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Of Zombies, Witches and Wizards – Tales of Sovereignty

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Don Herzog. ***Sovereignty RIP***. New Haven, CT and London: Yale University Press, 2020. Pp. 299. US$ 40.00. ISBN: 9780300247725.

Abstract

Don Herzog's book Sovereignty RIP *offers a* tour d'horizon *of one strand of sovereignty's conceptual history and its changing meanings over time. It culminates in a ferocious call to bury the notion of sovereignty and replace it with concepts such as jurisdiction, authority and state. Based on insights from conceptual history, in particular about basic concepts, the review essay criticizes Herzog's approach. It questions whether one can convincingly denounce the concept of sovereignty by relying predominantly on episodes from Anglo-American history as Herzog does. Instead, the essay tells two alternative stories in order to first argue that ignoring other narratives risks misunderstanding and misinterpreting the current re-rise of sovereignty-related discourses and that, second, sovereignty remains an important tool to understand how both the constitutional state and multilevel governance work. Eventually it would be more pernicious to discard the concept of sovereignty instead of engaging with it and confronting its diverging conceptions.*

1 Introduction

'Sovereignty is a zombie concept, undead, stalking the world, terrifying people.'[1] Don Herzog's book *Sovereignty RIP* in which he urges 'us' to 'bury' the 'zombie concept' of sovereignty deliberately chooses metaphors rooted in myths about magical worlds.

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[1] D. Herzog, *Sovereignty RIP* (2020), at 291 and at 259 and 263.

Thereby, the book reflects an awareness that metaphors and the emotions they create are at the centre of political and legal change.[2] This is particularly true for sovereignty and the sovereign state since both are intangible and invisible social constructs which throughout history have required some personification or symbolization.[3] The metaphor of a zombie is meant to create among Herzog's audiences a negatively connotated image of the undead – a person apparently awakened from death through an act of necromancy.

Accordingly, Herzog argues that contemporary political discourse has no (more) room for the 'zombie concept' of sovereignty. Since sovereignty has mutated, over the centuries, from the idea of an 'unlimited, undivided, and unaccountable locus of authority' to a concept of which we now think as limited, divided and accountable, it has basically turned 'obsolete, confused, and pernicious' and should therefore be discarded.[4] When it comes to international cooperation, 'sovereignty talk makes the stakes cosmic'.[5] On the international plane, states tend to use sovereignty as a blanket excuse instead of justifying their behaviour; or, under the pretext of sovereignty, refuse to listen to any type of criticism at all.[6] 'They're mistaking time-honored verbal flourishes for actual explanations and justifications.'[7] For Herzog, no good comes from actors basing their political arguments and deeds on conceptions of sovereignty. As a result of his *tour d'horizon* Herzog suggests replacing the notion of sovereignty with 'the concepts of state, jurisdiction, and authority'.[8] And he concludes: 'why not turn sovereignty over to the wizards at Pixar and Disney, so that when they tire of unicorns they can make charming cartoon movies about haughty kings?'[9]

For a German international lawyer who is informed by German constitutional history and legal debates on EU integration, Herzog's call seems like a late one.[10] More than 50 years ago, the German constitutional lawyer Peter Häberle had claimed that sovereignty was seen by many as an old-fashioned concept that should be eliminated or may already be dead.[11] Häberle acknowledged the ideological specificities and the vigour of the term,[12] thereby anticipating in the language of the German theorist

2 Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry', 86 *Nordic Journal of International Law* (2017) 170, at 181: '[metaphor] is one of the key ways in which epistemically-limited agents collectively and interactively generate cognitive resources, often with considerable emotional impact (with consequences for moral and political attitudes).'

3 *Ibid.*, at 181, quoting Walzer, 'On the Role of Symbolism in Political Thought', 82 *Political Science Quarterly* (1967) 191, at 194.

4 Herzog, *supra* note 1, at xi and ix.

5 *Ibid.*, at 151, also at 107.

6 *Ibid.*, at 244–255.

7 D. Herzog, 'Rousing from Dogmatic Slumbers', *EJIL: Talk!* 3 July 2020, https://www.ejiltalk.org/rousing-from-dogmatic-slumbers/.

8 Herzog, *supra* note 1, at 261.

9 *Ibid.*, at 263.

10 Herzog himself admits that 'in this general way my thesis is in fact relentlessly, outrageously, unoriginal'. *Ibid.*, at 264.

11 Häberle, 'Zur gegenwärtigen Diskussion um das Problem der Souveränität', 92 *Archiv des öffentlichen Rechts* (1967) 259: 'antiquierter Begriff, der möglichst zu eliminieren, wenn nicht gar schon tot sei.'

12 *Ibid.*, at 264: 'ideologische Eigengesetzlichkeit und Durchschlagskraft dieses Begriffs.'

many of Herzog's concerns.[13] In terms of political and legal practices, the dynamic development of EU law and institutions made it necessary to develop complex theories about multilevel governance and how to conceive a supranational political and legal order where power is limited, divided and made accountable on the regional, the national and the supranational level. Such approaches made blunt concepts of sovereignty look outdated and prompted calls for a post-sovereign world, in particular in the Global North. Observing these tendencies, the Japanese international lawyer Yasuaki Onuma noted a shift to the usage of jurisdiction instead of sovereignty in parts of international legal discourses[14] and provided a clear and, in my view, convincing answer to Herzog's claim:

> Sovereignty will not simply wane. It will continue to be invoked by governments, politicians, influential media and other participants of international law. Criticizing the idea of sovereignty and its negative roles is one thing. This should be done. Disregarding sovereignty is another. Political leaders, government officials and influential media do resort to arbitrary interpretations of sovereignty including an absolutist concept of sovereignty to justify their arguments or policies. International lawyers must confront such realities. Rather than disregarding the concept, they should seek to demonstrate its most appropriate interpretation in current international law, criticizing any kind of abuse.[15]

So why is there still a widespread interest in a book that aims to do away with sovereignty talk in frank and plain language? Hasn't all been said and done?

A simple answer may be that Herzog's book reacts to developments in the US under the Trump administration. This administration has abundantly used the term 'sovereignty' as an instrument in its international (legal) discourses,[16] for both rebuffing any international criticism and justifying unilateral measures or violations of international law as Herzog demonstrates.[17] Against this background, it is understandable that Herzog writes an invective in order to 'denounce the concept's role in our politics and law as obsolete, confused, and pernicious'.[18] And indeed, Herzog provides his account predominantly for an American audience. The 'us' he refers to is mostly the American readership with whom the chosen historical episodes resonate. Such inner-American discourses are certainly an important means to tone down the excessive use of sovereignty talk in US foreign policy, but eventually Herzog's claim reaches further.[19] As he underlines in the *EJIL: Talk!* book symposium, Herzog wants to eliminate

[13] E. H. Carr had already concluded in 1939 that sovereignty 'was never more than a convenient label; and when distinctions began to be made between political, legal and economic sovereignty or between internal and external sovereignty, it was clear that the label had ceased to perform its proper function as a distinguishing mark for a single category of phenomena'; E. H. Carr, *The Twenty Years' Crisis, 1919–1939* (1939), at 230.

[14] Y. Onuma, *International Law in a Transcivilizational World* (2017), at 217.

[15] *Ibid.*, at 218 *et seq.*

[16] Krieger, 'Populist Governments and International Law', 30 *European Journal of International Law (EJIL)* (2019) 971, at 984–987.

[17] Herzog, *supra* note 1, at 246–248, also at 283.

