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Table of Contents

Articles

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Regime change and the future of popular sovereignty[1]

Abstract

Today the notion of popular sovereignty is seen as the standard of political legitimation. However, there is an important theoretical discussion to be had about the helpfulness of this notion since it is not clear who constitutes the 'people' or whether 'the people' possess the necessary agency in order to enact sovereignty. This discussion takes on practical interest in light of recent popular struggles for democracy, as evidenced by the Arab Spring of 2010-12 as well as the uprisings in Syria. This paper seeks to discover how far these popular revolutions of the early 21st century can be understood as conforming to or diverging from the liberal notion of popular sovereignty derived from the dominant social contract model.

Keywords: *Regime change, popular sovereignty, the people, democratic legitimacy.*

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Introduction

Popular sovereignty is the doctrine in political theory according to which government is created by, and is subject to the will of the people. It is 'the people', not a monarch, religious leader or other absolute ruler - who are the ultimate authority and source of political legitimacy. The people are understood to be the last court of appeal and the body, which ultimately legitimizes all political institutions and governmental power.

The philosophical justification for this view was laid by the social contract tradition through the works of Hobbes, Locke, Rousseau and Suarez who despite their vast differences each postulated that no law or rule is legitimate unless it rests directly or indirectly on the consent of the individuals concerned. The American War of Independence and later democratic revolutions in Europe then make this idea into a political reality. Subsequently, the notion of popular sovereignty becomes the political norm in the Western World from which other understandings of legitimate political authority such as monarchy or oligarchy are, at best, considered to be deviations and, at worse, abuses. Struggles for post-colonial independence, with greater or lesser degrees of success, also attempted to recreate the same Western model of political sovereignty, similarly so with the post-communist states of Central and Eastern Europe after the regime changes of the late 80's and early 90's of the twentieth century. Indeed it would not be an exaggeration to say that in today's liberal democracies, popular sovereignty is seen as the standard of political legitimation *par excellence.*

However, the idea is beset with problems. Contemporary democratic political theory is at something of a loss as far as the notion is concerned. Many scholars have questioned whether the notion of popular sovereignty is indeed helpful since not only is the indeterminacy as to who constitutes the 'people' (Hazlitt, 1991), but there are also reservations about whether 'the people'

possess the necessary agency in order to enact sovereignty (Morgen, 1988). These theoretical issues become particularly pressing in contest of recent popular struggles for democracy, as evidenced by the Arab Spring of 2010-12 as well as the uprisings in Syria which followed. This paper will seek to discover how far these popular revolutions of the early 21st century can be understood as conforming to or diverging from the liberal notion of popular sovereignty derived from a social contract model.

The creation of popular sovereignty

Before looking at how far recent people's revolutions are similar or dissimilar from those of the past, it behoves us to consider anew the grounds upon which the notion of popular sovereignty was created, how it became a basis for the liberal democracies of the Western World, and how this theoretical notion is manifest in concrete political practice. Moreover, we need to recognize, highlight and, as far as possible, alleviate the tensions and complications contained within that concept. In other words, we must trace out popular sovereignty's past and present in order to understand its future.

In terms of political theory one may speak of popular sovereignty in terms of two great traditions or trajectories: the liberal and the republican (Lupel, 2009, 29). The first of these derives from the writings of John Locke, in which the author maintains that once the exchange of rights between individuals has been secured in the social contact it requires a neutral arbiter to legislate and therefore protect these rights and expand the sphere of freedom (Locke, 1988). This legislative power was supposed to represent the people and if this power was abused the people retained the right, even the duty, to replace the legislative. However, he did not envision anything like a direct democracy, where the people would be called upon for regular political intervention and decision-making. The second tradition can be traced back to the work of John Jacques Rousseau who did understand the people as being entrusted with legislative power. He also saw the need for representation, but the legislative

was charged with discovering and upholding 'the general will', extending both the same rights and the same obligations with total equality (Rousseau, 1966). In other words, the legislative in Rousseau's model was much more dependent on the wishes of 'the people' than in the Lockean model.

Sociologically speaking, the notion of popular sovereignty, which began life as a theoretical construct used to explain political legitimacy, was later able to gain enough force to justify and actually bring about regime change in the centuries that followed. The first and most noteworthy instance of popular sovereignty legitimating a regime change from monarchy to democracy can be seen in the founding of the United States. Alexis de Tocqueville goes so far as to say that popular sovereignty is America's 'dogma and 'law of laws'. 'At the present day the principle of the sovereignty of the people has acquired in the United States all the practical development that the imagination can conceive. It is unencumbered by those fictions that are thrown over it in other countries, and it appears in every possible form, according to the exigency of the occasion. Sometimes the laws are made by the people in a body, as in Athens; and sometimes its representatives, chosen by universal suffrage, transact business in its name and under its immediate supervision.' (Tocqueville, 1966, Book I chapter 4).

