completely detached from the latter and the latter emerges as an independent entity. As a consequence of the nominalist 'break' with the previous conception, a number of consequences flowed, including the release of the law-giver from the requirements of divine

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<sup>8</sup> More will be said about conflict below.

<sup>9</sup> Buijs, G 2003: 250.

reason so that the holder of sovereignty comes to be perceived as free from the law.<sup>10</sup> This approach emerges in Bodin's model and is clearly present in Hobbesian thought, as portrayed in the first chapter on Hobbes earlier in this thesis both in his eschatology and in his conceptualisation of sovereignty. Law comes to be seen as essentially arbitrary and for Hobbes, becomes a product of will, the existence of which can no longer be made attributable to a higher transcendent order.<sup>11</sup> Austin's model follows in this tradition as does Schmitt's decisionism.<sup>12</sup> Nominalism provides the conceptual space for the legitimisation of the geographically limited supreme ruler existing independently from the pope and Emperor as depicted in all the models of sovereignty discussed in this thesis with the exception of those of Augustinus Triumphus and Dante. It also allows for the emergence of the national community, that is to say 'the people' as a *corpus republicae mysticism* in its own right.<sup>13</sup> The emergence of the national community at first sight appears to be completely incompatible with the symbolism of the universal chain of being. However it is suggested that in fact what occurred was not so much the abolition of the chain of being altogether but the demise of it in its universal and explicitly theological form and the continuation of it in a secularised form.<sup>14</sup>

9. Its continuation is most clearly manifested in the metaphysical arrangement between people, government and population most powerfully expressed in arrangements of democratic governance. As with the universal chain of being where God as the creator of the cosmos could not be completely cut off from it, so with 'the people' who cannot be completely disconnected from its concrete manifestation giving rise to the infection of its transcendent absence with the qualities of its immanent presence. Hierarchy also, with

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<sup>10</sup> Or at the very least consists of a model in which higher law is largely residualised.

<sup>11</sup> Buijs, G 2003: 251.

<sup>12</sup> Schmitt's decisionism in its repudiation of rationality as providing an exhaustive explanation of sovereign decision-making most explicitly reflects the idea of the inscrutable God.

<sup>13</sup> Kantorowicz, E.H: 207-232 also referred to in Buijs, G 2003:254 and Lefort, C 1988: 251.

<sup>14</sup> Buijs considers that modernity ushers in the destruction of the universal chain of being but does not consider the possibility of its manifestation in secularised and localised form. Lefort, on the other hand, does recognise the emergence of the *corpus republicae mysticism*. However in the publications referred to at fn 7 above he does not explicitly relate it to models of sovereignty and does not appear to specifically explore the influence of nominalistic thought upon the development of secular governance and democracy. The idea of God associated with such thought constitutes Him as an inscrutable being unbound by any normative framework. The idea of emptiness associated with power referred to by Lefort in relation to democracy suggests a place of unfettered potentiality, the realisation of which is also unconstrained by any pre-existing normative limits in a substantive sense. (Note however the comments above about the actuality of limits). One can therefore see a significant connection between the two, that is to say the idea of an inscrutable God as constructed through a nominalist framework and the idea of emptiness associated by Lefort with the conceptualisation of power within democracy.

potential for enlargement, appears between the people, government and population. This is much like, referring to Cassirer's symbolic forms, the mythic gods which were projections of primitive man to fasten his immanent interactions to certainties in a perplexingly uncertain world. The discourse of democracy proclaims that government owes its existence to the people to whom it is accountable.<sup>15</sup> The attribution of the people's will to government action is reinforced by attributing that revealed will to 'the word' embodied in the constitution.<sup>16</sup>

10. This is accompanied by the growth of prescriptions for governance which explicitly embody functional separation of governance as a reaction against the emergence of centralisation as mirrored in writings of Locke and Montesquieu and in practical terms realised most obviously in the governmental arrangements of France and the United States. However in so far as the chain of being continues to exist, it does so under the influence of a nominalist metaphysic which provides the conceptual springboard for the growth of the secular and postivism and chimes in with the decentralisation of governance from its pre-modern hierarchical form. The finality of the sovereign decision is constructed around the foregrounding of the national community as the basic self-sufficient unity of governance.<sup>17</sup> Furthermore the unfolding of secularised 'higher' law embodied in the idea of the codified constitution occurs within a positivist framework which involves the expulsion of an ultimate theological rationale for the justification of law and the foregrounding of it as an instrument for change rather than the expression of custom.<sup>18</sup>

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<sup>15</sup> The rather paradoxical position 'the people' finds itself in is that it is considered to be both the foundation of government and also to be 'above' government in that government serves the people. This can be explained by the foundation comprising concrete episodic manifestations of the people in the form for example of elections giving rise to government while the people's supremacy relates to its transcendent continuity, which is located at the head of the secularised chain of being and which provides the point of reference by which governmental action is evaluated and justified.