[18] *Ibid.*, at ix.

[19] Herzog, *supra* note 1, at 91 and 291.

the concept of sovereignty from political and legal thinking in general with the following claim:

> But I would love China's audiences—the UN, other governments, publics and citizens far and wide—to be disabused of the fantasy that there is a there there, that something deep and valuable is in play when China launches this appeal to sovereignty. I would like all those audiences to learn to roll their eyes disdainfully, to guffaw, to ridicule, to wonder if China is staunchly in favor of phlogiston and witches, too, or if the spokesman had just staggered out of a time machine.[20]

Through the reference to Chinese practices, Herzog situates his book within a broader ongoing struggle around diverging narratives of sovereignty currently unfolding in the international (legal) order. Both in political statements[21] and academic literature[22] the concept fares high. In these discourses, the sometimes undifferentiated reliance on the term 'sovereignty' hides that diverging actors pursue different objectives and employ different practices in their use of sovereignty language.[23] Indeed, the political scientist Roland Paris has argued that in recent years China, Russia and the Trump administration have not only fostered sovereignty discourses but in these discourses have all put the modern predominant understanding of sovereignty as limited, divided and accountable aside in favour of conceptions of 'extralegal and organic sovereignty'.[24] Such a type of extralegal sovereignty corresponds with Herzog's portrayal of sovereignty as 'unlimited, undivided, and unaccountable'.[25] Paris warns against such uses since due to their 'autochthonous and primordial' character 'they offer a license for strong states to dominate others'.[26]

Situated within these debates, Herzog's claim to bury sovereignty and replace it with concepts such as jurisdiction, authority and state, intends to offer the exorcism against the spectre of absolute sovereignty which again and again re-emerges and

[20] D. Herzog, 'Unrepentant Sovereignty RIP', *EJIL: Talk!* 7 July 2020, https://www.ejiltalk.org/unrepentant-sovereignty-rip/.

[21] E.g. The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (25 June 2016), available at https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698; The Declaration of the Russian Federation and the Islamic Republic of Iran (17 June 2020), available at https://www.tasnimnews.com/en/news/2020/06/17/2287976/iran-russia-issue-declaration-on-promotion-of-international-law; for Chinese support of the latter: Ministry of Foreign Affairs of the People's Republic of China, Press statement (24 June 2020), available at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1792343.shtml.

[22] E.g. Basile and Mazzoleni, 'Sovereignist Wine in Populist Bottles? An Introduction', 21 *European Politics and Society* (2020) 15; Walker, 'The Sovereignty Surplus', 18 *International Journal of Constitutional Law* (ICON) (2020) 370; Johns, 'The Sovereignty Deficit: Afterword to the Foreword by Neil Walker', 19 *ICON* (2021) 6.

[23] Cf. Hurrell, 'Cultural Diversity Within Global International Society', in A. Phillips and C. Reus-Smit (eds.), *Culture and Order in World Politics* (2020) 115, at 133–135.

[24] Paris, 'The Right to Dominate: How Old Ideas About Sovereignty Pose New Challenges for World Order', 74 *International Organization* (2020) 453, at 454.

[25] *Ibid.*, at 458, 465–479.

[26] *Ibid.*, at 461 and 462.

haunts our political discourse.[27] Herzog's claim reflects the ambiguities of the current international order where, in disregard of the hegemon's power, the 'frenzy of sovereign claiming' can simultaneously be interpreted as the last gasp of a concept that is bound to fade out.[28]

But has Herzog provided the reader with convincing arguments for his call to bury sovereignty? To answer this question, I will first outline Herzog's account of sovereignty. Second, I will rely on insights from the works of the German historian Reinhart Koselleck on conceptual history and present sovereignty as a basic concept (*Grundbegriff*) with inherent ambiguity in order to contrast such an understanding of sovereignty with Herzog's account. To demonstrate why it is important to take these ambiguities into account, I will revisit two alternative narratives of sovereignty to argue that sovereignty is neither obsolete nor confused, and that eventually it would be more pernicious to discard the concept of sovereignty instead of engaging with it and confronting diverging conceptions thereof.

2 Herzog's Account

Don Herzog's book is not a book on theories of sovereignty. Instead, it is a book about actual political struggles, practices and problems for which – he thinks – sovereignty failed to offer appropriate solutions. Over a span of almost 500 years, he zooms in on episodes in which political actors in the Anglo-American world have fought over sovereignty, instrumentalized the classic conception and eventually transformed it into something that is limited, divided and accountable. In that process, sovereignty rather aggravated conflicts instead of mitigating them and – according to his account – changed its nature to such an extent that contemporary political arrangements can no longer be meaningfully described by the term. His vibrant language and the novel-like style in which the events unfold make the book a good read.

Herzog starts his story in Chapter 1 with a vivid account of the horrors of the European wars of religion which he considers to be 'the decisive context for the emergence of the theory of sovereignty'.[29] In reaction to these disruptions, early modern theorists, such as Bodin, Hobbes, Grotius or Vattel, developed the classic theory of sovereignty as a way to restore social order. Vesting the supreme authority in the monarch, sovereignty became an instrument of state building. But the classic theory of sovereignty remained a political idea that was never fully reflected in actual politics, or even worse, was one that according to Herzog, 'ha[d] things all wrong'.[30]

In Chapter 2, Herzog turns to political struggles that resulted in an understanding of sovereignty as limited. The confrontation between King Charles I and the English

[27] For this observation, see also Fassbender, 'Die Souveränität des Staates als Autonomie im Rahmen der völkerrechtlichen Verfassung', in H. P. Mansel *et al.* (eds.), *Festschrift Erik Jayme*, vol. II, (2004) 1089, at 1100.

[28] Johns, *supra* note 22, at 7 and 8.

[29] Herzog, *supra* note 1, at 16.

[30] *Ibid.*, at 90.

Parliament serves as a test to prove that the theory of unlimited sovereignty in the disguise of absolutism soon 'looked repellent' and 'no European state ever attained full sovereignty as described by the classic theories'.[31] Next, Herzog focuses on the American Revolution to show that reliance on sovereignty arguments fuelled conflict between the American colonies and Britain. Yet, he also demonstrates how in the course of these struggles limited government was firmly established in the US Constitution.

The potential for sovereignty to create conflict is the recurring motive in Chapter 3. According to Herzog, the idea of sovereignty being indivisible impaired the capability of different political actors to conceive of more viable political solutions for distributing political authority between them. The chapter starts with the American struggle over independence. While Herzog does not claim that the idea of sovereignty 'explains the American Revolution', he submits that 'sovereignty enthusiasts on both sides of the Atlantic helped polarize the debate. They made conciliatory measures offered by those who hoped to muddle through seem unacceptable, even incomprehensible. And all because of the conviction that sovereignty must be indivisible'.[32]

Herzog highlights further episodes of US constitutional history – the debate over the ratification of the US Constitution as well as the Civil War[33] – to demonstrate the extent to which debates over the sovereignty of the American states continue to stimulate conflict. In his analysis of US constitutionalism, he makes a plea to embrace the challenges that federalism and the delineation of federal competences create. In the last part of Chapter 3, Herzog extends the claim that sovereignty arguments hinder the search for practical solutions to disputes over membership in international institutions, including the League of Nations, the United Nations and the EU with regard to Brexit.

