Philosophy, Public Policy, and Transnational Law

AN EVOLUTIONARY PARADIGM FOR INTERNATIONAL LAW

Philosophical Method, David Hume, and the Essence of Sovereignty

JOHN MARTIN GILLROY

An Evolutionary Paradigm for International Law

Philosophy, Public Policy, and Transnational Law

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A Note from the Editor

This new series for Palgrave Macmillan seeks, for the first time with a major publisher, to take the philosophical and public policy foundations of legal practice seriously; that is, not in terms of bits and pieces of theory or policy used to illustrate empirical claims, but as a systematic and integral basis for the study of codified law. The series will pursue scholarship that integrates the superstructure of the positive law with its philosophical and public policy substructure, producing a more three-dimensional understanding of transnational law and its evolution, meaning, imperatives, and future.

For the purposes of this series, transnational law includes the traditional categories of comparative and international law and seeks to understand the role of not just states, but persons, international organizations, nongovernmental organizations, and governments that create or use law that transcends sovereign states. The series encourages an interdisciplinary approach to transnational law and seeks research reports, original manuscripts, or edited collections that explore the essence of legal practice in both the public policy arguments that inform legal discourse and the philosophical precepts that create the logic of concepts inherent in policy debate. The series aims to expand the types and use of philosophical and policy paradigms exploring the nature of transnational law, so that its empirical dimensions are better illuminated for practitioners and scholars alike.

An Evolutionary Paradigm for International Law

Philosophical Method, David Hume, and the Essence of Sovereignty

John Martin Gillroy

Philosophical Method, Policy Design, and the International Legal System

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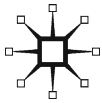

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For Margaret M. Murray
(Writer, Editor And Much More)

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Preface

The status of sovereignty as a highly ambiguous concept is well established. Pointing out or deploring, the ambiguity of the idea has itself become a recurring motif in the literature on sovereignty. As the legal theorist and international lawyer Alf Ross put it, "there is hardly any domain in which the obscurity and confusion is as great as here."[1] *The concept of sovereignty is often seen as a downright obstacle to fruitful conceptual analysis, carried over from its proper setting in history to "plague and befog contemporary thought."*[2] *…So contested is the concept that, rather than pursuing the contestation, many political theorists think we should give up so protean a notion. Granting that the debate on the relevance of sovereignty frustratingly oscillates between claims that it will either continue to exist or that it is about to disappear, forgetting it altogether, and thereby escaping this seemingly endless argument, can easily appear as the most urgent task for political theory.*[3]

The following argument makes a case that the "urgent task" is not the abandonment of the concept of sovereignty, but an understanding of its essential philosophical nature as an integrated and evolving expression of practical reason. Sovereignty is neither ambiguous nor obscure once its fundamental presuppositions are laid bare and its many philosophical and historical manifestations shown to be the product, in actuality, of a single, dialectally dynamic but integrated set of metaphysical elements.

This is the first of three arguments describing the evolution of international law as a manifestation of practical reason through an application of philosophical method to the *source*, *locus*, and *scope* of the concept of sovereignty. It moves from a dialectic balance favoring *utility* to a balance dominated by *legal right* to a dialectic of *duty* to humanity and nature. All three arguments are meant to be a contribution to the new field of *International Legal Philosophy* as defined by Phillip Allott.[4]

This field combines a sensitivity to legal practice with an effort to understand the underlying philosophical determinants of empirical choice and behavior. One purpose of international legal philosophy is to "remove" from the minds of those who study the law what Diderot defined as "the sophism of the ephemeral," and what Allott calls "the disempowering idea that what

happens to exist now is inevitable and permanent."[5] A core imperative is to "reunderstand what it is to be a thinking being"[6] and to rediscover the dialectic between the private and the public as it determines, and is redetermined by, legal practice. This requires a "revolution in the human mind"[7] so that we may transcend the current dependence on positivist methods and empirical fact as an end-in-itself, and try to understand the underlying and more constant and essential ideas and inherent dialectics that constitute the substructure or "metaphysics" of international law. I will approach this "revolution" with the use of R. G. Collingwood's philosophical method[8] and the philosophy of David Hume, applied to international law as an expression of practical reason.

