Sovereignty and the Rule of Law

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Abstract
The primary concern of this paper is to examine the source of power and authority in our political system with a view to determining where sovereignty resides in the state. It is a truism that the dynamics of power and authority in our culture have become so contentious that it forms the subject of highly valued and classical platforms and literature. But we must not lose sight of the fact that power and its control have been singled out as the most dominant fulcrum of enterprise leading to almost every one aspiring to possess them. Power and authority are so intoxicating that those who use them often tend to spill blood in their quest for its acquisition and control. In the socio-political arena, monarchs and politicians are all interested in how to attract power and authority and convert them to their own uses. In Africa generally as well as elsewhere, the case is quite obvious. The exercise of power and the dynamics of its transitions and transfers have become very obnoxious and controversial such that discourse on them becomes a welcome and timely development. The sit-tight syndrome to public offices by public office holders, the dying in power syndrome, the unconstitutional amendments and reforms of country's constitutions, the rampant bridge of rule of law and traverse of public trust and fund, the raw and stark-naked use of power and authority prevalent in our world, are all products of power intoxication. Hence this work seeks to x-ray and examine the source of political power and authority in our political system with a view to setting the axe at its right pole by identifying the place where sovereignty resides in a state.

Introduction: Concept Clarification

The term 'power' derives from the French word pouvoir, a derivative of the old French infinitive 'podir' which means 'to be able'. In Latin, the term corresponds to 'potestas' a derivative of the verb 'posse' meaning 'to be able'. Power says Russell (1927) is the production of internal effects. Tawney says it is the "capacity of an individual, or group of individuals, to modify the conduct of other individuals or groups in the manner which he desires." Hobbes (1986) conceives of power in terms of everyone agreeing to forego his or her rights and conferring all power and strength upon one person or an assemblage of persons "that might reduce all their Wills, by plurality of voices, unto one Will." Those who conceive of power in this sense tend to think that power is the abolition of rights of other people; hence they entertain the tendency to lord it over others. But Hume (1875 ed.) thinks that power depends on obedience. According to him, there would be no power worth fearing unless there were motives of obedience other than the fear of power.

On the other hand, the term 'authority' is used in two quite different ways. While one conceives of authority in terms of competence to make judgements which reasonable persons of lesser competence will accept as certainly or probably true, the other speaks of authority in terms of capacity to make choices on behalf of a group. In the first sense, one thinks of authority of experts, of scholars in their fields, and also of the teaching authority of the Church—each in its own domain and according to its own competence. In the latter sense, the

choice of authority specifies what those directed by the law ought to choose to do as cooperative members of the group.

The concept of sovereignty D.D. Raphael (1979) says simply means 'supremacy'. Supremacy implies autonomy, independence, or self-government. Sovereignty further entails supreme authority especially over a state. Independence refers to the right to self-government without interference from outside. For Bodin, according to Mesnard (1984), sovereignty is "the absolute and perpetual power of a Republic; i.e. the active form and personification of the great body of a modern state." In attempt to isolate the core issues inherent in the concept of sovereignty especially with regard to Raphael and Bodin, Nwoko (2006) writes:

> The state as represented by the sovereign has the right and duty of law making, which laws the sovereign is not bound to keep since they express his will. But they bind the subjects even if they do not have consent to them. But the sovereign representing the state is expected to be the custodian and respecter of the civil order and institutions. However, the sovereign is subject to the demands of the natural law, and the violation of it can make the subject not to obey any longer. In any case, the subjects cannot rebel.

Jeremy Bentham (1970) seems to have a different idea about the sovereign. In his work, Bentham conceives of the sovereign as "any person or assemblage of persons to whose will a whole political community owes loyalty and obedience." Like Bentham, Austin (1964) visualizes sovereignty in the Hobbesian concept whereby "it is one who is obeyed by all while he owes obedience to none"

Unarguably, Hobbes identifies the sovereign or sovereignty with the commonwealth. And this is the core of his absolutism; for he insists that 'sovereignty means authority in all spheres of state activity (not merely in some spheres)'. The sovereign is the one that takes up the person of the commonwealth hence there could be no limitation to the authority of the sovereign. He further calls the power of the sovereign "indivisible" and claims that the sovereign represents the person of the people and also bears private personality.

Having said this, it becomes obvious that sovereignty, generally speaking, implies the exercise of a political right and duty of a state from an unlimited sense of it. It is all about power and authority which a state has. In fact, the most dominant opinion is that power and authority are the most dynamic characteristics of state sovereignty. Hence they are also the most characteristics of every theory of dominations and control of a state over other people's wills. They are resources for control, manipulation and sanctions. It is all about assigning final authority to the state.

Why Sovereignty and the Rule of Law?