Chapter 4 explores to what extent political struggles made 'sovereign actors legally accountable'.[34] Again, the chapter starts with King Charles I and focuses on the 'regicides trial', then fast-forwards through American constitutional history from John Adams to Richard Nixon and Bill Clinton to analyse structural parallels and differences in arguments about the accountability of kings and presidents. Herzog then singles out two central US Supreme Court cases – the 1793 *Chisholm v Georgia* case[35] and the 1831 *Cherokee Nation v Georgia* case[36] – relying on the first case to critically engage with the concept of sovereign immunity before US courts and, with the second, criticizing the use of sovereignty language in efforts for guaranteeing the equality and dignity of Native Americans. The remaining parts of the chapter question diplomatic immunity and uses of the sovereignty argument in international relations.

[31] *Ibid.*, at 77.

[32] *Ibid.*, at 113.

[33] For issues of race and racialization in Herzog's book, see J. Gathii, 'Burying Sovereignty All Over Again: A Brief Review of Don Herzog's Sovereignty RIP', *EJIL: Talk!* 7 July 2020, https://www.ejiltalk.org/burying-sovereignty-all-over-again-a-brief-review-of-don-herzogs-sovereignty-rip/.

[34] Herzog, *supra* note 1, at 164.

[35] SCOTUS, *Chisholm v. Georgia*, 2 U.S. 419 (1793).

[36] SCOTUS, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

In his final chapter, Herzog engages with more theoretical takes on sovereignty and disagrees with three alternative readings that are relevant to the Anglo-American discourse. First, he claims that popular sovereignty is irrelevant for his argument because it explains the legitimacy of government. Second, he rejects definitions of sovereignty that conceive of the concept as a bundle of rights ascribed to the state. Third, he convincingly deconstructs Carl Schmitt's approach, for whom sovereignty indicates the competence to decide on emergency situations, as an 'echo of the classic theory'.

Herzog's book offers a lively account of political struggles over sovereignty. But his story is more or less confined to episodes from Anglo-American history and – apart from some references to Bodin and Schmitt in particular – does not engage with any other account of sovereignty. Yet, despite this selective take, he raises a general plea to 'retire the concept'. This call to bury sovereignty rests on a claim of historical contingency. Herzog isolates the classic conception of sovereignty as formulated by Bodin and Hobbes from any earlier and any later development[37] and rejects the idea that concepts – or at least the concept of sovereignty – can change their meaning over time without losing conceptual clarity or political relevance. He does not admit the possibility that while conceptions of sovereignty may have become outdated, the concept as such could well persist. This is problematic since sovereignty is confined neither to one historical period nor to one conception. And its evolution is not necessarily a progress narrative from the dark ages of wizards to the enlightened present in which it can simply be abolished. Instead, it combines different temporalities and diverging conceptions.[38] Therefore, very different understandings and normative evaluations of diverging interpretations of sovereignty coexist and, in a world where 'international power becomes more competitive and fragmented',[39] sovereignty's different temporalities and diverging conceptions matter, as they may bolster the multiple claims to legitimate allocations of power among the diverging actors. To understand how sovereignty creates these effects, it is helpful to think of it as a basic concept – a *Grundbegriff*[40] – in political, social and legal language.

3 Sovereignty as a *Grundbegriff*

The German historian Reinhart Koselleck defined *Grundbegriffe* as basic concepts that are 'highly complex, …unavoidable, ambiguous, controversial, and contested' because diverging actors aim to monopolize their interpretation.[41] According to Koselleck, such basic concepts are constituted by multiple temporalities: they consist of past meanings

[37] N. Walker, 'Of Babies and Bathwater: A Comment on Herzog', *EJIL: Talk!* 6 July 2020, https://www.ejiltalk.org/of-babies-and-bathwater-a-comment-on-herzog/.

[38] Cf. R. Koselleck, *Begriffsgeschichten* (4th ed., 2019), 86–98; Pernau, 'Neue Wege der Begriffsgeschichte', 44 *Geschichte und Gesellschaft* (2018) 5, at 23.

[39] A. Roberts, *Is International Law International?* (2017), at 289.

[40] On *Grundbegriffe*, E. Müller and F. Schmieder, *Begriffsgeschichte* (2020), at 29.

[41] Koselleck and Richter, 'Introduction and Prefaces to Geschichtliche Grundbegriffe', 6 *Contributions to the History of Concepts* (2011) 1, at 3.

and future expectations and thus create potential for movement and change. They can work 'both as causal factors and as indicators of historical change': they contribute to identifying change in as much as they may contribute to bringing it about,[42] and because of their contested nature they are often used in a polemical manner so that they possess a political quality.[43] In that sense, sovereignty represents a quintessential *Grundbegriff*.[44]

In many ways, Herzog provides an excellent diachronic analysis of one strand of sovereignty's conceptual history and its changing meanings over time. He demonstrates to what extent conceptions are the results of political struggle, and encourages present-day readers not to fall under the spell of a conception that is outdated, not the product of our own political doings and not appropriate for the political challenges with which we are confronted.[45] Indeed, in all episodes that Herzog describes, sovereignty contributed to a polarization of the debate but likewise all these episodes mark decisive steps in creating limited, divided and accountable government. In that sense, the evolving understanding of sovereignty corresponded to and pushed for a transformation of the democratic constitutional state.[46] Conceptual history demonstrates that 'political struggles are waged over the meaning of words';[47] contestations include narratives and are not confined to power and interests.[48] Therefore, it is eventually irrelevant that the classic theory of sovereignty was never fully reflected in actual politics. What is decisive is that sovereignty can be a site for contestation. It works as a foil against which new ideas and conceptions can be conceived of and articulated in political struggles. The aspirational character of the concept offered a foundation for reconceiving and reorganizing the European order in the 17th century,[49] and the extent to which it promoted constitutional development in the Anglo-American realm is demonstrated by Herzog himself.

However, what makes sovereignty so difficult to grasp is that past meanings and future expectations are neither fixed in their interpretation nor linear in their historical development. Therefore, for understanding how the basic concept of 'sovereignty' works, a diachronic analysis which Herzog offers should be complemented by a synchronic one which takes alternative visions of sovereignty into account. Herzog's failure to include alternative visions affects the force of his claim. I doubt that one can convincingly denounce the concept of sovereignty by focusing on one narrative and

[42] Koselleck and Richter, *supra* note 41, at 8; Koselleck, *supra* note 38, at 67–68, 99.

[43] Egner, 'Begriffsgeschichte und Begriffssoziologie', in A. Busen and A. Weiß (eds.), *Ansätze und Methoden zur Erforschung politischen Denkens* (2013) 81, at 94 note 90.

[44] There is an entry on sovereignty in O. Brunner, W. Conze and R. Koselleck (Hrsg.), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (2004).

[45] Herzog thereby fulfills the functions of conceptual history as described by Müller and Schmieder, *supra* note 40, at 38.

[46] Loh, 'Völkerrechtliche Souveränität', 60/61 *Archiv für Begriffsgeschichte* (2018/2019) 363, at 363.

[47] Koskenniemi, 'Conclusion: Vocabularies of Sovereignty – Powers of a Paradox', in H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (2010) 222, at 234.

[48] Hurrell, *supra* note 23, at 115.

[49] Loh, *supra* note 46, at 372 and 401.

criticizing other understandings as cartoonish wizardry, and thus expect that actors globally will stop invoking different understandings of sovereignty. To the contrary, ignoring other narratives risks misunderstanding and misinterpreting the current sovereignty frenzy and underestimating the role that a legalized conception of sovereignty continues to play.

