

SYMPOSIUM ON FRÉDÉRIC MÉGRET, “ARE THERE ‘INHERENTLY SOVEREIGN FUNCTIONS’ IN INTERNATIONAL LAW?”

DEFINING THE RIGHTS OF SOVEREIGNTY

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In the recent theoretical scholarship on sovereignty, it has become commonplace to encounter the numerous ways in which state sovereignty has been quietly “outsourced” and “pooled” with other agents and institutions, especially international institutions aimed at promoting global governance and commerce. Frédéric Mégret’s fascinating article, which contributes to this growing body of scholarship, adds an important twist to this literature, by focusing specifically on the *privatization* of state sovereignty—that is, how various sovereign functions, once thought to be essential or “inherent” to statehood, have now been outsourced and handed over to private actors. While Mégret’s analysis concerns the consequences of privatized sovereignty on modern public international law, there is a rich pre-modern legal history anticipating the conceptual and normative problems explored in this piece. This essay focuses on some of those early modern sources, especially the theory of Jean Bodin (c.1530–1596), which bear a striking resemblance to Mégret’s analysis. Like Mégret, Bodin, the preeminent theorist of state sovereignty, approached the concept of sovereignty by focusing on those qualities that were regarded to be exclusive.

The principal worry motivating Mégret’s article is the alarming pace at which major functions of sovereign states, what he calls “inherently sovereign functions” (ISFs), are being privatized and transferred to private agents, especially profit-seeking corporations which, he argues, are unaccountable to public interest and immune from public scrutiny.¹ How far, Mégret wonders, can such privatization go? Surely, he thinks, there must be some basic sovereign functions, a “minimum [of] statehood,” whose alienation or privatization would be tantamount to dissolution of the state itself, resulting in a hollowed-out empty shell of a “failed state.”² Could a state which chooses to privatize and alienate, say, its foreign ministry, its court system, and its military, as well as the ISFs they perform, still deserve to be regarded as “sovereign” under international law? Mégret’s thesis postulating a core bundle of inalienable ISFs inseparably annexed to statehood is designed, in large part, to put the brakes on the neoliberal project of privatizing ISFs and restrict the growing power of private agents acquiring sovereign functions and even treating such rights exclusively as vendible assets.

The Rights of Sovereignty

Remarkably, Mégret’s search for a core list of ISFs resembles a pattern of thought originating in a very different intellectual context, in early modern Western legal thought. Like Mégret, jurists of the sixteenth century were

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¹ Frédéric Mégret, *Are There “Inherently Sovereign Functions” in International Law?*, 115 AJIL 452, 454 (2021).

² *Id.* at 467, 469.

similarly tasked with identifying the essential and inalienable qualities of sovereignty—what academic lawyers variously called *droits de souveraineté*, *ius maiestatis*, *ius summi imperii*, *regalia maiora*, *prerogativa regis*, and *droits de majesté*, among other terms.³ These lawyers—such as Grassaille, Alciato, Dumoulin, Bodin, and Loyseau—produced a voluminous body of historical and legal scholarship in the form of commentaries and treatises documenting the many sovereign functions held by independent rulers legally claiming what we could today call “sovereignty.”⁴

What drove lawyers frantically to document and publish these sovereign regalian rights and prerogatives? It was largely a preemptive measure, designed to prevent and thwart ambitious duchies, principalities, feudalities, bishoprics, and city-republics, all lacking sovereignty, from attempting to claim a legally valid *de jure* title of sovereignty for themselves. In this pre-Westphalian context, upstart feudal regimes, such as the duchies of Milan and Burgundy, successfully acquired enormous *de facto* power, often through war, but increasingly also through commerce, and often ended up exceeding the power of their nominal feudal overlords. Yet, such *de facto* power or territorial control did not make them sovereign—at least not in the eyes of lawyers. A rivalry, thus, emerged between those entitled to claim *de jure* sovereignty (such as the Pope, the Holy Roman Emperor, or the King of France) and those asserting *de facto* power (such as the Dukes of Milan and Burgundy), thereby challenging the foundations of the international medieval order of Christendom.⁵

Given this rapidly emerging gap between *de jure* sovereignties and *de facto* powers, especially after the Council of Constance, lawyers asked, as a theoretical question, whether the *de facto* power of a duke, a minor prince, a feudal lord, even an autonomous city, should legally be recognized as something equivalent to *de jure* sovereignty? Academic lawyers of the later Middle Ages—above all, Bartolus of Sassoferrato (1313–1357) and his “Bartolist” followers in the law schools of the universities—introduced creative juridical solutions designed to do this by explicitly recognizing the *de facto* power of lesser dukes, lords, and cities, as instances of derivative or prescriptive acquisition of sovereign title, and consequently attributing to them all the discrete rights and prerogatives typically associated with sovereign princes, such as the right of war and peace, the right of jurisdiction, and the right of embassy. Since they did not recognize any sovereign [*superiorem non recognoscant*] in their affairs, it was reasonable to treat the powers of dukes, princes, counts, and others, as if they held a valid legal title, alongside that of kings and emperors.