The goal of philosophical method is the construction of a comprehensive policy argument (CPA) for a public policy or legal issue. In addition to the conventional use of empirical models and their logic of investigation in the study of policy and law, CPA requires that an underlying philosophical logic of concepts be deciphered to identify the ideas within the issue, and their definition, overlap, and systematic interdependence. Philosophical method is a means with which to interpret and understand competing systematic and complete conceptual logics, existing at the core of an issue and pertinent to policy change.

Philosophical method is therefore not meant to be a replacement for the empirical investigation of a policy or legal issue, or the use of scientific method in social studies. Rather, it is a complimentary and prerequisite method that seeks to transcend the limitations of positivism and present a more complete understanding of the philosophical presuppositions of positivist ideas like power, interest, or strategic rationality. Philosophical method is meant to be used with the facts of the policy or legal issue to match an illuminating *logic of concepts* with a pertinent *logic of investigation*. Within the CPA, the use of philosophical method and the metaphysics of a policy or legal issue is assumed to be critical to the full understanding of the overlapping concepts, dialectics, and scale of forms that determine, and are determined by, the empirical context of the policy or legal topic.

Specifically, instead of utilizing bits and pieces of various theoretical arguments to address narrowly focused empirical questions, as positivism prescribes, I will address the evolution of international law as practical reason in three phases. Each will be approached through a single integrated logic of philosophical concepts from a particular philosopher (i.e., David Hume, G. W. F. Hegel, Immanuel Kant). This philosophically holistic approach to the law is based on the assumption that only through the use of a single integrated argument in legal analysis can sovereignty, or any concept, be understood as a truly systematic and logical whole. A complete philosophical paradigm has a dialectic integrity and systematic logic that can more adequately describe the evolving essence of a concept like sovereignty. This approach also has the advantage of generating a number of distinct holistic descriptions of the law through the application of different philosophical systems, one at a time, to its factual structure.[9] Positivism does not seek

holism, and rejects the idea that "theory" has such a characteristic. The essential or comprehensive substructure of any idea is therefore ignored in a method that recommends the observation of empirical problems through the use of whatever hodgepodge of theoretical elements is seen fit to frame its superstructure. This failure to deal with metaphysics has retarded both an essential understanding of international law as a species of legal system, and any holistic and dialectical conceptualization of its inherent concepts, like sovereignty.

A second positivist convention expects modern theorists to create new theory rather than to refine and apply that of existing philosophy. This predisposition is driven by the positivist goal of *discovery* that ignores *refinement* as a possible purpose of philosophical analysis. Collingwood argues that philosophy must take that set of ideas already known and utilize existing systematic philosophical arguments to refine them so that they evolve closer to their essence as concepts. Considering this imperative, the idea of sovereignty can be assumed to have had valid usage for hundreds of years, over which time, the concept has evolved to mean different things, each a refinement of the definition that preceded it. Transcending positivism means that the scholar's search is not for "new" material, but to decipher the metaphysical essence of a concept as it has been made manifest over time and context. These manifestations are rooted, and refined from, the known terms of that concept's inherent idea(s).

Rather than depending exclusively on positivism and its conventions, my work utilizes, in addition to Collingwood, the intact philosophical systems of Hume, Hegel, and Kant to trace the refinement of international law as a product of human practical reason. These paradigms, or integrated systems of logical concepts, will be applied to legal practice individually, so that each CPA can be deciphered separately. This provides a set of integrated and logically intact paradigms for the evolutionary stages of practical reason in international law. Because each argument is applied systematically, a deeper understanding of the source, locus, and scope in the development of law in general, and international law in particular, is possible where it is not with the application of various disconnected components of many theories. Each CPA based on Hume, Hegel, or Kant can then be used to describe a distinct context that its logic of concepts best illuminates; specifically, the (1) genesis, (2) contemporary dilemmas, and (3) future of the international legal system. By widening the perspective of international lawyers and policymakers, they can more easily perceive the dialectic of ideas that has created, and is refined by, the legal practice in which they participate. We also move toward Allott's goal of "human self-perfecting."[10] And, in addition, by providing a more complete knowledge of the origins of legal practice and its evolution, we illuminate the practical possibilities for what we might "choose to be"[11] in the future.