Because of the ambiguous and contested nature of 'sovereignty' as a basic concept, political actors can use it in order to establish any interpretation of the locus and the legitimacy of sovereignty as a dominant one, since sovereignty as such does not set a normative standard: 'it can be used for good and for ill',[50] 'for admirable or non-admirable reasons'.[51] The normativity only stems from the accompanying adjectives – absolute, limited, divided, national. 'Sovereignty is never without an adjective.'[52] Thus, it oscillates between mostly negatively connotated forms of exclusion and positively connotated forms of emancipation, between its dark past as absolute and thus discretionary, and its promising future expectations for normatively desirable goals, such as autonomy, collective self-determination, independence and, eventually, equality.[53] This diversity is not reflected in Herzog's account, but it remains important for understanding why the concept of sovereignty persists today. In sections 4 and 5, I will therefore engage with two alternative conceptions, to show how they would affect Herzog's claim: one concerns 'sovereignty and the colonial encounter', the other attempts to 'legalize' the notion of sovereignty. Both require us to move out of Herzog's narrower focus on Anglo-American history, but precisely because of this, I submit that they enrich his portrayal of sovereignty and provide arguments as to why calls to bury sovereignty will most likely not succeed.

4 Sovereignty and the Colonial Encounter

An important case in point is the ambiguous and contradictory role of sovereignty in narratives told from the perspective of political communities in the non-Western world. This first alternative narrative engages with the entanglement between sovereignty and imperialism and emphasizes the contradictory effects of sovereignty as an instrument to both realize and resist hierarchization within the international order. However, Herzog does not engage with an analysis of sovereignty's colonial pedigrees in early modern times, and their structural continuities, because he considers this critical narrative to be anachronistic. I will argue that Herzog cannot convincingly rely on the anachronism charge to explain why he is sidestepping this approach: an awareness of sovereignty's different temporalities and its imprinted anachronism is germane to understanding why sovereignty with its emancipatory elements also works

[50] Koskenniemi, *supra* note 47, at 241.

[51] J. Goldsmith, 'Does Anyone Buy the Classical Theory of Sovereignty?', *EJIL: Talk!* 6 July 2020, https://www.ejiltalk.org/does-anyone-buy-the-classic-theory-of-sovereignty/.

[52] D. Philpott, *Revolutions in Sovereignty* (2001), at 17.

[53] Loh, *supra* note 46, at 364.

to resist a hierarchization of the international legal order and why calls for burying the concept will therefore not resonate among all audiences globally.

A *Sovereignty as an Instrument of Hierarchization*

According to Antony Anghie's critical account, a decisive conception of sovereignty dates back to the writings of Francisco de Vitoria. It was developed in the colonial encounter to deal with cultural difference, albeit in a hierarchical, excluding and thus imperialist way.[54] By analysing the difference in social and cultural practices of the Spanish and the 'Indians', Vitoria is said to not have addressed 'the problem of order among sovereign states, but the problem of creating a system of law to account for relations between societies which he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance'.[55]

In the positivist European understanding, sovereignty was equated with the European state to the exclusion of all other social and political entities. Thereby, from the very beginning, sovereignty offered justifications for both imperialist atrocities as well as long-lasting asymmetries in the international order. The challenge remained whether and, if at all, how non-European entities could acquire sovereignty. A narrative that is still embedded in contemporary international law was constructed according to which an evolutionary understanding of international law saw the sovereign European state as the future and normative vantage point of any development.[56] It is international law's discourses and practices on sovereignty 'that have mystified the contingent and violent origins of capitalism in Europe, have posited recent developments such as the centralized state as expressions of the inherent rationality and superiority of European culture, and have demanded their universalization'.[57] Basically, any other type of political organization was disqualified and not recognized under international law.[58] By emphasizing as much, the critical narrative exposes sovereignty as an instrument for expanding capitalism which in turn is considered to explain why the European conception of the sovereign state has so successfully been spread across the whole globe.[59]

This expansion required – from its beginnings – the construction of a deep divide between 'perfect European sovereignty' and 'a non-sovereign … non-European other'.[60] The way in which this hierarchization in the international legal order, was replicated by conceptions of sovereignty over time is skilfully demonstrated by Anghie. It culminated in the post-Cold War period of US American hegemony. Anghie reads the democratic peace theory as a claim to superiority of democratic sovereignty as compared

[54] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 29 and 102.

[55] *Ibid.*, at 16.

[56] *Ibid.*, at 102–103; Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599, at 606.

[57] Tzouvala, 'The Spectre of Eurocentrism in International Legal History', 31 *Yale Journal of Law and the Humanities* (2021) 413, at 430; see also N. Tzouvala, *Capitalism as Civilisation* (2020), at 44–87; R. Parfitt, *The Process of International Legal Reproduction* (2019), at 7–8.

[58] Anghie, *supra* note 54, at 102; Kingsbury, *supra* note 56, at 607.

[59] Parfitt, *supra* note 57, at 189, 202–203 and 219.

[60] Wheatley, 'Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines', 60 *History and Theory* (2021) 311, at 314.

to other political systems embedded in sovereignty. This claim reproduces patterns of international law reaching back to early modern times.[61]

In the post-Cold War period, legal and quasi-legal concepts such as rogue or failed states, but also good governance and state building, conditionalities in development policies and the Responsibility to Protect (R2P) doctrine, undermined sovereign equality.[62] These concepts were entangled with and reproduced colonial metaphors about barbarism and savagery, and served to justify the interventionism of the period.[63] The problematic progress narrative related to a European understanding of sovereignty re-emerged when intervention aimed at 'transforming the inferior non-democratic state into a proper functioning democratic state'.[64] Thereby, in particular, US politics promoted a stern hierarchy in the international legal order.

B *A Charge of Anachronism?*

This critical narrative about hierarchization does not feature in Herzog's account. Herzog addresses the relationship between sovereignty and the colonial encounter only indirectly through the lens of US constitutional history. Thereby, he deals with race and racialization, for instance, in regard to the American Civil War and the fight over slavery, and in the context of the 1831 US Supreme Court case *Cherokee Nation v Georgia*. However, he does not engage with earlier colonial encounters outside US history or its present-day emanations except for a short reference to the normatively flawed concept of 'failed state'.[65] In response to James Gathii's criticism in the *EJIL: Talk!* book symposium,[66] Herzog acknowledges that 'the slave trade was already underway as the wars of religion heated up, and yes, you can find people trying to make sense of what Europeans were doing to Africans'.[67] However, he attributes the impact of sovereignty to 'the oft-racialized domination of one country by another' of later centuries. This is a somewhat surprising assessment in view of Anghie's insights. Herzog's approach is 'partly' owed to 'chronological reasons' – an argument which in turn recalls the criticism voiced by Ian Hunter towards Anghie's work. Hunter accuses Anghie of 'anachronism and "presentism"'[68] because Anghie does not sufficiently take the historical context into account: Anghie is said to 'project

[61] Anghie, *supra* note 54, at 310–311; cf. Anghie, 'Rethinking Sovereignty in International Law', 5 *Annual Review of Law and Social Science* (2009) 291, at 303.

[62] Krieger, 'International Legal Order', in T. Risse, T. Börzel and A. Draude (eds.), *The Oxford Handbook of Governance and Limited Statehood* (2018) 543, at 548–550.

[63] Anghie, *supra* note 61, at 307.