The motive for this discussion is prompted by the questions posed by D.D. Raphael years ago in his work '*The Problem of Political Philosophy.'* In this work, Raphael rhetorically asks:

> A much disputed question in political science is where the sovereignty of a state is located. Does it reside in a legislature which is empowered to make statutes that can override rules of common law or repeal earlier statutes? Or in a supreme court that can determine whether an Act of the legislature is constitutional? Or does it reside in the constitution itself, or in the body that is empowered to amend the constitution?

Apparently, Raphael rightly posed this set of questions from the perspective of political science. But is it really a legitimate problem of political science or a problem for political philosophy? My answer, no doubt, is that political philosophy remains the concept by which an individual or group of people adopt specific viewpoints regarding the duties of a

government and the way it interacts with the population of a nation, state or local region. Nwoko calls it a rational inquiry into all that concerns man and his life in his relationship with others in the state. And John Christman (2002) admits that central to political philosophy is the fact that it asks such question as what is the ultimate justification of political authority.

From this perspective therefore, one can rightly say that political philosophy is a normative discipline prescribing how power and authority in the state ought to be used rather than describing how they are used. Political science, I can say, falls in this latter group where it is concerned with the collective and descriptive explanation of political phenomena. Hence it is not a rational inquiry but a descriptive one. In fact, its interest is purely empirical and thus it is not normative.

The need for this explication is *ad rem* since our mission is to find out where sovereignty in the state resides. It is imperative however, that the perspective of this argument derives from that of political philosophy; hence it follows the critical evaluative method of beliefs, giving rational basis for accepting or rejecting them.

Granted that the activities of the state are divided among different bodies, how therefore, can it be justified that sovereignty in a state resides here or there? Should it be considered from a perspective of a separate body or from the point of view of a state as a whole? Or is it from the point of view of the rule of law?

Revisiting the Social Contract Tradition

The theory of social contract in its different forms generally confers absolute power and authority to the sovereign. This power of the sovereign includes the power to make laws, interpret and execute them. However, the identity of the sovereign is not yet clear.

Thomas Hobbes claims the sovereign could be embodied in 'one Man' or upon one Assembly of men'. What Hobbes wants to convey is that the social compact that secures and justifies the sovereign authority is not a contract between the citizens and the sovereign. For him rather, the sovereign cannot be bound by any contract or promise, so-to- say otherwise it would be to assume the presence of a third power, more powerful than both the sovereign and citizens, who could enforce such a contract, and there exists no such third power in the scenario.

Jean Jacque Rousseau (1987) appears to localize the power of the sovereign on the people who constitute the common wealth. Rousseau thinks it is only when society is arranged so that individuals can participate directly in the development of legislation can a type of sovereignty be established where a person 'obeys only himself'. By this, Rousseau advocates the right of the people. It is in them that sovereignty is to be located.

Jean Bodin believes that as the force of the people, the sovereign must represent the common interest of the state and not private or the individual person. And since all the force of civil laws and customs lies in the power of the sovereign, the sovereign has all the legislative and judicial powers. And in his final say, D.D. Raphael articulates this legal right and power of the people as well as the Hobbesian sense of sovereignty as legal authority.

What is Legal Authority?

Law simply means the body of rules that regulate and guide the conducts and affairs of a given society. D.D. Raphael states that the state is considered sovereign when its rules and laws have final authority that there is no appeal from them to any more ultimate set of rules. It is the rules of the state that override the rules of any other association. While the rule of any other association is subordinate to the authority of the state's rules, the sovereignty of the state is an expression of the state's unlimited supreme legal authority. Thus, to say the law of the state has supreme authority is not to say that it has no equals, or that it is the only final

legal authority in the world. States, no doubt, recognize international law which has its own independent form of authority. But to say that the state has sovereign or supreme authority means that its legal authority is not subordinate to any other authority while at the same time it is superordinate over the authority of other associations which carry on their affairs within the territorial boundaries of its jurisdiction. This is sovereignty from the legal point of view.

Some Objections to Legal Theory

Critics of legal theory would not accept the attribution of sovereignty to a state from a legal point of view. They would think that while this theory is doubtlessly of use to lawyers, it has little relevance to politics. Legal sovereignty, they would argue, is better called political sovereignty. If this is the case, why then would they think the concept of legal sovereignty is defective in the attribution of sovereignty to a state?

From the Perspective of Private Morality

The anti-legal theorists notably H. L. A. Hart (1987) has criticized legal theory of sovereignty from the point of view of private morality. According to them, legal theory, if taken alone, is defective in the face of private morality. Situations abound when an individual could claim final authority from his own moral point of view irrespective of the legal prescriptions. By this, he makes the law of a state subordinate to his own moral prescriptions. Therefore, legal sovereignty cannot be justified from appeal to moral conscience in moral situations.