To achieve this, the essential metaphysical elements of state sovereignty and its inherent evolutionary scale of forms will be deciphered and described. This will transform what appears to be a multitude of definitions and

practical realizations of the concept of sovereignty into a set of interdependent manifestations of a single substructure, made of a single set of dialectic elements. The interpretation of international law through practical reason sorts and integrates a diverse and discordant literature and defines state sovereignty as a single concept evolving on a scale of forms that allows it to exhibit diverse character traits, all arising from different combinations of common and essential metaphysical elements. This approach, compared to positivist methods and legal realism, allows one to transcend current agreement that sovereignty is, at best, a narrowly focused set of empirical characteristics or, at worst, "organized hypocrisy."[12] This method also encourages the scholar and practitioner to understand the predispositions and pitfalls of the concept of sovereignty, as well as its potential future paths, more effectively.

The use of philosophical method to create policy paradigms out of preexisting philosophical systems and apply these to international law will be called *Philosophical-Policy & Legal Design*. This approach allows the use of preexisting and complete philosophical arguments that provide an adequate logic of concepts to chart the evolution of the idea of sovereignty along its scale of forms. An examination of the source of practical reason in human social convention with the employment of a philosophical-policy drawn from Hume's logic of concepts about human nature will demonstrate this new approach.

Why Hume? Because, up to now, without an adequate substructure we have arguments, like Brunneé's and Troope's,[13] that may correctly identify international law as an "interactional" system, but cannot present any argument as to why it is, where this empirical reality comes from, or what its implications are for the future.

Comparatively, Hume provides a logic of philosophical concepts that answers these concerns. First, he fulfills the requirements for a fuller understanding of the origin and evolution of law from social convention and the dependence of social convention on the human imperative for society. Second, he offers a more adequate delineation of the overlapping concepts of the law in terms of the ideas and institutions that deal with norms and justice (e.g., principle, process, practice, rule, power, interest). Third, he provides a fundamental understanding of the essential dialectics at the core of a conceptualization of the law with both unconscious and conscious human participation (i.e., passion↯reason, process↯principle). These differences provide for the establishment of a dialectic and evolutionary scale of forms that conceptualizes law as applied practical reason. It creates both a two-stage legal system where principle, within its dialectic with process, can redress an inherent process-bias, and a fuller and more systematic explanation of the presuppositions of the concept of sovereignty, than positivist models alone can provide.

In this book, the genesis of the modern international legal system takes shape in the process↯principle dialectic and Hume's concept of law as social convention. For Hume, the process side of this dialectic that finds social

stability, as it transforms convention into positive law, is most critical. But his paradigm is limited; it fails to consider what the rise of critical principle in the law (e.g., human rights) means for the evolution of sovereignty. Since his argument cannot deal with critical principle or its full integration into the law, a second philosophical-policy to inform the next moment of legal evolution is required.

In the second book, Hegel's philosophical-policy is pertinent to understanding the rise of critical principle in the law. Applied to contemporary dispute resolution it illuminates the struggle between a Humean or conventional definition of state sovereignty and the requirements of international human rights. Hegel's argument for "recognition" combines process and principle by engaging "abstract right" in dialectic with social "morality" to create a synthesis product of "ethical life." Hegel, defining the *locus* of sovereignty through practical reason, places it, not in the individual or the community, but in the synthesis of the two through legal right. This grants the process⇆principle dialectic a new field of application with a better balanced tension that creates and defines the responsibilities of the modern state. But beyond its manifestation in the state, Hegel cannot help us understand the process⇆principle dialectic. Since international law is a distinct mode of law that deals with more than just states we require yet a third philosophical-policy to completely understand the evolution of international law as a product of practical reason.

In the third book of the series, Kant's critical philosophy is employed to define the *scope* of sovereignty as practical reason beyond the state, allowing us to move to the final stage of transnational legal development, including an imperative for what I will call an "Ecological Contract." Kant's philosophical-policy defines the scope of sovereign protection in one's duty to the integrity of humanity and the environment as dialectic representatives of the synthesis of the realm of freedom with the realm of nature.

Overall, the three-stage dialectic that defines the evolving concept of sovereignty maps onto both Collingwood's argument that practical reason moves from *utility* (Hume), to *right* (Hegel) to *duty* (Kant) and Bartelson's[14] argument (see Prologue) that a full analysis of sovereignty requires attention to its *source* (Hume), its *locus* (Hegel), and its *scope* (Kant). The ultimate purpose of this project is to explain international legal practice as an integrated manifestation of human practical reason. The motivation for this effort is to represent the entire philosophy and history of international law through a single coherent set of dialectic precepts that provide an essential, yet evolving, metaphysics for international law from its origins, through its modern dilemmas, and into its future. Let us begin with the application of Hume's philosophical-policy as the initial manifestation of practical reason in international law.