[64] *Ibid.*, at 307 and 293; Kendall, 'Cartographies of the Present: "Contingent Sovereignty" and Territorial Integrity', 47 *Netherlands Yearbook of International Law* (2016) 83, at 100. Parfitt, *supra* note 59, at 4–5 criticizes the 'framing of state sovereignty as conditional [upon a set of supposedly universal individual rights]' as a way to legitimize various kinds of interventionism in disregard of sovereign equality. For the ambivalences of R2P, see also A. Orford, *International Authority and the Responsibility to Protect* (2011).

[65] Herzog, *supra* note 1, at 228 and 257.

[66] Gathii, *supra* note 33.

[67] Herzog, *supra* note 20.

[68] Hunter, 'The Figure of Man and the Territorialisation of Justice in "Enlightment" Natural Law: Pufendorf and Vattel', 23 *Intellectual History Review* (2013) 289.

a history of what jus naturae et gentium should have been or could have become, as opposed to a history of what it contingently happened to be'.[69] This criticism has led to a broader debate about the way in which historians and international lawyers differ methodologically in their assessment of the history of international law and its basic concepts[70] – a debate that also offers insights for assessing Herzog's claim that to have taken into account the earlier critical narrative of sovereignty would have been anacronistic.

First, the methodological dispute seems to subside. At least, in conceptual history a strong awareness has emerged for the need to reinterpret traditional conceptions of long-standing European basic concepts in the light of their global histories.[71] Such approaches aim to demonstrate that these basic concepts were also conceived of as legitimizing the 'civilizing mission' of the West.[72] Herzog's defence of anachronism to explain his reluctance to take into account alternative narratives of sovereignty fails for another reason: it assumes a clear distinction between the 'before' and 'after', which does not easily fit basic concepts as described by Koselleck. Conceptual history offers the insight that despite changes in the context in which a concept was conceived, structures may be transferable and persist.[73] Acknowledging the role sovereignty played in the early modern phase of colonialism allows the tracing of such 'structural continuities of empire into the present'.[74] Conceptual history thereby reflects or confirms what authors writing from a perspective of Third World Approaches to International Law have underlined for the history of international law. Moreover, because of the different temporalities inherent in basic concepts, such as sovereignty, different layers of time of different length and origin can simultaneously coexist within such concepts and exert relevant impacts.[75] Using a geological metaphor – familiar to the international lawyer[76] – Koselleck spoke about 'layers of time'.[77] In that sense, anachronisms are an essential characteristic of basic concepts, such as sovereignty. The different temporalities of sovereignty become particularly evident in the simultaneous call for its abandonment in the Global North, at least

69 Hunter, 'The Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations', in S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought* (2010), 11.

70 For a criticism of Hunter, see A. Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (Finalized June 2012) (IILJ Working Paper 2012/2, History and Theory of International Law Series) and Orford, 'On International Legal Method', 1 *London Review of International Law* (2013), 166, at 171–177; see also A. Orford, *International Law and the Politics of History* (2021); Tzouvala, 'The Spectre of Eurocentrism', *supra* note 57, at 427–432. For a meta view of the debate: Wheatley, *supra* note 60.

71 Pernau, *supra* note 38, at 10–17.

72 *Ibid.*, at 11 citing the example of U. S. Metha, *Liberalism and Empire* (1999).

73 Wheatley, *supra* note 60, at 325.

74 Cf. *ibid.*, at 318.

75 R. Koselleck, *Zeitschichten* (2000), at 9: 'mehrere Zeitebenen verschiedener Dauer und unterschiedlicher Herkunft, die dennoch gleichzeitig vorhanden und wirksam sind.'

76 Weiler, 'The Geology of International Law', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 547; see on the metaphor Müller and Schmieder, *supra* note 40, at 97.

77 Wheatley, *supra* note 60, at 325 also stresses the relevance of Koselleck's approach for understanding law and legal history.

since the 1960s, and its continuing relevance for states of the Global South to shun a hierarchization of the international legal order. Onuma has made these different temporalities explicit:

> For most of the non-Western countries that are home to some 90 percent of the world's population, the task of nation-building and state institutionalization began only after WWII. Against this historical background, people in non-Western societies do not necessarily share the negative perception of sovereignty held by many Western intellectuals. … If the study of international law simply denies the raison d'être of 'sovereignty,' this would mean that it does not listen to the voices of these non-Western people. … For those in developed countries, which have 'graduated' from the stage of needing the concept of sovereignty for establishing such mechanisms – i.e., from around the seventeenth to early twentieth centuries – 'sovereignty' may be an outmoded term. However, for the overwhelming majority of humanity, the twenty-first century will be the period of sovereignization of states.[78]

This perspective stresses the emancipatory conceptions of sovereignty: sovereignty linked to self-determination enabled independence and, through the concept of sovereign equality, became a significant legal instrument to counter the persistence of more or less hidden forms of continuing colonial domination. In the era of decolonization, for many academics and politicians from the Global South, sovereignty read through the lens of self-determination was a decisive tool in the fight against empire. Imperialism was challenged from within the legal system and not from the outside.[79] Nationalism as a form of self-determined sovereignty was expected to provide a sense of 'solidarity and unity and collective political agency' directed against colonialism.[80] Moyn sees a historic pattern in this response ranging from Latin American states in the 19th century via the Soviet Union after World War I to the process of decolonization. He claims that in these processes a conception of sovereignty as unlimited, undivided and unaccountable was promoted and – through this argument – demonstrates the persistence of different temporalities of sovereignty. As Moyn explains:

> By the same token, however, the value of self-determination made the sovereignty of the postcolonial states themselves absolute, impregnable, and unqualified. It was not, as sometimes today, that sovereignty implied responsibility to higher principles (such as human rights), but that a decolonizing international law imposed responsibility on former masters to cease and desist from empire in all its modes.[81]

[78] Onuma, *supra* note 14, at 281; he makes a comparable argument at 91: 'the twenty-first century will be an era of *nation state-building* for the most people in the non-Western world. The enhanced nationalism and state-centrism on the part of non-Western nations may work against the proper functioning of the international law of co-operation which is generally based on the "common values" and interests mostly advocated by Western intellectuals.' See also Koskenniemi, *supra* note 47, at 241; M. Koskenniemi, *International Law and the Far Right* (2019), at 28.

[79] Cf. Tzouvala, *supra* note 57, at 429; for an account of the uses of sovereignty in disputes between the South Asian 'princely states' and the British government in the 19th century, see Saksena, 'Jousting over Jurisdiction', 38 *Law and History* (2020), 409.

[80] Hurrell, *supra* note 23, at 124.

[81] Moyn, 'The High Tide of Anti-Colonial Legalism', 23 *Journal of the History of International Law* (2021) 5, at 17–18; this observation is also made by Saksena, *supra* note 79, at 452–453.

C *Resisting Hierarchization*

While I certainly do not want to argue in favour of the classic theory of sovereignty, sweeping aside any argument about the continuing relevance of sovereignty for audiences in non-Western states does not seem convincing either. Eventually, Herzog's claim is oblivious to the emancipatory power of sovereignty and its (limited) potential as a legal means to resist a hegemonic hierarchization of the international order.