<sup>16</sup> The sacred character of this revealed will is captured by Justice Hugo Black who states '[The] Constitution is my legal Bible: its plan of government is my plan and its destiny is my destiny. I cherish every word of it from the first to the last and I personally deplore even the slightest deviation from its least important commands' (Black, H 1969: 66). The idea of the chain of being as applying to governance is not simply applicable to democracy but is also potentially revealed in dictatorship. For example God is replaced by the iron laws of history as exemplified by Marxist writings through which the people develop as revealed by a leader whose will embodies that of the people as made possible by the operation of such laws with government seeming to emanate and be dependent upon such a leader for its continued existence, legitimacy and effectiveness.

<sup>17</sup> There are clearly departures from this exclusivity with the arrangements associated with the European Union and the European Convention on Human Rights but these are partial exceptions to prevailing practice described above and do not re-introduce higher law in a pre-modern sense. In so far as the finality of decision-making is re-located in institutions whose jurisdictions are international, it is limited and voluntary in character.

<sup>18</sup> Freeman, M.D.A 2001:199.



11. Lindahl's model reflects the idea of a secularised chain of being and is not simply applicable to democratic governance. The chain exists within and is penetrated by a nominalist metaphysic which is embodied in the relationship between government and the governed. If the symbolic pole of 'the people' is residualised by, for example, the negation of the availability and undertaking of genuinely democratic means of government choice with its voice coming to be permanently attributed to one individual or group then one can see coming to the fore out of the chain of being a single relationship, denoted by fixed government and subject to what amounts ultimately to the emergence of dictatorship. A modern variant of the inscrutable and transcendent God might be expressed through the charismatic dictator whose decisions are final and infallible and whose claim to quasi divine status is attempted through a multitude of devices.<sup>19</sup> The infallibility of the decision, furthermore in the final analysis, need not be based on reason or justification but can be 'created out of nothing.'<sup>20</sup>

12. Hence the arrangement of governance, as depicted by the secularised and diachronically existing chain of being, appears to operate as an all-encompassing arrangement from which the 'outside' is comprised of the potentially threatening 'Other' whose characterisation is the subject of international relations and which can be seen to comprise in the main, of parallel units of governance, in what to use Schmitt's term, amounts to a pluriverse of states.<sup>21</sup> Relationships with the outside are conducted by halting references to the practice of international law, where the conflicting principles of sovereign equality and hierarchy interact.<sup>22</sup> As Hobsbawm has pointed out, in the international arena where the process of

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<sup>19</sup> Thus in relation to Hitler, the construction of his myth resulted from 'a mixture of autosuggestion, deliberate fabrication and quasi-universal acceptance... The failed artist was transmuted into the architect of the universe, the deranged ascetic into a saint on a stained glass window, and his entire spasmodic biography into the architect of the universe' (Aycoberry, P 1999: 68). Apart from his live performances, emphasis was placed on visual propaganda in the form of the cinema, photography and artistic representation. Mythic generation in the case of Hitler had at its centre the claim that he had a unique affinity with the German People. In effect through a continuous and infallible contract with the people, the ' "[p]eople were personified in the *Fuhrer*"' (Overy, R 2004: 113). In so far as the ruler embodied the ruled one can see a similarity with Hobbes' model of sovereignty.

<sup>20</sup> As Schmitt describes when alluding to the writings of De Maistre, an anti-liberal thinker of the 19<sup>th</sup> century who in effect precedes Schmitt in reducing the state to the moment of the decision and who considered that every government was absolute and that authority was good once it existed (Schmitt, C 1988:55, 66).

