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Delegating Sovereignty

Chapter 5: Governing Sovereignty: Negotiating French Absolutism in Europe

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1 Introduction

Chapter 5 of Martti Koskenniemi's monumental work of legal scholarship considers the construction of the modern state as the chief subject of modern public international law and invites us to revisit that experience in one of the major centres of early modern statecraft – France during the absolutist reign of the Sun King, Louis XIV. In exploring this theme, chapter 5 investigates the intellectual legacy of statecraft and *raison d'état* in the theoretical works of jurists and state officials such as Jean Bodin, Charles Loyseau, Jean Domat, Jean-Baptiste Colbert, the Cardinal Richelieu and the Chancellor Henri François d'Aguesseau. Yet, it also raises one of the most fundamental theoretical questions of public international law: Can sovereignty be delegated to an agent without losing it?

One of the many admirable features of this magnificent chapter concerns the close attention Koskenniemi pays to the novel techniques of French statecraft, such as commercial warfare, the obsession with demographic change and accurate 'calculation' in political decision-making, the creative methods of financing war and the innovative use of public law as an instrument for efficiently coordinating private interests for common benefit.[1] The use of such techniques has often been characterized as symptomatic of absolutism, by extending the control of an absolute monarch over his realm. But Koskenniemi's treatment actually seems to suggest just the opposite, by revealing a fragmented, pluralistic state under the rule of a monarchy desperately trying to maintain unity among aristocratic 'holders of customary privileges' in a religiously divided society that has emerged with fresh wounds from civil war.[2]

Indeed, Koskenniemi effectively dissolves the conventional picture of *ancien régime* France as a unitary and absolutist state under the complete control of an absolute sovereign, revealing instead the fragmentary and provincial condition of Valois and early

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1 M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), at 370, 377, 404.

2 *Ibid.*, at 350.

Bourbon France.[3] He rightly observes that what we now think of as 'France', as an indivisible unitary juridical person at international law, was still, even after Westphalia, relatively novel in this period, given the then-recent admission of formerly autonomous, quasi-sovereign dukedoms and principalities as provinces of the kingdom, such as Guyenne, Burgundy, Provence and Brittany.[4] Early modern French politics became a contest of political and religious forces running in contrary directions – on the one hand, the centripetal forces of royal authority gravitating towards the royal court staffed by bourgeois *officiers*, and, on the other hand, the centrifugal forces of local allegiances to provincial seigneurial elites asserting their customary privileges against the monarchy and bourgeois 'officialdom'.[5]

The period studied in Koskenniemi's chapter is often characterized as the 'Age of Absolutism', exemplified by the personal rulership of absolute monarchs such as James I, Philip II and, of course, the Sun King, Louis XIV. The internal fragmentation and localism of French politics, however, reveal the practical limitations of absolute rule for even the most skilled technician of *raison d'état*. As much as sovereigns may have wanted to rule their states by fiat and to present outwardly in matters of diplomacy and international law the illusion of a unitary will and legal personality, the feudal seigneurial privileges and practices continuing to shape the pluralistic constitutional structure of the early modern French state required the monarchy to act as an intermediary, coordinating and balancing private interests and strategically engaging in the mundane politics of coalition-building with local grandees.

2 Venality of Office

What Koskenniemi's account uncovers, then, is the pervasive fragility of France's supposedly 'absolutist' state – and with it, the plausibility of the traditional Westphalian myth of an international legal order constituted by indivisibly sovereign states. One question that we might ask Koskenniemi is *why* France remained so fragmented and fragile even during this period of absolutism.

One interesting answer he supplies throughout the chapter involves what Koskenniemi describes as the 'proprietary nature of lordship and office' and, more generally, a distinctively French 'proprietary understanding of public power'.[6] This understanding, he argues, was embodied in the principle that public offices, as well as the authority attached to them, could legally be held as private property as part of one's estate or *domaine*. In this way, public offices, like judgeships, could be bought and sold, used and abused, let and hired, contractually mandated, gifted, passed on to heirs and so on. Like any vendible commodity, public office could likewise be subject

[3] *Ibid.*, at 374.