In his blog response, Herzog remains critical of the emancipatory narrative of sovereignty and suggests turning to different types of arguments instead of invoking sovereignty: 'And third-world actors have plenty of resources to assert their independence, equality, and full dignity in the community of nations, to denounce exploitation and contempt, without huffing and puffing about sovereignty.'[82] TWAIL authors share the perspective that the use of conceptions of sovereignty may have done more harm than good: it is seen to contribute to the 'collapse of the radical potential of decolonization and the transformation of Third World sovereignty in a tool of protecting local autocrats'.[83] Also the current re-rise of 'sovereign claiming' seems to reflect the repetitive pattern of sovereignty as a shield for autocratic governments. Thus, Fleur Johns describes populist claims for sovereignty as a phenomenon of 'partisan power seized opportunistically, and sustained for the time being with the self-interested support of fractious elites: this seems to be characteristic of many national regimes'.[84]

But sovereignty remains Janus-faced, and Herzog does not take the role of sovereign equality sufficiently into account even if one merely considers the concept as one of the 'face-saving phrases in international politics'.[85] Sovereignty and sovereign equality counter the factual inequalities in the international order and, despite persisting incoherence, serve to protect weaker states against power asymmetries and hegemonic aspirations of the more powerful states.[86] In this regard, Herzog's rhetorical question about Article 2 para 1 of the UN Charter – 'What would change if we deleted *sovereign* and shifted the sentence to something like "of the equality of all member states?" Maybe nothing, right?'[87] – is suggestive but misleading. As Bardo Fassbender noted, it is the combination of sovereignty and equality of states that is decisive for the paradigmatic role of the concept.[88] The basic idea of state sovereignty under international law is as appealing to powerful states as it is to smaller ones. In contrast, as a legal rule, equality of states works to limit the claims and ambitions of Great Powers and has therefore recurrently been challenged by such powers, in

[82] Herzog, *supra* note 20; see also Herzog, *supra* note 1, at 228.

[83] Tzouvala, *supra* note 57, at 433 with reference to A. Getachew, *World-Making After Empire: The Rise and Fall of Self-Determination* (2019).

[84] Johns, *supra* note 22, at 8.

[85] Moyn, *supra* note 81, at 19 referencing P. Corbett, *Law and Society in the Relations on States* (1951), at 264–265.

[86] On the ambivalence of sovereign equality: Kingsbury, *supra* note 56, at 599–600 and 623; Onuma, *supra* note 14, at 95–96.

[87] Herzog, *supra* note 1, at xii.

[88] Fassbender, 'Art. 2 (1) UN Charter', in B. Simma *et al.* (eds.), *The Charter of the United Nations* (2012), paras 2 and 47.

particular in the 19th century.[89] Here, the traditional conception of external sovereignty as independence paves the way for legally conceiving of all states as being equal because, despite factual differences, all states enjoy the same legal status of being sovereign. Thereby, sovereign equality counters any older claims of formally organizing international relations on the principle of hierarchy.[90] For many, sovereignty and related legal concepts, such as immunities, which Herzog criticizes, work both as a shield to protect 'freshly and hard-won independence' and as an enabler to participate in international law-making processes.[91] As a legal principle, sovereign equality furthers international justice, albeit with constant setbacks[92] and if only as a shared minimum standard.

Herzog's denouncing of the concept of sovereign equality suggests a certain lack of awareness of the effects of US hegemony on the international order. Thus, his claim that armed intervention in the federal state is basically the same thing as armed intervention in the international order[93] is striking. The juridical concept of sovereign equality is a major instrument for weak states to gain protection in the international legal order against the factually more powerful hegemon. This external juridical function of sovereignty is not mirrored in the constitutional framework of divided powers in the federal state. Without engaging with hierarchization in the international order, it seems questionable for voices from the Global North to call for a burying of sovereignty. It is hardly convincing to reduce sovereignty and sovereign equality to 'incantations'[94] in view of Western politics that have repeatedly pushed for hierarchies in the international order to the detriment of states in other regions of the world. Here, sovereignty and sovereign equality are more than incantations – they are legal instruments that exert counter-hegemonic effects. Actors, such as China, are well aware of both these policies and the space for movement that sovereignty creates as a site for contestation, and they utilize these insights in their competition for hegemony. Ridiculing China with references to witchcraft will not delegitimize these efforts. For both a convincing call and a critical assessment, Herzog would have needed to engage more thoroughly with the alternative visions of sovereignty that China relies on and to situate these visions in the context of narratives of sovereignty and imperialism. Eventually, Herzog sufficiently appreciates neither the coexistence of different layers of time in the concept of sovereignty, nor the way in which these different layers have been consciously used by actors in the Global South for their political struggles. In this respect, it remains open for whom the word sovereignty is actually a problem.

89 Fassbender, *supra* note 88, at paras 15 and 19.

90 Cf. Hurrell, *supra* note 23, at 123–124; Onuma, *supra* note 14, at 92; on earlier forms of hierarchization, see, for instance, Zhu, 'Suzerainty, Semi-Sovereignty, and International Legal Hierarchies on China's Borderlands', 10 *Asian Journal of International Law* (2020), 293–320.

91 E.g. Koagne Zouapet, 'Regional Approaches to International Law (RAIL): Rise or Decline of International Law?', *KFG Working Paper Series, No. 46* (2021), 34.

92 Anghie, *supra* note 61, at 299; see also Kokott, 'Sovereign Equality', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), at 57.

93 Herzog, *supra* note 1, at 148–149.

94 Herzog, *supra* note 20.

5 Normalizing Sovereignty by Legalizing It

According to a second alternative narrative, often told from the perspective of German constitutional thinking, sovereignty through a continuous adaption of its meaning to changing circumstances has been normalized in a process of legalization. For the lawyer, it is a common undertaking to interpret legal concepts dynamically in the light of changing circumstances and challenges and even to attribute new substantive meaning as long as the concept is structurally broad enough[95] and new meanings can be rationalized on the basis of legal methodology. Here legal approaches reflect the insights from conceptual history: while concepts are introduced for the purposes of a specific historical context, in their adaption over time, new meanings may be added, other meanings may be nuanced or disappear – but the concept persists.[96]

A *Dividing Competences and Allocating Power*

The second alternative reading offers a counter-narrative to Herzog's story in that it stresses the functions of sovereignty as an analytical tool to understand how both the constitutional state and multilevel governance work by focusing on technical doctrinal modes for allocating power. Unlike Herzog's narrative, it is explicitly told to demonstrate that sovereignty does not make the stakes for multilevel governance 'cosmic' as Herzog had claimed for all sovereignty talk,[97] but that from the time of the European wars of religion onwards, sovereignty could be conceived of as divided and constitutionally regulated in a multilevel system. In this respect, the specific constitutional shape of the Holy Roman Empire of the German Nation (*Heilige Römische Reich deutscher Nation*) is often (re-)interpreted as a forerunner to the EU. It allowed – at a certain point in time[98] – for the EU to be seen in a very long tradition of divided competences and as a legally conceived form of sovereignty, and to even

[95] Häberle, *supra* note 11, at 260: 'einzelne Rechtsinstitute, die sich in historischen Konflikten gebildet haben, angesichts veränderter problemorientierter Fragestellungen neu zu überdenken', and 261: 'geschichtlich-inhaltlicher Wandel eines strukturell offenen Begriffs.'

[96] Müller and Schmieder, *supra* note 40, at 98.

[97] Herzog, *supra* note 1, at 151, also at 107.