However, America is by no means the only liberal democracy to take the idea of popular sovereignty seriously. Britain too began to give voice to 'the people' in the form of parliamentary sovereignty with the Reform Act of 1832 and the enfranchisement of women almost a century later (Jackson, 2011, 83). Germany similarly holds onto a strong conception of popular sovereignty. Indeed author Lars Vinx maintains, not without sharp criticism, that the German Federal Constitutional Court relies on a conception of popular sovereignty according to which 'a written constitution is itself legitimate, and thus has the power to legitimate ordinary laws enacted in accordance with its rules and constraints, if and only if it has been created by a constitution-giving act on the part of the

people as constituent power and continues to enjoy the people's tacit support' (Vinx, 2013, 102).

The aforementioned author takes exception to the notion that the people exist prior to and apart from all law, including constitutional law, and have the right to give itself whatever constitution they please, favoring a weaker version instead in which the constitutional law shapes the people as much as they shape it. However the commitment to uphold the ideal of strong popular sovereignty is shared by other nation states both in Europe and across the globe, with the countries of the former Soviet bloc and other relative newcomers in the adoption of liberal democracy being no exception (Krasner, 1999, 186-194).

Put differently, popular sovereignty is not a myth or merely a convenient trope to which politicians pay lip-service. The idea has had a very real influence not only on the hearts of men in order to bring about regime change, but it has had just as much impact in the later determination of legislation and construction of political institutions, not to mention, of course, its influence in the drafting of a plethora of constitutions and foundational documents (Lessard, 1999). In the American context, Bruce Ackerman is correct to argue that 'the Founders developed a distinctive form of constitutional practice which successfully gave ordinary (white male) Americans a sense that they made a real difference in determining their political future. This Founding success established paradigms for legitimate acts of higher-lawmaking that subsequent generations have developed further.' (Ackerman, 2014, 329).

Two persistent problems

However, despite its success, it must be admitted that from its inception the idea of popular sovereignty has struggled with two persistent difficulties. Having briefly sketched out both the philosophical and the historical

development of popular sovereignty, we can now move to the more critical endeavour of delineating the problems that beset this concept.

The first and perhaps greatest of these, one which has always haunted the concept, is that of how to transform the expression 'the people' from an abstraction into a concrete reality. As many scholars rightly point out there is a great deal of indeterminacy when it comes to deciding who constitutes 'the people'. 'Who are the American people?' asks Jackson, 'Does a segment of the population have a right to assert a separate and subsequent declaration of independence?' (Jackson, 2011, 80) Are they to be understood as a collection of specific individuals? But if so, then, which ones? Are they merely the aggregate of citizens of a given nation state? Americans may be inclined to give just such an answer. If not explicitly then at least in the sense that 'the people' of whom Thomas Jefferson speaks in the Declaration of Independence -- those by whom and for whom 'governments are instituted amongst Men, deriving their just powers from the consent of the governed' (US Declaration of Independence) -- are later interpreted by the Constitution as referring to citizens. But as Jackson again rightly asserts: 'the people must be constituted and organized by somebody' (Jackson, 2011, 82). One might go even further and say that 'the people' must first be 'named' by somebody as a people before citizenship status can be conferred on them. Indeed this is a *sine qua non* in the case of regime changes where a new independent state is coming into existence, since 'the people' at the moment prior to its founding are necessarily the citizens of a different state or political entity, presumably the one from which they wish to be released and not of that which they are trying to create. 'The American people' therefore had to precede 'American citizens'.

One may dismiss this as a chicken-and-egg problem, and argue that yes a 'baptismal moment' is required, but once 'the people' have been named and the criteria for their admittance have been set; henceforth 'the people' are synonymous with 'the citizens' of a given state. However this explanation is

also is unconvincing to anyone with even the most basic knowledge of America's democratic beginnings in which only a small percentage of the US populace was understood as having citizenship status and the rights that accompanied it. Notable, and embarrassingly, women and African Americans who together made up well over 50% of the population of the United States were excluded from citizenship, until their gradual inclusion with the citizenship clause of the XV Amendment in 1870 (US Constitution) and the enfranchisement of women in 1920 (Amendment IX of the US Constitution).

Moreover, what about numerous non-citizens who legally live and work within a given state, not just in America but also in other liberal democracies such as resident foreigners, children or the disenfranchised? (Hazlitt,1991,12). Should they be excluded from 'the people'? In an era of increasing immigration especially within the borders of the United States and the European Union, this ceases to be merely an academic question. Interestingly, Bruce Ackerman seems to offer something of a response, namely he presents 'a richly detailed story of the mechanisms by which the
Supreme Court eventually bends to the demands of social movements and changes its doctrines to accommodate legislation that the Court would previously have deemed unconstitutional...providing an incisive explanation of how constitutional law came to accommodate the exercise of legislative power, both state and federal, formerly considered at odds with the Constitution's text.' (Barnett, 2014, 2). Although Barnett agrees that Ackerman presents an accurate account of the evolution of constitutional law, he remains unconvinced that this evolution is a normatively legitimate expression of popular sovereignty.