[4] *Ibid.*, at 352–353.

[5] These themes are explored in J. R. Major, *From Renaissance Monarchy to Absolute Monarchy: French Kings, Nobles & Estates* (1994); Giesey, 'State-Building in Early Modern France: The Role of Royal Officialdom', 55 *Journal of Modern History* (1983) 191.

[6] Koskenniemi, *supra* note 1, at 355–356.

to ordinary legal rules governing commercial transactions. Feudal titles to land could be regarded as property of the feudal *seigneur* who held them. Even the kingdom as a whole could theoretically be regarded as the property of the king.[7]

Quite sensibly, Koskenniemi explains that the origins of this seigneurial system, intermingling private rights with public powers, can ultimately be traced to longstanding feudal customs in France's medieval past.[8] Early modern academic French lawyers of the *droit coutumier*, such as Charles Du Moulin, documented evidence showing that feudal *seigneurs* customarily treated their *seigneurie*, and the assorted *droits* attached to them (including even public functions of office such as the right to hold a court), effectively as vendible private property. The influence of this view was further exacerbated by the 'venality of office', the French royal practice of strategically selling public offices to wealthy private buyers as an additional lucrative revenue stream for the perennially cash-strapped monarchy.[9]

Viewing public powers and offices as vendible objects of private ownership, as early modern French lawyers did, left an indelible mark on the modern international legal imagination. It opened the way for lawyers to interpret the juridical relations between states, particularly with respect to fundamental rights of sovereignty, such as territorial rights and jurisdiction, explicitly as commercial transactions. Various *regalia* and *droits de souveraineté*, constitutive of statehood, could theoretically be purchased and sold, leased and hired, mandated, delegated, gifted or ceded, like any ordinary asset.

It must be stressed, however, that the venality of office and, more generally, the proprietary theory of office, were sources of deep controversy in French constitutional thought. One notable critic that Koskenniemi discusses in chapter 5 was the jurist Charles Loyseau whose work, developing this point, uncovered 'the distortion that venality had introduced in the government of the realm'.[10] As Loyseau put it in his *Treatise on Offices*, subordinate authorities such as magistrates or feudal *seigneurs* can never have anything more than a minor use-interest in the authority they hold. While 'mere exercise', 'use' or 'administration' are permissible to officers, the 'true ownership' of the public *imperium* is not.[11] Perhaps the same point might be made about conditional delegations of sovereign rights to international third-parties or international organizations and courts, who, like magistrates, are merely exercising 'borrowed' powers lent to them by sovereign states.

3 Bodin's Critique

The most notable critic of the venality of office was the Angevin jurist Jean Bodin, a critical source for Loyseau's own analysis of office. Bodin takes up about a third of Koskenniemi's chapter, and for good reason. His principal work of legal and political

[7] This was the principal thesis of H. H. Rowen, *The King's State: Proprietary Dynasticism in Early Modern France* (1980).

[8] See D. Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (2016), ch. 3.

[9] Koskenniemi, *supra* note 1, at 380.

[10] *Ibid.*, at 374.

[11] C. Loyseau, *Les Œuvres de Maistre Charles Loyseau* (1701), at 96 (*Offices* book 2, chapter 1, sections 8, 20).

theory, *Les Six Livres de la République*, is still regarded the canonical text on the concept of state sovereignty. While Bodin's influence on modern political theory is well known, it is worth stressing his influence on modern international law, through his direct influence on how jurists imagined sovereignty, as a juridical construction of the *ius gentium*, in largely Bodinian terms.[12]

Modern readers of Bodin still expect to find an outrageous defence of lawless absolutism in the pages of the *République*. But they won't find it.[13] And that is because one of Bodin's primary purposes in this work was to combat the seigneurial attitudes that led many of his contemporaries to view sovereign princes like *seigneurs* (*domini*) as if they *owned* the states and the people they ruled, with unlimited licence to do as they pleased – a style of governing that Bodin called seigneurial government.