[98] Contrasting this narrative with the one presented by the 1910 North Atlantic Coast Fisheries Tribunal also demonstrates to what extent narratives of conceptual history are influenced by and depend on the narrative's vantage point. When the tribunal had to decide on whether the US could hold a servitude in Canadian territorial waters, it denied the idea that sovereignty could be divided. Such an understanding of sovereignty, noted the tribunal, was intertwined with the obsolete and isolated medieval context of the Holy Roman Empire which came closer to private law relations between territorial units holding dominium instead of imperium, i.e. a kind of quasi sovereignty. By contrast, the tribunal considered the modern state to be built on the concept of absolute sovereignty; *Reports of International Arbitral Awards (R.I.A.A.)*, Vol. XI. Permanent Court of Arbitration, North Atlantic Coast Fisheries Tribunal of Arbitration constituted under a Special Agreement signed at Washington, January 27th, 1909, between the United States of America and Great Britain, The Hague (1910) 104, at 182–183; Kingsbury, *supra* note 56, at 608.

consider 19th - and 20th-century ideas of absolute sovereignty to be the exception rather than the rule.[99]

The narrative told by German constitutional lawyers about the legalization of sovereignty emphasizes that the adaption of Bodin's theory in Germany took a different route than in France or England because the theory did not conform to the constitutional practices of the *Heilige Römische Reich deutscher Nation*. The Empire consisted of a conglomerate of power that was divided between the Emperor, and, in particular, the prince-electors, and the estates present in the Imperial Diet (territorial rulers and Free Cities) so that diverging competences were attributed to the diverging entities. With the Westphalian Peace, earlier constitutional practices of the Empire were formally codified, and the de facto authority of the estates as territorial units confirmed. However, neither the Emperor nor the estates gained absolute sovereignty. Despite some competence in the external realm and their factual power within their territories, the authority of the estates remained dependent on the Emperor and the Empire, and the estates were legally bound by the Westphalian treaties. Thus, the personalized centralistic conception of an undivided and unlimited authority never fitted the Westphalian order established within the Empire. Instead, that order was marked by a constitutionally regulated joint exercise of authority by the Emperor and the estates. Within the German territories, sovereignty after the Westphalian Peace was *de iure* layered and divided and to some extent even accountable. This unique situation made it necessary to depersonalize the concept of sovereignty and attribute it to a legally constituted community. In this narrative, sovereignty became a tool for the legal ordering of power and the attribution of competences to different actors.[100] What is more, politically speaking, the use of the concept of sovereignty subsequent to the Westphalian Peace was not about state building as claimed by Herzog[101] but about destabilizing the existing authority structures of the Empire, the Emperor and the Pope, and to counter their 'universalist claims for authority'.[102]

Based on this narrative, sovereignty as a legal concept embedded in a constitutional framework allows us to differentiate where Herzog sometimes oversimplifies. For example, concerning the differentiation between external and internal sovereignty, Herzog claims that there is no significant difference in the way in which sovereignty works internally or externally, but stresses the structural similarities. Admittedly, there are ample academic comparisons, for example, between the EU and federal states. At a bird's eye view, there are also structural parallels in the way legal conflicts

[99] In the first decade of the new millennium, such a reading of sovereignty was offered by several authors in German constitutionalism, including U. Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (2004) and B. Fassbender, *Der offene Bundesstaat* (2007). E.g. Fassbender, *ibid*, at 443: 'In der Völkerrechtssubjektivität der deutschen Länder hat sich vielmehr jene geschichtlich tief verwurzelte föderale Vielgestaltigkeit der deutschen staatlichen Verhältnisse behauptet, die nur im Überschwang des Nationalismus des neunzehnten und zwanzigsten Jahrhunderts zeitweise vergessen war oder unterdrückt wurde.'

[100] Schliesky, *supra* note 99, at 80–90; see also K. Lascurettes, *Orders of Exclusion* (2020), at 60.

[101] Herzog, *supra* note 1, at 48.

[102] Lascurettes, *supra* note 100, at 59 and 61–65.

between different orders are mitigated, including through the principle of subsidiarity or claims of hierarchy. However, a closer look reveals that multilevel governance requires differentiation. For example, Herzog treats the UN and the EU pretty much in the same way when he raises the question: 'Transfer sovereignty to a world government?'[103] Although he argues that 'there is no reason to conjure up an all or nothing choice',[104] his simple answer to the challenges the classic theory of sovereignty presents is to bury the concept. While the political equation of the EU with the UN in political rhetoric is indeed often fostered by sovereignty talk which ignores the legal details, it remains analytically important to differentiate between diverging legal constructs and their interaction with sovereignty and not to throw the baby out with the bathwater. From the perspective of the German constitution, for example, a clear legal differentiation between membership in the UN and membership in the EU has been carved out in doctrinal discourses. Membership in the UN and its collective security system is based on Germany's consent to limitations upon its sovereign powers. By contrast, membership in the EU entails a transfer of such sovereign powers. In the latter case, the German constitution allows the opening up of the national legal system to the direct effect of EU law and scales back its own exclusive claim to control. Thereby, the constitution allows for EU law to be accorded primacy of application over national law. Thus, the legal effects of membership in the EU reach much further than the effects of membership in the UN, which in turn has led to significant differences in the applicable procedures for transferring or limiting sovereign powers, in the implementation of the respective obligations and in the extent of domestic judicial control. Eventually, these domestic constitutional provisions only mirror the diverging designs of both institutions on the level of international law. Contesting far-reaching powers of the EU cannot and should not be equated with contesting powers of the UN.

B *Interrelations Between Popular Sovereignty and State Sovereignty*

From the internal perspective of the German constitutional state, the legalization of sovereignty in the second half of the 20th century could be seen as a response both to the exaggerated understanding of sovereignty in the monarchical national state, i.e. the German Reich, as well as to the experience of the totalitarian state.[105] In a constitutional democracy, sovereignty is expressed in rules governing the allocation of competences to particular offices of the state, and political and societal conflicts are solved within the legal order under the primacy of the constitution.[106] In that sense, popular sovereignty and state sovereignty remain intrinsically linked, which contrasts with Herzog's claim that popular sovereignty 'has its place in a different debate'. According to Herzog, 'it's an answer to the question, what makes government legitimate' but

[103] Herzog, *supra* note 1, at 158; on different approaches to foreign relations law in Germany and the US, see Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective', in J. Bomhoff, D. Dyzenhaus and T. Poole (eds.), *The Double Facing Constitution* (2020), 345–375.

[104] Herzog, *supra* note 1, at 147.

[105] Häberle, *supra* note 11, at 262.

[106] *Ibid.*, at 267.

does not mean that 'the people actually govern, still less that their authority is unlimited, undivided and unaccountable'.[107] In making this claim, Herzog neglects the idea of representation as an element of constitutional democracy.[108] Representation allows for the people to 'actually govern'[109] and 'become the sovereign person' in that democracy, and government by the people requires forms and structures for exercising power and authority in the name of the people.[110] In that sense, sovereignty is not the only concept related to the state that has long historical roots, that has changed over time, that crystallized in early modern statehood and that has continued to change until today. Just like sovereignty (as understood here), 'representation' constantly changes meaning, but for those wanting to understand how the constitutional state functions, it is difficult to bury.[111]

The interrelations between popular sovereignty and state sovereignty have been intensively explored in German constitutional thinking: with the Atlantic Revolutions, the contrast between princely sovereignty (*Fürstensouveränität*) and popular sovereignty (*Volkssouveränität*) became more pressing, even in Germany, where monarchist constitutionalism prevailed during the 19th century. In the ensuing political struggle, hegemonic understandings changed from princely sovereignty to popular sovereignty[112] based on the compromise to conceive of the state as a legal person to which sovereignty is accorded.[113] Against the monarchical system in Germany, the concept of the state as a legal person with an identifiable will allowed for this solution by attributing sovereignty neither to the monarch nor to the people but to the state. However, over time, what was first used to reconcile princely and popular sovereignty eventually led to a separation of popular sovereignty from the concept of the state's sovereignty.[114] This process also implied a depersonalization of power and sovereignty and created – in the words of Hermann Heller – 'a conceptual phantom labelled the state'. Heller therefore emphasized that every theory of sovereign state power had 'to be able to name a person of this sovereign power';[115] he concluded that 'whenever we speak of state sovereignty, the idea of popular sovereignty is also somehow implicated' because the people 'can be conceived of as a suitable sovereign person'.[116]

[107] Herzog, *supra* note 1, at 270 and 271.