However, even if the first issue were resolvable in the way Ackerman suggests and popular sovereignty were indeed malleable enough to admit changes in the constitution of 'the people' without any loss of legitimacy, a second question remains. While it is easy to understand how sovereign power and the decision-making authority that goes with it can be placed in the hands of the

one or the few, what does it mean for sovereign power to be in the hands of the many or indeed everyone? *Somebody* has to make actual laws and actual executive decisions, how can 'the people' as a collective do this? This is not a problem for democracy *per se* which talks in terms of the decisions of a majority based on regular, fair elections as well as occasional referenda and plebiscites. Is it not simply a pious fiction to think that 'the people' as a whole can have sovereign power, one that is ultimately no more helpful for actual politics than the concept of divine sovereignty which preceded it? Both the divine law-giver as well as 'the people' require some elite to first interpret their will and secondly, to do their bidding. Both tasks are, of course, easily open to manipulation.[2]

In his foundational essay on popular sovereignty, Harold Laski puts the matter quite succinctly and decisively: 'It is clear, in brief, that popular sovereignty if it means that the whole people, in all but executive detail, is to govern itself, is an impossible fiction' (Laski, 1919, 204). In other words, unlike the direct democracies of ancient Athens, we cannot avoid 'the device of representation' (Laski, 1919, 204). John F. Knutsen agrees with Laski that while popular sovereignty does not demand that the people directly influence decision making on every legislative issue. He believes that 'it is not possible to envision popular sovereignty without (at least) a form of semi-direct democracy' (Knutsen, 2011).[3]

Such a conception would naturally rule out the Hobbesian understanding of popular sovereignty, which can be thought of as merely a temporary affair. As

[2] That is why the Federalists insisted on a system of checks and balances in which the legislative, executive and judicial were pitted against each other, precisely in order to moderate excessive populism to which the legislative, as the most direct representative of the people would be prone. For more on this see Federalist 51 (Hamilton, 2003).

[3] Knutsen defines semi-direct democracy as 'a combination of direct democracy and representative (also called indirect) democracy. A semi-direct system is characterized by the people having delegated legislative powers to a parliament or other representative body, but having made this delegation revocable and limited. In addition to the legislature there must also be a mechanism allowing for the people to express its will directly.'

for Locke there is an exchange of rights between individuals in the social contract, but once this contract has been drawn up there is a hand-over of sovereign power to an absolute ruler who henceforth makes all the rules according to his own wishes, with the single exception that he cannot endanger the lives of those who vested him with power (Hobbes, 1994). We may not like or indeed want Hobbes's form of popular sovereignty, but it is possible to envision it. Indeed there is nothing logically incoherent about his reasoning. What happens when popular sovereignty understood as 'the authority of the final word (which) resides in the political will or consent of the people of an independent state' (Jackson, 2010, 78) is not democratic? In other words, what happens when the people freely consent to hand over sovereignty to an absolute law-giver or elite? This is an issue to which we will return, as we look as some contemporary struggles for popular sovereignty especially in the Middle East.

In recent literature, a number of scholars have tried to resolve the aforementioned problem by offering a more complex understanding of popular sovereignty. One amongst these is Yale Professor Paulina Ochoa Espejo who argues in a recent publication that democratic political theory has long had an erroneous understanding of 'the people'. According to her, we are suffering under two misconceptions; the first is that 'the people' is a cultural, ethnic or national construct, the second is that 'the people' is simply the majority of citizens. She forcefully argues for a third alternative – namely that the people 'should be seen as a series of events, rather than a collection of individuals'. (Espejo, 2011, 13) Like Ackerman she believes in the malleability of the concept of 'the people', which is shaped over time and has a different depending on the socio-cultural context.

Struggles for popular sovereignty in the new millennium: similarities and discontinuities.

Historically, of course, the relationship between popular sovereignty has always been one directional. As the notion of popular sovereignty has taken hold as a way of explaining and securing political legitimacy, so authoritarian or absolute forms of government have given way to democratic ones. If the people are the source and summit of political authority, this must be made manifest in their actual decision-making power, if not in the impractical form of direct democracy then at least in the form of representative or 'semi-direct' democracy, as Knutsen calls it. (Knutsen, 2011). This model was initiated with the American War of Independence, and has followed suite in Europe and increasing parts of the globe ever since. It has often been assumed therefore that this relationship could not be otherwise. Popular sovereignty and representative democracy must go hand in hand, in other words.