<sup>21</sup> Given the fundamentally arbitrary quality of any existing configuration of states, embodied within the idea of the pluriverse of states is the potentiality of rupture, the demise of existing ones and the emergence of new ones and the reconfiguration of borders. Hence the role played by most states through international law to strictly limit the realisation of this potentiality.

<sup>22</sup> Simpson, G 2004.

globalisation has unfolded in a multitude of arenas, to date no effective expression has emerged in the political domain of an adequate supplement or alternative to the nation state.<sup>23</sup>

### ***Conflict***

13. However, the seeming completeness of a governmental arrangement existing within a seemingly complete and self-generating world characterised by a secularised chain of being, confronts elements, that in terms of potentiality, continuously pose a threat to its integrity, even if such a threat is remote. These threats are capable of emanating from both the 'outside' and the 'inside' and a combination of the two to the integrity of the chain of being.<sup>24</sup> Leaving aside the general issue of the disempowerment of the state through globalisation and the hegemonic practices of the more powerful of their number, from the outside comes the possibility of destabilisation and ultimately 'cold' or 'hot' war and conquest. From the inside, ultimately rupture is continuously posed albeit frequently only as a remote possibility in what can be conceptualised as the triadic relationship between people, government and population. To explore this a little further, a return will be made to Sartre's bus queue and the existence of a set of groupings that interlock through the persons of the members of the queues 'through' whom a series of grouping also intersect.<sup>25</sup> One can picture from this, in relation to the process of governance, the unfolding political configuration of the population as attributed to it by the activities of its representatives.

14. Within the population which can be perceived as being formed into a collective through the activity of representation, there is a continuing possibility that individuals operating as individuals or within a group context, in so far as they contemplate their identity and needs, might consider that existing governmental priorities and policies do not suit them. Within the

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<sup>23</sup> Hobsbawn, E 2007: 23. Turning the 'outside' into a domain that more resembles the 'inside' is the function of bilateral and multilateral treaty making and international law. The European Union itself can be seen as the most advanced project for the turning the outside into an extension of the 'inside' with the construction of a series of interlocking arrangements between governments of existing European states expressed through centralised regional institutions with growing jurisdictions regarding regional governance. This arrangement poses a move beyond the nation state as the fundamental unit of equality towards their individual citizens. Such movement operates in an international context wherein the arrangement of states is characterised by the principles of equality and hierarchy interacting. The sense of inside is revealingly explored by Conquest, R in his exploration of order and chaos in the international domain (Cooper, R 2003).

<sup>24</sup> Dangers posed by both 'outside' and 'inside' developments in combination are raised for example by the current governmental claim in the United Kingdom as to the threat of international terrorism.

<sup>25</sup> On the basis of Sartre's classification some of these may have the features associated with what he classified as the 'group' namely 'an ensemble each of whose members is determined by the others in reciprocity' (in contrast to a series as manifested in the bus queue) (Sartre, J-P 2004: 828).

domain of the democratic process, this is captured in the daily activity and routine of politics. The assumption is that the democratic process provides the possibility of satisfying the priorities of the population through representation as it unfolds. Yet what occurs where, within an existing population that is attributed in a transcendent sense to ‘the people’, there is another which is potentially disruptive to existing arrangements?<sup>26</sup> A useful example here is a population, perhaps a sub-state nationality or even majority population that does not consider that it can obtain the necessary autonomy or representation under existing constitutional arrangements.<sup>27</sup> One can see that from the perspective of such a grouping, its perceived emergence as a people separate from the majority or dominant population might have been forged in counter-position to it with regard to a variety of factors including language, race, religion and economic position. Its own perceived religious, economic and cultural qualities together with its ideals and political aims might well have been developed in reaction to the actions, propensities, ideals and policies it attributes to what it perceives as the dominant population. Hence its sense of collective identity might be inextricably linked to the way that it considers it has been historically treated and excluded by what it perceives to be the dominant population, whose identity seen from its particular perspective possesses certain permanent characteristics.<sup>28</sup> In so far as there has been a routine of engagement in the existing mode of governance and within the existing chain of being, it might become disrupted.<sup>29</sup> The uncritical acceptance of the existing *status-quo* becomes replaced with an increasingly critical attitude based around an increasingly coherent alternative narrative, expressed through an emerging leadership in what Sartre would call a fused group that poses a rupture from existing arrangement in order to create a new chain of being, given expression

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<sup>26</sup> The way in which oppositional movements develop has attracted a substantial literature. See for example McAdam D, Tarrow, S and Tilly, C 2001, Tarrow S, 1998 and Tilly, C 2004. What emerges, clearly exemplified by Tarrow for example, is that the collectivity of such movements is achieved, *inter alia* through the attribution of grievances that identify injustices whereby responsibility is ascribed to identifiable others and solutions are formulated that form pivotal points around which mobilisation is organised (Tarrow, S 1998: 111).