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John Martin Gillroy
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Prologue: Sovereignty and Practical Reason

Sovereignty is a central concept in international law. But there is no concept that generates as much confusion among scholars and practitioners. While there is general agreement that sovereignty, as the absolute power of the state to exist without transnational restrictions, has no application within the contemporary international system, this is where the agreement stops. Social science cannot seem to provide any single conceptualization of sovereignty that can not only describe the past and understand the dilemmas of the present but also predict the trends of the future with reasonable authority.

I both agree with, and challenge, this conclusion. I agree with it because sovereignty, like all social concepts, cannot be definitively classified as a single empirical phenomenon, but evolves dialectically over time, producing a variety of manifestations with the same underlying metaphysical essence.[1] But I also challenge it by contending that an essential concept of sovereignty does exist that encompasses most of the variant definitions and claims about its past and future. This unitary metaphysical foundation contains a tension of component ideas that relate sovereignty, as a manifestation of practical reason, to various definitions of justice, which are time-sensitive synthesis-moments or "snapshots in law" of sovereignty's metaphysical character. This seeming contradiction, that sovereignty is both pluralistic and unitary, is accessible through the transcendence of scientific method by philosophical method. I propose to show that sovereignty can be considered a dialectical concept with a stable metaphysical essence that produces plural manifestations over time as its component dialectics rebalance themselves.

In a definitive study of the concept of sovereignty, Jens Bartelson[2] examines the effort to apply scientific method to the idea of sovereignty in both international and sociological theory. He concludes that, first and foremost, problems of conceptual definition arise primarily when "a scientific understanding of sovereignty is attempted…the problems confronted by conceptual analysis are intrinsic to the meta-language guiding this analysis…[a meta-language preoccupied with] what it means to be scientific."[3]

Bartelson's deconstruction establishes that questions about the *source*, *locus*, and *scope* of sovereignty[4] must shift from an emphasis on the "quest" for its empirical essence to embrace a study of the epistemological context of

the word itself, or the language of sovereignty in distinct historical periods. "If we are to understand the concept of sovereignty historically, the problem is not so much a matter of what *sovereignty* is, as it is a matter of what this *is* has come to mean."[5] For him, the chronology defines the concept.

He defines two possible routes to a conceptual understanding of the idea of sovereignty: first, through a scientific search for essence or, second, through an historical search for contextual truth as historical knowledge. He chooses the latter path, because he concludes that sovereignty is not a physical thing subject to essential scientific investigation.

> sovereignty has no essence, since it is what makes differen[t] spheres of politics empirically representable and intelligible; as soon as we start to demand that the concept of sovereignty should refer to something present in the world of empirical beings, our understanding of the concept itself must presuppose the same line in the water which is drawn in and through its meaningful use in political discourse…[t]hus, if we want to make sense of sovereignty…without itself being a mysterious prior essence, we should pay attention to the internal connections between sovereignty and knowledge.[6]

Bartelson's arguments about both the limits of empiricism in matters of conceptual analysis and the positive attributes of his historical epistemology are persuasive. However, while critical of any effort to use scientific method as a way of understanding sovereignty, his work is nevertheless encased within the methodological conventions of social science. For example, he definitively sorts empirical from normative conceptual worlds as a basis for his study and identifies the former as the source of meaning.[7] He also links empiricism with the existence of an object, and then with the idea of essence, so that in order for sovereignty to have any essence it must be an empirical object, which it is not.[8]

But perhaps, in addition to the deconstruction of sovereignty as a source of knowledge, which Bartelson accomplishes, there is another way to approach the subject of its essence: a philosophical-metaphysical approach. If the concept of sovereignty can be considered a metaphysical dialectic of normative and positive, rather than an empirical ontology, then we may be able to locate a new source for its essence.

R. G. Collingwood's philosophical method offers such an alternative to the social science methodology. His philosophical method attempts to treat the unique qualities of social concepts, like sovereignty, not as objects, but as metaphysical subjects of reason. That is, subjects of reason understood from the application of a set of (i.e., absolute and relative) philosophical presuppositions that are argued to be foundational to the way humans create, and are created by, the empirical world around them.

Here, Immanuel Kant is also helpful in that he describes two forms of reason that map onto, and can represent, the distinct subject matter of scientific and philosophical reason. For him, the application of human reason in the world must be defined in two ways. Kant distinguishes between