Critics, however, pointed out that, legally speaking, even the most powerful dukes and princes were still legal subjects to the overlordship of the Holy Roman Emperor. In theory, they recognized—or at least, should have recognized—the sovereignty of the Emperor. Instead of conferring sovereignty upon a duke, then, the better solution, they thought, was to explain their *de facto* powers as delegated powers, by concession of the Emperor, rather than as sovereigns *suo iure*, independent of the Emperor’s sovereignty.⁶

The Principle of Sovereign Exclusivity: Andrea Alciato on the merum imperium

Perhaps the most influential academic lawyer of the sixteenth century to develop this line of reasoning was the legal humanist, Andrea Alciato (1492–1550), who held the chair of civil law at the University of Bourges, the humanist intellectual center of the so-called *mos gallicus docendi iuris* (“the French way of teaching the law”). Sovereignty, what civil lawyers traditionally called *merum imperium*, after the *Digest* of Justinian, must be regarded

³ *Id.* 46 at 471–72, citing Vattel.

⁴ A typical example is the *Regalium Franciae libri duo* (1538), a treatise authored by the sixteenth-century French jurist, Charles de Grassaille (1495–1582). On this literature, see DONALD KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP* (1970).

⁵ On this theme, see HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1994).

⁶ This is based on the classical model of provincial governors whose jurisdiction in the Roman Empire was seen as a delegation from the emperor.

as exclusive to the emperor [*proprium principis*]. It cannot be shared with, prescribed by, and alienated to, anyone else, least of all to subordinates.

Individual functions of sovereignty, however, could be conditionally *delegated*, on the understanding that delegated powers can always be revoked by the principal. Since it seemed only emperors and kings can legally have *merum imperium*, it followed that subordinates, like dukes and free cities, could have no legal right to claim *merum imperium* for themselves. At most, what they may claim is a limited delegated right of use, like a usufructuary, to exercise, by way of delegation, someone else's property.⁷

Alciato's doctrine commanded widespread currency in the sixteenth century, reappearing in major legal treatises on public law and state, such as the commentaries of Duarenus and Donellus. Without question, however, the most important early modern theorist to use Alciato's analysis was the Angevin jurist and philosopher, Jean Bodin (c.1530–1596), author of the *Six Livres de la République*.⁸ While Bodin is perhaps most remembered today for his definition of sovereignty as “the absolute and perpetual power of the state”—a definition that has often been misconstrued and abused by later theorists—his analysis of the various constitutive “rights of sovereignty” was the direct consequence of Alciato's influential analysis that explained, in terms of private law, how sovereignty could be delegated. Private law rights served as a model showing how sovereign rights might function in a system of international public law.

Jean Bodin on the Rights of Sovereignty

The key text is Chapter 10 in Book I of Bodin's *République*. The principle articulated there bears a close family resemblance to Mégret's own approach to classifying ISFs. That is, in order to identify who (or what) holds sovereign authority as well as the content of sovereignty, it is vital, Bodin argues, “to know which *marques* [of sovereignty] are not shared in common,” whether with private persons or with any other foreign entity.⁹ Exclusivity, thus, becomes the essential quality of sovereignty.

Having laid down this fundamental principle, Bodin famously identified eight such exclusive rights—or ISFs—that he regarded as essential to sovereignty: the power to make and unmake law, the right of declaring war and peace, the right to create offices and appoint officers, the judicial right of final appeal, the power of pardon, the right of coinage, the right of regulating weights and measures, and the power of taxation.¹⁰ All of these rights and powers, as Bodin put it, were *summi principis propria*—entirely “exclusive to the sovereign prince” and, thus, could not be shared with others.

Although Bodin famously identified these eight rights and prerogatives as essential to sovereignty, it is also worth noting how relatively short his list was. For comparison, Bodin cited the growing early modern treatise literature on regalian rights (*droits de regales*) and ultimately blamed academic lawyers for excessively augmenting ducal and lesser feudal rights (*amplifié ces droits*), almost to the point of infinity.¹¹ By documenting these rights, dukes,

⁷ See generally DANIEL LEE, [POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT](#) ch. 3 (2016).

⁸ JEAN BODIN, [SIX LIVRES DE LA RÉPUBLIQUE](#) (1583) [hereinafter BODIN, *RÉPUBLIQUE*]; JEAN BODIN, [DE REPUBLICA LIBRI VI](#) (1586) [hereinafter BODIN, *DE REPUBLICA*].