<sup>27</sup> The obvious example of the majority population in this position historically is the South African non-white population. An example of a sub-state nationality is the Tamil people of Sri Lanka or the Kurdish people concentrated in South-East Turkey.

<sup>28</sup> For example, the emergence of the Palestinian people and their claim expressed through their leadership to nation and statehood can be seen to be inextricably linked to the emergence of the Zionist challenge and the emergence and continuation of the Israeli state. That is to say there can be a relationship operating in which, to use the language of normalities, one desired normality which is perceived to be currently denied, is developed in reaction to another normality as perceived by the subjugated people characterised by exclusion by a ‘hostile’ people. See for example Shlaim, A 2000; Gregory, D 2004: 76-106; Pappé, I 2006.

<sup>29</sup> One sees this for example in relation to the Kurdish population in South East Turkey. The Palestinian example does not fit into that of the Kurdish, Tamil or South African examples in that their physical exclusion was central to the creation of the Israeli state (Shlaim A 2000).

through the creation of a new state.<sup>30</sup> The secularised chain of being is therefore not simply applicable in case of resistance to existing governmental arrangements, made in the name of the existing sovereign people, but is also applicable to a grouping that considers itself to be a people whose sovereignty in effect only exists in the domain of subjective entitlement and expectation.

15. Civic routine, involving engagement in existing political and legal processes through existing representation, hence can become increasingly pervaded with a sense of generalised unsatisfied aspirations which become, to reflect Cassirer's terminology, symbolic poles through which political debate and contest is constructed and emerges as, to put it in Wittgensteinian terms, the new language game of liberation.<sup>31</sup> The routine of engagement may become infused by language which points to the possibility of disengagement perhaps signified by contestation over sovereignty. The routine of constitutional engagement expressed, for example, through the use of law to advance a grouping's cause might be replaced or joined by the routine of disengagement from such mechanisms and the routine of the pursuance of unconstitutional means.

16. This process can be seen for example in relation to the Anglo-Irish conflict which has only recently been settled with any realistic possibility of success.<sup>32</sup> Here in what was a conflict that lasted some eight hundred years, it is worthwhile focusing upon the events sparked by the general election in the United Kingdom in 1918 which at that time included the entirety of the island of Ireland. A majority of Irish representatives, elected to the British parliament, were committed to withdrawal from Britain, an independent Irish republic and

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<sup>30</sup> Sartre, J.P 2004: 254, Clearly this is not inevitable in the sense that it may well be that lack of identification with the existing mode of governance might resolve itself for example in the formation of sub-state arrangements of governance that are constitutionally reached in what can be described as a pluri-national state. Tierney provides an important account of the constitutional dynamics of this process by reference to Western states and their minority nationalities including the Quebecois in Canada, the Catalans in Spain and the Scots in the United Kingdom. In all these cases constitutional adjustments are made to provide such nationalities with greater autonomy in the form of limited representative government See Tierney, S 2004. See also Hopkins, J 2002 which explores the regionalisation of European governments from a constitutional perspective. The possibility of a separation and the creation of a new state through which a new chain of being would have been constituted was posed by elements of the nationalist movement in Ireland as represented by Sinn Fein before the current settlement.

<sup>31</sup> This may well express itself in debate over the character of the existing arrangements of sovereignty which may feed into the attitudes towards the existing constitutional arrangements including the interpretation of the constitution itself. This emerged in particular in the conflict between Canadian state and those seeking the independence of Quebec (Tierney, S 2004:100-109).