However, this is precisely what is being called into question today. If Espejo is correct that 'the people' is not just a fixed association of individuals but something that is constructed by social events and legal decisions, (Espejo, 2013) then it ought to be safe to assume that the desires of the people are also not fixed but they differ based on social, cultural and religious context. If this is true there is nothing at all to rule out the possibility of struggles for popular sovereignty, which will not end in a regime change towards liberal democracy with all the trappings of constitutionalism, but away from it. They could just as easily decide upon popular sovereignty of the Hobbesian sort, which ends in the mortal God of the Leviathan.

Take for example the uprisings of the Arab spring and the rise of fundamentalist Islam in the Middle East. Describing the fall of Mubarak's regime in Egypt, author Ege Ozyegin admits that these struggles for popular sovereignty have had a different outcome from the American and French

Revolutions that preceded them centuries ago. 'These uprisings are not yet revolutions, but remain as "bottom — up mass movements" that demonstrate the power of the people. However, interestingly the uprisings also show how their power is constrained. Until recently, the countries in the Middle East have changed to stay the same' (Ozyegin, 2015). Following Brownlee in his book *Democracy Prevention*, she seems to believe that the reason the popular uprisings that toppled the Egyptian dictator have ended in authoritarianism rather than democracy is that they this has served US foreign policy interests. The persistence of autocracy in the Middle East in other words, is largely due to America's support of authoritarian rulers over democratic governments made up of former opposition leaders (Brownlee, 2012). Indeed nowhere is this truer than in Egypt, which has shared a long-standing alliance with the U.S. Indeed many prominent U.S. political leaders are officially moving away from the previously unanimous stance of supporting regime change that results from bids towards popular sovereignty. Indeed when it comes to the Middle East these days many are happier to support authoritarian dictators than popular mass-movements.

This is not because dictators promise the U.S. lower oil prices in exchange for their support, but because 'recent history has shown that ...(this) opens the door for the kinds of chaos that sucks in American troops and creates problems worse than the ones the U.S. was trying to solve' (Seib, 2015, 1). And 'this worse problem', not just for the U.S., is that of the radical Islam which has been able to take hold in the region after the popular uprisings. As Sen. Ted Cruz put it: 'Assad is a bad man. Gadhafi was a bad man. Mubarak had a terrible human-rights record. But they were assisting us—at least Gadhafi and Mubarak—in fighting radical Islamic terrorists. And if we topple Assad, the result will be ISIS will take over Syria' (Seib, 2015,1).

And what if the blame for this situation is not to be placed with the U.S. and other Western countries for propping up authoritarianism, but somewhere else

entirely, namely at the feet of a rather naïve liberal understanding of popular sovereignty which always results in an American-style constitutional democracy of the republican variety? What if, as has earlier been mentioned, 'the people' are not all the same? What if they are not all equality-loving democrats but 'the general will' really does desire the establishment of the caliphate and the radical execution of Sharia law? Adam Lupel is correct to argue that in today's complex globalizing world we cannot take anything for granted, especially that what has been resulted in the context of Western liberal democracies, namely representative democracies that have resulted from the struggles of popular sovereignty, can be everywhere reproduced according to the same model. Indeed Lupel states that '*pace* Rousseau popular sovereignty has seldom if ever concerned the governance of unified societies, but rather struggles for power in divided societies (Lupel, 2009, 141).

His own response to this situation, following in the footsteps of Habermas and Held, is to develop some kind of transnational popular sovereignty, which is based on a cosmopolitan solidarity between peoples.[4] Paradoxically however, it seems that the truest current manifestation of what we might call transnational popular sovereignty although admittedly in a pathological form is not, as Habermas, Held or Lupel would have it, to be found in the European Union but in the Islamic State (ISIS).

Conclusion

In conclusion, it seems that today's struggles for popular sovereignty do not conform to the normal trajectory to which the Western world has grown accustomed. Of course we have focused only in a cursory way on the events in the Middle East, and not undertaken a comprehensive study in how regime change is occurring across the globe. However with that proviso in mind, enough has been said to at least undermine the previously thought

[4] For more on this see my previous work on the subject matter (Olearnik-Szydłowska, 2015).

unshakeable relationship between popular sovereignty and liberal democracy. Moreover, as has also been shown the philosophical and social context in which the notion of popular sovereignty developed and was able to assert itself in actual political decision-making and institution-building was highly culturally specific and it that it necessarily follows the same pattern everywhere. Indeed, perhaps Hobbes's realism was correct after all, that in situations of grave insecurity popular sovereignty exists only for a moment in order to name an individual or group as sovereign who when has absolute power and is owed absolute obedience by all.

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