Again, the anti-legal theorists would also argue that unless the law has a provision for a conscientious objection, the individual is legally not to disobey. This is because if he refuses to obey from the moral point of view, he is equally entitled from the legal point of view to be subjected to the penalties prescribed by the state for breaking the law. This needed subjection cannot be achieved from law or legal sanction alone except if there is a coercive power, a threat of force; hence they advocate for power theory of sovereignty.

Power Theory of Sovereignty

Sovereignty, when understood from the perspective of coercive power of a state in discharging its unlimited political rights and duties, is known as power theory of sovereignty. The power theory is the view that sovereignty consists in supremacy of coercive power of a state, that is to say, of power sufficient to allow a state to formulate and carry out its policies without having its freedom of action limited by any other body capable of exercising power. In the face of legal sovereignty, power theory is also called political sovereignty. The reason for this preference is that power theory recognizes the insufficiency inherent in legal theory. It is the view that the rules and the laws of a state are enough to command obedience without the presence of coercive power to back its authority or enforce them or the ability to do so without the threat of force. Hence power theory recognizes that the superior power of a state is the power of force or arms.

The concept of power as applied to this theory is far from mere ability to do things as in will power. Onyeocha argues that the coercive import of this power when A has power over B implies that A can produce certain effects that he intends to produce in B's behaviour. From its social context, it refers to a specific kind of ability; the ability to make other people do what one wants them to do. D.D. Raphael, once again, indicates that this ability can come in different ways except that the prominent among them is such that one has the strength to make things unpleasant for others if they refuse. Thus power by threat of force is a capacity of an individual or group of individuals to modify the conduct of other individuals or group in the manner which he desires.

The reason why the power theorists go for this view is that any association or community may claim to be a final authority from its own point of view and any individual may claim the same from his own judgement of what he ought to do as we see in the legal theory. But what really counts however, is the power to enforce such a claim. They dwell in the fact that it is only the state that has such a coercive power to enforce its claims.

Power theory has been criticized from the point of view of necessity and sufficiency in substantiating a state's claim to supreme authority. From the point of necessity, the criticism states that supremacy of coercive power is not always necessary to substantiate a claim to supreme authority. This criticism recognizes that from the perspective of internal practises, or other groups and association within a state's jurisdiction, although one can consider the effectiveness of a state's claim to superior power through the force of arms but this is not always necessary.

Since it is not possible to get in the present-day world a single state that commands complete freedom of action over her subjects, it is not necessary that the state should always use the threat of force or force of arms at all times to demand obligation from her subjects. Even in the face of international relation, each state is therefore limited by a balance of power as comparable to the territorial limitation on legal sovereignty. This means that the legal authority of each state is confined to its territory and is balanced by the equal authority of other states in their territories.

From the point of view of sufficiency, the criticism of power theory continues to say that coercive power of a state over other bodies within its jurisdiction alone is necessary but not sufficient to substantiate claim to sovereignty. When a state employs the threat of force as the only means to command obedience and substantiate its claim of authority, the state is bound to fail because not at all times are coercive power necessary and irresistible. In the relationship between man and man, no one person and no body of persons is in the position of being able to exercise irresistible power everywhere all the time; and this fact is what makes the possession of power insufficient for political dominion. When people obey the rules and laws of the state out of fear of sanction, what happens when the threat of force is no more? And it is not to be supposed that at all times, the threat of force will be in force.

Power and Authority as Coextensive with Sovereignty

The dynamics of power and authority are quite intriguing. Onyeocha defines authority as the quality by virtue of which persons or institutions make laws and give orders and expect obedience for them. In another place, he calls authority "a moral factor...present only in its symbols...not by sheer force." While power in the sense of ability or capacity to make thing happen is acquired, authority is conferred. Thus one may have acquired a power to do something but cannot do it because the authority is not yet conferred. In this sense, it is not enough to have power, it is, above all, important to have authority. Authority gives meaning and import to power otherwise power without authority becomes coercive and arbitrary.

Power is by nature coercive, inherent of force and threat. Authority, on the other hand, is not except when associated with power. Because authority is by nature a moral virtue, to have authority to do something is to have the right to do it. A claim to authority may be acknowledged for different reasons. One reason that is mostly applied is the effective exercise of power. This is the truth that lies behind the theory that power substantiates authority.

The Place of Humans in a Political Society

Human beings remain always political animals. And they can only realize themselves fully in a well-organized political state. Aristotle says that the state or society came about as a means of securing life itself, it continues in being to secure the good life; it truly exists with

the great aim and end as the perfection of its members, living together for mutual complementation. Thomas Hobbes recognizes human's freedom and right to everything in the state of nature but such an uncultivated freedom landed humans into trouble; hence the emergent anarchy and insecurity where humans are wolves to themselves (homo homini lupus). Thus a remedy was sought in the social contract. John Locke (1963) agrees with Hobbes (1986) that natural rights existed in the state of nature but that the social contract or the commonwealth (community) was not invented as a leviathan of all, but it came up as a good umpire to maintain order in the distribution of properties. Jean-Jacque Rousseau (1987) was convinced that a human being was not brutish as Hobbes had depicted in the state of nature. The state of nature, for Rousseau, was peaceful until the introduction of property; but the remedy is sought in social contract where actions of human beings acquire a moral character.