<sup>32</sup> The historical and factual detail that follows is based on a variety of sources which include the texts of the agreements referred to and Beckett, J.C 1966; Fitzpatrick, D 1977; Kelley, K.J 1988; Foster, R.F 1988 and Coogan, T.P 2003.

resistance to what it perceived as continuing illegitimate occupation by the British of Ireland. These representatives proceeded to adopt a provisional constitution and set up a separate all-Ireland legislature in Dublin. They also reaffirmed the declaration of independence of 1916 made in the name of the Irish people.<sup>33</sup> Significant parts of the country started to be administered by or on behalf of the newly formed government. The British, supported mainly by the Protestants of the North-East of Ireland, refused to recognise the proclamation. Two chains of being faced each other, the existing British one and a newly forming Irish one. Irish resistance to existing arrangements of governance was made through what was a double claim. Firstly it was made in the name of the Irish people and secondly by those who claimed to be its representatives. Both these claims were opposed not only by the British but by mainly protestant sections of Irish population, who identified with the British chain of being. The Anglo-Irish War from 1919 to 1921 was fought over the question of sovereignty and the Irish republican initiative was effectively crushed.<sup>34</sup> What emerged was a constitutional settlement which allowed for the creation of an Irish state on part of the island of Ireland with dominion status providing less than complete independence.<sup>35</sup> Initially, reflecting the character of the settlement, which was effectively imposed following military defeat, no reference was made to the Irish nation in the first constitution of the Irish Free State. The Irish chain of being, expressed through the language of popular sovereignty was substantially suppressed through the rather ambiguous claim that governmental authority was derived from ‘the people of Ireland’ with no mention of the Irish nation, its sovereignty and its claim to the entire island.<sup>36</sup> It re-emerged more forcefully in the 1937 constitution in a number of ways. Firstly this later constitution was created in the name of the Irish nation whose sovereignty was expressed, *inter alia*, by its right to form a government.<sup>37</sup> Secondly, the territorial expression of nationhood was expressly and unconditionally proclaimed to be the entire island of Ireland rather than the part occupied by the Irish state.<sup>38</sup> Thirdly, the legislature and executive of the new state in the constitution unconditionally reserved their

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<sup>33</sup> Beckett, J.C 1969: 445.

<sup>34</sup> The declaration of independence hence was never followed by the institutionalisation of all Irish governance through the creation of an independently existing and effective normative system that would allow for the presupposition of a newly created basic norm. Hence the declaration’s potentiality to become the ever-present moment of founding of a created state was never realised. These observations reflect the more general point that the pre-supposition of a new basic norm can only take place retroactively (Kelsen, H 1999: 115; Lindahl, H 2007: 19).

<sup>35</sup> Most obviously, through the continuing right of the British military forces to undertake the defence of Irish coastal waters, to use Irish harbour facilities and the restricted right of the Irish government to establish and maintain its own defence forces ( Second Schedule to the Irish Free State Act 1922).

<sup>36</sup> Article 2 of the Constitution of the Irish Free State Act 1922.

<sup>37</sup> The preamble to the constitution and Article 1.

<sup>38</sup> Article 2 of the 1937 constitution.

rights to exercise jurisdiction over the whole of the island.<sup>39</sup> As part of the process leading to the current settlement in Northern Ireland, interestingly, amendments to the 1937 constitution have been undertaken so the Irish nation's claim to the entire territory of the island of Ireland is now made conditional upon the consent of a majority of the population and the reserved powers referred to above are removed.<sup>40</sup>

### *States of Exception and competing normalities*

17. Violent conflict that episodically has characterised relations between Britain and Ireland.. Such conflict need to be seen not simply from the perspective of the state's prerogative but also from that of those that engage in resistance and which is pointed to as an embryonic possibility in Hobbes' model and more fully in Locke's and implicitly in Austin's through the cessation of the habit of obedience.<sup>41</sup> The language of sovereignty has primarily perceived the state from the perspective of the ruler and not the ruled reflecting its origins in seeking a justification for centralised governance.<sup>42</sup> To stretch the meaning of the exception, employed by Schmitt in his exploration of the idea of sovereignty, against what was an authoritarian context, so as to include the decision by a population to resist a state's unwarranted encroachments, reflects more consistently the idea of sovereignty as having a relational dimension between ruler and the ruled, particularly bearing in mind the implications of democracy that are reflected in the idea of sovereignty residing with 'the people'. The ultimate conclusion to such a struggle might be the emergence of a new political order out of the old that has the ingredients of statehood. Hence the spectrum of crisis measures associated with this broadened idea of the state of exception can range from the suspension of existing constitutional arrangements by existing government to quell acts of resistance to revolutionary overthrow by its population.<sup>43</sup>

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<sup>39</sup> Article 3 of the 1937 constitution.