⁹ BODIN, [RÉPUBLIQUE](#), *supra* note 8, at 212; BODIN, [DE REPUBLICA](#), *supra* note 8, at 147.

¹⁰ Bodin attempted formulating lists of sovereignty in earlier works: BODIN, *IURIS UNIVERSI DISTRIBUTIO* (1578) fol. A, s.v.: *Ius Publicum*; fol. E, s.v.: *Extrainridicalis*; BODIN, [METHODUS AD FACILEM HISTORIARUM COGNITIONEM](#) 261, 234–35 (1572).

¹¹ Among the major authorities in the *consilia* literature cited at BODIN, [RÉPUBLIQUE](#), *supra* note 8, at 213 include PAUL DE CASTRO, *CONSILIA* (Venice: De Gregorio, 1493) fol. 104_{ro-vo} [2:196]; PHILIP DECIUS, *CONSILIA* (1533) 1:fol. 141_{vo} [191, §1]; GIASONE DE MAINO, *CONSILIA* 758 [2:227, §§42–3] (1611).

barons, bishops, even minor counts, such as the Count of Apremont, could easily arrogate unto themselves the title of “sovereign prince.”¹²

But many of these feudal or ducal rights often claimed as dubious “proof” of sovereignty—such as the right of marque and reprisal, the right of the fisc, the right of royalties, and the right to hold a fair—really had nothing to do with, or were tangential to, sovereignty.¹³ While these rights typically appeared in legal treatises documenting the various sovereign rights, prerogatives, or *regalia maiora et minora* of kings, Bodin deliberately chose to exclude these, and many others, from his list, for a very simple reason: they were not exclusive, or inherent, to sovereignty. Take, for example, the right of marque, by which privateers were authorized to engage in acts of war. Sovereigns do not lose their sovereignty, simply on account of privatizing war powers through the grants of marque and reprisal.¹⁴

Numerous jurists apparently had failed to recognize this basic point, leading them, in Bodin’s view, to make a “huge mistake” by “confusing” rights held in common by sovereigns and non-sovereigns alike, with rights exclusive only to sovereigns. This observation may be regarded one of Bodin’s most lasting contributions to modern public law, judging by the many generations of later jurists who apparently accepted and followed Bodin’s strategy in identifying the inherent rights of sovereignty, such as the English Civilian, Richard Zouch, and the German *Reichspublizist*, Henning Arnisaues.¹⁵

The Principle of Indivisibility

Bodin had one more interpretive point to make in explaining the relation between each of the eight rights of sovereignty:

The power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it.¹⁶

The reason for this is that legislative power ultimately is a Hohfeldian power: it is the higher-order power of sovereigns to alter the structure of legal duties, whether by creating new legislation and binding subjects, or by repealing (or derogating from) existing legislation and releasing subjects. All official sovereign acts of state, even those that do not appear *prima facie* to be legislative, can be reducible to, and re-described as, legislative acts.¹⁷

The unavoidable conclusion for Bodin is that the essential rights and prerogatives of sovereignty are fundamentally *indivisible*, a principle that would later become central to Thomas Hobbes’ theory of sovereignty.¹⁸ Dividing or alienating away any one of these sovereign rights, whether to a private person or to a foreign party, would be

¹² On the question whether subinfeudation of the Count of Apremont by the Duchy of Lorraine can create a new title of sovereignty, see BODIN, *RÉPUBLIQUE*, *supra* note 8, at 185; BODIN, *DE REPUBLICA*, *supra* note 8, at 126.

¹³ BODIN, *RÉPUBLIQUE*, *supra* note 8, at 247–48; BODIN, *DE REPUBLICA*, *supra* note 8, at 171–72.

¹⁴ Cf. *Mégret*, *supra* note 1, at 472 for *Mégret*’s treatment of privateering.

¹⁵ RICHARD ZOUCH, *ELEMENTA IURISPRUDENTIAE* (1652) 101–4 [IV, §3: *De Iure Principis*]; HENNING ARNISAES, *DE JURE MAJESTATIS LIBRI TRES* (1610) 209–11 [2.1.1].

¹⁶ BODIN, *RÉPUBLIQUE*, *supra* note 8, at 223; BODIN, *DE REPUBLICA*, *supra* note 8, at 155. Cf. Daniel Lee, *Unmaking Law*, 39 *HIST. POL. THOUGHT* 269 (2018).

¹⁷ Rousseau took aim directly at Bodin in *THE BASIC POLITICAL WRITINGS* 154–55 (1987) [*Social Contract* 2.2], arguing that “acts of declaring war and making peace have been [wrongly] viewed as acts of sovereignty, which they are not, since each of these acts is not a law but merely an application of the law.”