[108] Herzog only brushes aside the idea of the *pouvoir constituant*; for a criticism of Herzog's argument in this respect, see Roth, 'Legitimacy in the International Order: The Continuing Relevance of Sovereign States', XI *Notre Dame Journal of International and Comparative Law* (2021) 60, at 70–73.

[109] A clear expression of this concept is included in Art. 20 para 2 of the German Constitution: 'All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.'

[110] For traditional conceptions of representation and surrounding controversies, see E.-W. Böckenförde, 'Demokratische Willensbildung und Repräsentation', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts* (3rd ed., 2005) § 34 para. 12.

[111] H. Hofmann, *Repräsentation* (2005).

[112] Schliesky, *supra* note 99, at 101.

[113] Häberle, *supra* note 11, at 265; Schliesky, *supra* note 99, at 98.

[114] H. Heller, *Sovereignty* (1927/transl. 2019), at 105; Schliesky, *supra* note 99, at 99.

[115] Heller, *supra* note 114, at 106.

[116] *Ibid.*, at 107.

6 Why Stick to a Legalized Conception of Sovereignty?

Now Herzog might reply that this whole German narrative is just another example that proves his point, namely that the traditional conception of sovereignty never really existed, not even at the time of the Westphalian Peace.[117] So, might Herzog be right, even for the wrong reasons? Is sovereignty not a superfluous concept that is outdated and dangerous, particularly in view of more recent attempts to reinvoke its extralegal and organic conceptions, and in view of manifold negative connotations of sovereignty which make it look 'instrumentalized and debased', or 'compromised, partially contracted-out' as Fleur Johns claims? Is the idea of a legally curtailed sovereignty that is accountable and divided not in itself outdated in times of transnational activities of subnational authorities and powerful private actors that take over more and more tasks within the public realm?[118] Even if it is used as a contested political concept, does sovereignty help us as an analytical category at all?

My sense is that sovereignty both as a basic concept and as an analytical category will stay with us for the time being. Norm research highlights that 'norm retrieval', i.e. the resurrection of older well-established concepts and conceptions (of 'zombies' in Herzog's words), 'offers strategic advantages compared to concocting new formulations of sovereignty that key audiences might not even recognize, much less embrace'.[119] 'Older norms are more likely to resonate with key audiences than novel, less-recognizable formulations.'[120] Since the reservoir from which to draw such resonating concepts is limited, actors with hegemonic aspirations will be prompted to rely on the resonating concept of sovereignty. The different layers of time and meanings of sovereignty make it a useful instrument for states and other actors which seek to call into question the existing international legal order, and to promote new approaches that better reflect their interests and values.

Moreover, one may also think of more conceptual reasons why sovereignty continues to exert such a strong influence on how we think about the international order. The philosopher Mathias Risse considers it to be morally justified or even morally required that any kind of reform proposal for the international order and any thinking about global justice remain within the limits of existing basic concepts because of the conceptual limitations we are subjected to: 'Epistemic constraints on utopian thinking keep us from taking actions towards a vision of the world order not based on states. We cannot theorize such a world order well enough for it to be action guiding.'[121]

[117] This is also stressed by Schliesky, *supra* note 99, at 120; see also Herzog, *supra* note 1, at 27.

[118] On these arguments, see Johns, *supra* note 22, at 9–10.

[119] Paris, *supra* note 24, at 464.

[120] *Ibid.*, at 463.

[121] M. Risse, *On Justice* (2020), at 370; for a related argument on sovereignty, see Kingsbury, *supra* note 56, at 600: '… if sovereignty were to be displaced as a foundational normative concept for the structure of international law, an alternative means to manage inequality would become essential. No such alternative is presently on offer. This article argues … that the lack of such an alternative provides a strong reason to adhere to the existing concept of sovereignty, however much it may be strained by practice and problematized by theory.'

According to Risse, this is not just a pragmatic consideration but a fundamental epistemic limitation on utopian thinking, so that not all normative stances are available for those reflecting on global justice. Risse aims to 'reconcile the state's moral relevance with its historical contingency' and thereby rejects all those ideas that aim to dissolve the state and argue in favour of other conceptions that aim to substitute state power.[122] 'At the time of conception there … is no good understanding of what it would be like to have the vision realized.'[123]

Against this background, the re-rise of extralegal and organic conceptions of sovereignty promoted by China, Russia and the Trump administration might make conceptions of sovereignty as divided, limited and accountable seem less ghost-like. It is not likely that organic or extralegal conceptions of sovereignty can simply be refuted by stating that they 'are pursuing unhappy, even repellent, political causes'.[124] What makes these claims attractive, at least among certain audiences, is the future potential that lingers on in the term sovereignty: such claims for sovereignty offer a 'roadmap of radical change for the future', 'a powerful anti-utopia, a call to action in order to avert a perceived unfolding catastrophe, first, by projecting as a warning an extreme version of the present and, second, by offering an alternative path to a better future'.[125]

However, as the political scientist Paris stresses: 'extralegal and organic conceptions of sovereignty do not lend themselves to collective responsibilities, or even to self-restraint. … Conceiving of sovereignty as an expression of organic nationalism, societal strength, civilizational destiny, or extralegal leadership does not limit hegemonic behavior. Rather, it appears to legitimize it.'[126] Against such an understanding, conceptions of sovereignty as limited, divided and accountable and their accompanying normative framework may not only contribute to countering hegemonic aspirations. They also offer a basis and a vocabulary for a minimum shared understanding of how to allocate, limit and legitimize power and competences in an increasingly competitive world order that remains an interstate order for the foreseeable future.

In the end, Herzog's metaphors do not work. One cannot get rid of sovereignty by turning it into a modern myth in the movies of Pixar and Disney because it has always been a myth anyway and exactly as a myth it has exerted extraordinarily pernicious but also beneficial effects. To the contrary, if there is one thing that we can learn from the wizards and witches in contemporaneous movies it is that we should 'always use the proper name for things. Fear of a name increases fear of the thing itself'.[127] In the Harry Potter series, the dangers stemming from Voldemort do not subside because people in the wizarding world do not call out his name but refer to 'He Who Must Not Be Named'. Altogether dropping sovereignty as a legally curtailed concept, despite its

[122] M. Risse, *On Global Justice* (2012), at 305.
[123] *Ibid.*, at 317.
[124] Herzog, *supra* note 1, at 162.
[125] Kallis, 'Populism, Sovereigntism, and the Unlikely Re-emergence of the Territorial Nation-state', 11 *Fudan Journal of Humanities and Social Sciences* (2018) 285, at 286.
[126] Paris, *supra* note 24, at 481.
[127] J. K. Rowling, *Harry Potter and the Philosopher's Stone* (1997), at 216.

recurrence as organic and extralegal, and the continuance of the social practices related to it, may eventually be more pernicious than to continue to support a legally curtailed version of it which needs explaining and analysing in view of everchanging circumstances.