<sup>40</sup> These were removed by way of amendments made to the 1937 constitution in 1999, reflecting the terms of Article 1 of the Agreement between the governments of the United Kingdom and Ireland and Article 2 of the Good Friday Agreement both made on 10<sup>th</sup> April 1998. The current settlement provides for newly structured devolved government for the people of Northern Ireland within existing borders.

<sup>41</sup> One can also see the state of exception used in this way by reference to natural law. For example, both Aquinas and Suarez considered it justifiable for example to kill a tyrant in self defence (Finnis, J 1998: 288-290; Tiernay, B 1997: 313-315). See chapter 10 para 1 above.

<sup>42</sup> The sense of seeing the state from the perspective of the ruler as opposed to the ruled is usefully commented upon by Bobbio N 1989: 54-57.

<sup>43</sup> The range of crisis is captured by Christodoulides, E 2001: 122.

18. In the idea of war, as for example experienced in Ireland, looked at from a British perspective, a state of exception in effect existed as manifested by the introduction of martial law in large parts of Ireland, the draconian use of powers of search and arrest accompanied by the use of the 'Black and Tans', auxiliaries who behaved like independent mercenaries and who engaged in the sacking of towns and villages.<sup>44</sup> From the Irish republican point of view, it could be said that the British occupation of territory in defiance of the Irish's entitlement to sovereignty also amounted to exceptional circumstances requiring a state of exception which was initially expressed in the formation of an Irish parliament and declaration of independence in defiance of the British in a bid to create a new normality and was subsequently accompanied by military initiatives to protect the bid for independence. The potential was therefore open for configurations of sovereignty to profoundly change and referring back to the grammar of normalities explored in relation to Schmitt, one can see posed two incompatible normalities, namely a re-establishment of order by existing sovereign arrangements associated with British governmental institutions or its establishment through the successful realization of Irish sovereignty expressed in Irish statehood manifested through Irish governance.<sup>45</sup>

19. More generally, moving away from the specifics of the Irish conflict, the temptation here is of course to highlight the rupture that will be undertaken to create such a formation, primarily one in which the new form of government emerges in contravention of existing constitutional arrangements and hence is detached from them. However, in terms of the principles over which the conflict leading to separation might be fought, they are likely to be profoundly connected with those associated with the state from which separation is sought. The constitutional structure of the new formation might well reflect those of the arrangement applicable prior to separation, either mirroring or reacting to them or a combination of both and the terms of conflict are likely to reflect international practice in the sense of existing border configurations even where a new state emerges out of an existing one. Neither is there detachment in the sense of the continuing need to refer to transcendent entities, whether they be 'the people' or 'nation' or God or a combination thereof, as the reference points by which the formation is justified and against which, through its governmental expression, it seeks to justify its continuing existence. Hence Derrida's point about foundations involving

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<sup>44</sup> Foster, R.F 1988: 498.

<sup>45</sup> I do not seek here to engage in the issues of international state recognition.

references to God and natural law at such moments.<sup>46</sup> The point however is that the major significance of these references is not their enunciation at the time of their making whether it be in a constitution or otherwise and the resultant expectations that these create. It is in the fact that their existence forms a constant background to society's operational foreground as it moves into the future. It is that very movement that helps to invest what otherwise might have been an insignificant historical event with its significance as an ever present moment of founding that provides a reference point that ultimately helps to justify and legitimate governmental activity.<sup>47</sup> As part of the background, that event contributes towards the ontological security that is achieved through the routinization of governance. In such circumstances and in so far as it comes to the foreground in the process perhaps of constitutional controversy, moments of foundation achieve a double presence. That is to say they constitute a double moment.<sup>48</sup> One exists historically in real time and another which is transcendent and exists outside time and so is experienced as an ever present foundational reference point.<sup>49</sup>

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<sup>46</sup> Derrida, J 1986: 11.

<sup>47</sup> This sense of the past operating as a reference point for the future is captured by Lindahl 2007: 19.

<sup>48</sup> Being akin to the King's two bodies as per Kantorowicz, E.H: 1957.