Is Absolute Legalism the Answer?

There is no doubt that political society exists in order that humans may experience good life. And we know that the instrument with which the state uses to arrive at this is law. According to Njoku (2002, 2007) the temporal axis of co-ordination within which the common good is realised is called the legal order or law. Law is used to curtail the excesses of humans. Law is an ordering system of settling disputes which claims supreme authority. Law is an order of purposeful activity and relation between people in society. Bentham and Austin claim that law is a posited fact, a command of the sovereign where the sovereign is obeyed out of fear of threat of sanction for non-compliance, and habit of obedience. The sovereign is not bound by his commands, and disobedience to his commands attracts a sanction or punishment.

Both Austin and Bentham separate law and morality and endorse a utilitarian morality. The command of the sovereign determines the seat of sovereignty; no more, no less. The implication of this command theory of law to the civil society is that most times, people are drifted into doing what the laws says even when what the law says is morally iniquitous. Their moral rights as humans could be suppressed. Though Hart (1987), like Bentham and Austin, advocates for a separation between law and morality, for him, there is a limitless intervention of law in moral matters. Law is law and remains so always. D.D. Raphael is not comfortable that law is used to the detriment of morality. Hence he writes:

> When I am obliged to do something from fear of unpleasant consequences, I am simply obliged to act. But when I am obliged by the acknowledgement of authority, I am not only obliged to act but am under obligation to someone. My obligation to him corresponds to his right against me. The fictitious 'bond' not only limits my freedom of action but 'ties me to another person, who has the fictitious 'power' of a recipient right or claim. When I am compelled, the wielder of coercive power has a real power over me, but we do not say that I am under an obligation to him or that he has a right against me.

What D.D. Raphael is talking about here is that legal obligation ought to be generated from 'a certain rule of recognition' (using Hartian concepts) i.e. from an acknowledgement which an individual has of the custodian of law in the civil society. Thus, in the absence of law, there would be chaos, and people cannot settle disagreement except by setting up supreme authority to decide disputes as claimed by Hobbes is not always the case.

Where then is the Axe Placed? Conclusion

Going through legal theory and the challenges that confront it, we also entered into power theory. The criticisms of the two theories discussed plunged us into seeking for a better ground that can serve as a better import to our issue. The axe of law as command of the sovereign and generally backed up and enforced by sanction seemed to run through our observatory remarks. Consequently, we became aware that legal enforcement of social facts, as well as morals, is as necessary as it is important in every society and political system. However, law in this sense of coercion, we equally observed, cannot be sufficient and answers all questions in all cases.

Granted that both legal and power theories are necessary in the establishment of state sovereignty, it is defective in the face of morals and leads to legal extremism. Therefore, we came to a conclusion that 'rule of recognition' or acknowledgment of legal authority by the individual in the civil society can mediate the two theories we have earlier examined. In which case, we underscored the fact that state is sovereign from a general point of view and not either from coercive power alone or from legal power alone. This recognition further drove us to another conclusion that while the state should adopt coercive power to substantiate its claim to sovereignty, it is not in all cases that this should be so.

The 'rule of recognition' accepts that most people conform to authority not because of fear, sanction or unpleasant consequences but from the acknowledged fact that they have moral obligation to obey what the rules say. 'Rule of recognition' is a Hartian conceptual framework of elucidating the relationship between authority and obligation. Rule of recognition seeks to express that to some extent; there must be a willing, or at least an uncompelled obedience, which means an acknowledgement of authority existing between one who has authority and one who is under authority.

The laws of the state do indeed have the threat of force behind them; but if it were necessary to use those forces on every occasion when there was the possibility of disobedience to the law, the system would break down. In fact, this view recognizes that most people conform to the law because they recognize its authority and accept that they ought to obey rather than out of fear of punishment or sanction. In this case, when people acknowledge authority without the threat of sanction or out of fear of unpleasant consequences, then there is proper obligation. And by then, the substantiation of the claim of the sovereign would not have been from the effectiveness as in the use of coercive power but would depend more on the general acknowledgement of its authority for other reasons; moral included. Having gone this level so far, we therefore conclude this work recalling Njoku's suggestion that "To have obligation implies a relationship of authority and recognition of what the authority says as having a special significance to the person addresses; it is not acting under the threat of punishment". Here lies the essence of sovereignty and the rule of law.

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