¹⁸ Hobbes cites Bodin by name (the only time he does in his theoretical writings) in connection with sovereign indivisibility in the *THE ELEMENTS OF LAW: NATURAL AND POLITICZ* 167 (1994).

tantamount to surrendering sovereignty altogether. Give one up, you give them all up. It was critical, therefore, for Bodin to stress that these core rights of sovereignty were indivisible and inalienable.¹⁹ Sovereignty always comes bundled together as a package of legislated rights, powers, prerogatives—or, in Mégret’s vocabulary, “functions.”

Delegating Sovereignty

Yet, even though sovereign rights cannot be divided or alienated away, Bodin nevertheless allowed that individual sovereign rights or functions could always be *delegated* to others, to agents, mandataries, or *locum-tenentes*. Bodin frequently exploited the legal concept of delegation (often relying on the law of delegated jurisdiction surrounding the *Digest* of Justinian) to explain how *delegation* of an ISF need not entail the *loss* or alienation of an ISF, a crucial distinction often overlooked in the modern scholarship.²⁰ Indeed, the concept of delegation explains why sovereigns need not personally or directly hear every legal dispute or case at law, or why sovereigns need not make every decision on matters of policy: Professional judges and politicians are appointed specifically to do that work on the sovereign’s behalf.

Bodin’s argument on this point relied on a feature of the Roman law of obligations. That is, delegation merely creates an *in personam* obligatory relationship between principal and agent; it does not make the agent a new sovereign. And that is because any principal-agent relationship of delegation always comes with strings attached, unlike, say, gifts or donations. Principals are always, in theory, entitled to revoke whatever has been delegated to agents or to override whatever decision has been made by agents. From Bodin’s point of view, then, delegation advantages the position of the principal over the agent. Sovereignty continues unchanged over government agents to whom exercise of sovereignty has been entrusted and delegated.

Bodin liked to use the example of Roman real contracts, such as deposit [*depositum*] and loan for use [*commodatum*], as a legal analogy to illustrate this point. Just as depositaries and lessees are duty-bound to return the entrusted asset to depositors and lessors, respectively, so too are agents duty-bound to return whatever functions or powers are entrusted to them back to their principal. This is precisely why Bodin liked to compare the legal status of a public office to a borrowed asset [*res commodata*]. As he put it, “a public office is a borrowed asset [*une chose empruntée; commodato*], which the owner [that is, the sovereign] cannot demand again [from the lessor] before the term of the loan has expired.”²¹

Certainly, part of Bodin’s motivation was to provide a theoretical framework to understand the fundamentals of bureaucratic government—how a sovereign authority could still be regarded as being in charge, even while the day-to-day operations of state were carried out by a professional political and legal class of subordinate agents exercising delegated powers.

The more important motivation, however, concerned the same problem that motivated Mégret’s article—the illicit privatization of sovereignty, which Bodin observed first-hand, in despair. The cash-strapped, debt-burdened Valois monarchy devised sketchy tactics to raise revenue, one of which was the lucrative practice of the “venality of office”—the sale of public offices to private individuals. The legal instruments through which such commercial transactions took place, in the form of charters or sealed royal *lettres*, typically included language that grants of office lasted in perpetuity, leading officeholders to believe that they could treat public office as private property.

¹⁹ The indivisibility doctrine was aimed specifically at defenders of the so-called “mixed” constitution, such as Polybius and Cicero, who postulated that the chief powers of state could be divided and mixed among different holders, such as in Rome, where the magistrates, the senate, and the *comitia* each exercised different powers. The inalienability doctrine, on the other hand, targeted jurists who suggested that sovereigns may unilaterally alienate regalia or the royal domain, or that sovereign rights may be prescribed by the passage of time.

²⁰ See LEE, *supra* note 8, ch. 1 for the medieval origins of this technical debate in the jurisprudence on D.1.4.1.

²¹ BODIN, *RÉPUBLIQUE*, *supra* note 8, at 378; *DE REPUBLICA*, *supra* note 8, at 282.

But could public office really be “owned” as private property? Bodin strongly denied that position, for reasons strikingly similar to Mégret’s. No one, neither the officeholder nor even the sovereign, can “own” sovereignty, for the simple reason that sovereignty is not the sort of thing that can be privately owned by any person.²² It is a mistake to see sovereignty as if it were a vendible asset. The solution is to “depersonalize” sovereignty, so that it belongs not to any person, but only to the impersonal state. The fact that Mégret has found it urgently necessary to restate this basic principle of modern theory of state illustrates how much we, in the twenty-first century, have returned to a neo-feudal age.

²² MARTIN LOUGHLIN, [FOUNDATIONS OF PUBLIC LAW](#) (2010).