<sup>49</sup> This is akin to the creation myth which takes place in sacred time as for example developed by Eliade, M 1975: 36-37. A slightly different way of capturing the transcendent quality of the transcendent moment is to say that 'it spreads over continuous time' (Christodoulides, E.A 2001:115).



## Chapter 13: Concluding Remarks

1. Augustinus Triumphus' model of sovereignty, although distinctly pre-modern in character provides an important clue to the nature of sovereignty. From that model one can see the chain of being in operation with the idea of God at its head. The location of sovereignty ostensibly with the pope, although dependent upon the acquiescence of the Council of Bishops, denotes the relational quality of sovereignty and hence its embedded character. However as importantly from the perspective of this thesis, the configuration of his model is captured by the idea of the chain of being. It is the idea of this chain of being, albeit in secularised form, which remains a constant point of reference within this thesis. The models of sovereignty alluded to and indeed other models not specifically explored in some way or other are orientated towards the chain of being, even if only in attempt to depart from it. One can see in the variety of ways that domestic sovereignty has been described. Whether by reference to a particular institution as in the case of Bodin, Hobbes, Austin and Schmitt, or whether by reference to 'the people', as for example in the case of Locke, or Kant and Lindahl, or whether by reference to sovereign power, as for example by Loughlin with specific reference to the relationship between government and citizenry and Agamben with specific reference to the relationship between constituting and constituted power, all such models reflect in one way or another a persistent theme, that is the chain of being, which for all of them, save for Bodin's, has a secularised form.<sup>1</sup> To put it in relational terms, the triadic relationship between people, government and the governed persists, even where the model suggests an attempt to suppress or residualise.

2. For example, Hobbes' model is a reaction against the pre-modern chain of being which posed God at its head and hence constantly posed the danger that religious institutions would trump secular ones concerning governance. However he attempts to replace God with sovereign and in so doing to reduce a triadic chain of being to a dyadic one, with the sovereign occupying both the position of government and transcendent being. This duality of being is fed by a legitimating narrative which culminates in the story of the sovereign's creation. This narrative's suppressive

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<sup>1</sup> Loughlin, M 2003: 70; Agamben, G 1998: 41.

quality is characterised by the construction of the public requirement of a residualised God by the sovereign himself and the denial of a diachronically existing people by its presence being confined to one ever present moment of the sovereign's creation. That momentary existence witnesses the almost simultaneous birth and absorption of 'the people' into the body of the sovereign fuelling his quasi-divine status. But to tell it like this is to miss the most important suppression. It is that the power of such a narrative is fed by the actuality of the sovereign's domination over his subjects rather than the other way round, as their present existence is infused with the uncertainties of the future captured by the ever-present threat of chaos denoted by the idea of the state of nature.

3. Austin's model does not refer to the third element but simply concentrates on the sovereign and subject. However the very lack of presence of a legitimating narrative and the pivotal position of habit leaves open the possibility of the sovereign institution being associated with the third transcendent element most obviously expressed in the idea of 'the people'. Austin does not deny this possibility.<sup>2</sup> Schmitt's model, even in its concentration on the moment of the exception and its authoritarian character, does not negate the position of 'the people' as a transcendent pole whose will in the final analysis is determined by sovereign decision at the moment of exception. Lindahl's model reflects the chain of being, without explicitly drawing out connections with other models of sovereignty, apart from Bodin's. Yet leaving aside the difficulties in his conceptualisation of transcendence and immanence, his endeavour to locate sovereignty simply with 'the people' by an interpretation of Bodin's model is unconvincing. More importantly however, in foregrounding 'the people' as the exclusive location of sovereignty, Lindahl provides a model which illustrates rather than clarifies the fundamental point about sovereignty. That is, to use Cassirer's idea of the symbol as Lindahl endeavoured, sovereignty constitutes a symbol whose meaning is contested. It is within the domain of the secularised chain of being that the various models of sovereignty studied in this thesis can be located and so the chain is capable of acting as a common reference point. This extends to locating sovereignty within a particular institution and as a relationship between entities.

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<sup>2</sup> In effect, he does briefly contemplate the existence of the third element when he briefly ponders the causes of obedience to sovereigns and consigns the answers to this problem to the domain of 'statistics' and 'particular histories', that is to say to arenas outside the domain of his positivist jurisprudence. (Austin, J 1832: 247).

4. It is furthermore the case that to gather a full understanding of the models discussed, an exploration of their operation in a diachronic sense reveals that routine plays a profound role in their operation, whether it is within times of normality or times of exception and such routine suggests an embedded existence of sovereignty manifested through its practice. Such embeddedness, if anything is suppressed by the discourse associated with sovereignty which points frequently to the founding moment which is detached from history with its supremacy seemingly existing outside the prevailing practice of governance nationally or internationally. This moment of founding as for example exemplified in the loop of foundation where ‘the people’ in effect appear to found themselves as referred to above, points to the chain of being not simply being conceptualised in a two dimensional sense as denoting a hierarchy, but in a three dimension entity as it exists in time. It is government in its constant activity that energises the chain of being in its unfolding and at the same time energises the transcendent moment of founding and in so doing casts into the shadow the exclusionary consequences that any founding involved,<sup>3</sup>

5. The relationship between the insights of Cassirer and Wittgenstein has been explored above in the context of the sovereignty. Neither one can do without the other. The endless meanings that can be attributed to terms is consistent with the symbolic character of language. It is therefore the language game that provides one strategy to enable inter-subjective communication. This in turn provides the bedrock of routine which exists beyond the subjective background of the individual upon which the contestation of meaning over terms is resolved including that of sovereignty and its applications. Lying behind such contests, inevitably for the individuals engaged, views of sovereignty within the particularities of the debates and circumstances within which such terms are used, will be fed by generalised conceptions of sovereignty which in turn will be affected by such particular meanings.

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<sup>3</sup> One founding moment, fitting into both an inclusionary and exclusionary narrative can feed and be fed by the continuing existence of one territorially based people expressed in particular through its actual governance and the continuing denial of another people’s claim to statehood. Hence the declaration of the foundation of the Israeli state with its recitation of the proclaimed history of the Jewish people and consequential victory in what is described as ‘the War of Independence’ is fed by the continuing existence of the Israeli state. At the same time, the very same events within the Palestinian narrative is described as *al-Nakba* (‘the disaster’) which feeds and is fed by what is perceived as continuing Palestinian dispossession. This example also highlights in a stark way the conditionality attached to the common space and empty place referred to by Lefort, C. See above.

In considering the language game of sovereign creation, as for example expressed in Searle's formula, the circumstances C which allude to Wittgenstein's stage setting or form of life includes the secularised chain of being.

6. To return to Cassirer, from the models of sovereignty explored or touched upon in this thesis, sovereignty is a symbol upon which a variety of meanings are attributed. Those meanings reflect wider assumptions by the modellers of the character of the human condition, his sociability, the ends around which society should be organised, and the models of governance best equipped to meet such ends. Each model in its own way constitutes an empire of social being in which there is a point of unity around which social interaction is perceived to operate. That point of unity is where sovereignty resides. These models, despite their apparent variations, reflect the configuration of the chain of being whose existence has deep theological roots and whose operation expresses a deep political metaphysic which in turn contributes towards the realisation of human ontological security. The achievement of such security involves containment of human potentiality in a variety of ways which in turn facilitates its enablement.<sup>4</sup> Operating within a political chain of being which is captured, for example, by the process of democracy contributes towards the contemplation of such potentiality which covers both the immensely creative and destructive and we are assisted in participating and holding ourselves open to it and its conflictual possibilities. The chain of being casts light upon the articulation of sovereignty, as discussed in the models explored above, by its reference to the relationship between government, the point of transcendent unity, which government by its operation claims to represent as a pre-existing entity and the population under its jurisdiction. In so doing, however looking at the process of governance simply from the perspective of government within the chain of being is inadequate. The contingency of governance, associated with the operation of the models of sovereignty explored above, finds itself reflected in the operation of the chain of being particularly when viewed from perspectives external to it and from those of the diversity of embedded individuals who comprise the population that is subject to government. The chain of being, particularly when viewed from these additional positions, takes sovereignty beyond the confines of the positivist features of the

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<sup>4</sup> Both language and law are inter-related mechanisms that are part of this process and embrace both containment and enablement of human potentiality.

models explored above, revealing their richer implications through exposing their contingent and reflexive nature.

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