Bodin's anti-seigneurialism, however, effectively placed strict limitations on a sovereign's scope of permissible actions with respect to its state. A recurring theme in Bodin's work, for example, concerns the question of alienation – whether the monarchy (or its agents) can sell or simply give away assets to others, including land in the royal domain. If it were really true that a sovereign king personally owned such assets, as defenders of the venality of office apparently believed, there shouldn't be any difficulty for a king to alienate royal assets.

But Bodin consistently opposed such venal practices. Indeed, he regarded the venality of office as inconsistent with the fundamental law of the realm which specifically prohibited the alienation of the domain. Nor was this an abstract academic question for Bodin.[14] He attended the Estates-General of 1576 as an elected deputy for Vermandois and advocated policies, especially on matters of royal finance, that alienated himself from the king's favour by stubbornly insisting on the inalienability of the royal domain, thereby denying the proprietary theory of office: Kings can't simply sell the palace silverware to pay for sovereign debts. Why? It's not his to sell; such assets properly belong to the state (*république*, *respublica*).[15]

Bodin's own published notes of the proceedings of the Third Estate reveal his firm conviction that the monarch was not the owner of the royal domain and, thus, had

[12] See D. Lee, *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations* (2021) at 62, 238, 239 (documenting numerous examples of Bodin's direct influence on the classical authorities in modern international law, including Gentili, Grotius, Pufendorf and Vattel).

[13] Not least because 'absolutism' was a heuristic category invented by liberal historians after the French Revolution. *Ibid.*, at 149.

[14] J. Bodin, *Six Livres de la République* (1583), at 381 [hereinafter *République*]; J. Bodin, *De Republica Libri VI* (1586), at 264–265, book 3, chapter 2 [hereinafter *De Republica*], recalls an incident during his tenure as the royal commissioner for general reform of the forests in Normandy in 1570, requiring him to sue the *tout corps de la ville de Rouën* to prevent an illegal alienation of crown lands. H. Lloyd, *Jean Bodin, This Pre-eminent Man of France* (2017), at 94.

[15] In developing this point, Bodin, in *République*, *supra* note 14, at 158, 859; *De Republica*, *supra* note 14, at 104, 640, book 1, chapter 8, 6.2, relied on a commonplace of medieval legal science, a legal analogy drawn from the Roman law of guardianship, especially *ibid.*, at C.2.53(54).4, concerning the legal status of pupils and minors *in tutela* – that is, in the care of tutors, curators, guardians: 'The state itself is a minor', the implication being that sovereign princes serve the function of a legal guardian over the minor's estate. See Lee, 'The State Is a Minor: Fiduciary Concepts of Government and the Roman Law of Guardianship from Azo to Hobbes', in E. Criddle *et al.* (eds), *Fiduciary Government* (2018) 119.

no right to alienate royal assets – let alone to sell public offices and royal lands.[16] The king was, rather, the 'simple usufructuary of an estate' ('simple usaiger du domaine') 'belonging to the people' ('proprieté dudit domaine, qu'il appartenoyt au peuple').[17] It was a principle he already articulated in the *République*, where he clarified the principle, drawing from the Roman law of property, that 'sovereign princes, properly speaking, are merely usufructuaries [*usufruictiers*, *usumfructum*], or to put it better, users [*usagers*] of the public domain'.[18] Assets attached to the domain belong to the whole kingdom and its people. Thus, Bodin reasoned, decisions about alienation ultimately can only be made by deputies (like himself) given 'express power of attorney for that purpose' ('baillé procuration expresse à ceste fin, & non autrement') by the provinces, as agents to principals, and not by the king.[19]

We might, therefore, read Bodin's political theory as a rejection of seigneurial government, a style of rulership best exemplified, in Bodin's view, by the 'oriental' despotisms of the Ottoman sultans and the Muscovite tsars. While seigneurial rulership may have been appropriate and common in the earliest stages of human civilization, when the earliest sovereigns viewed their conquered subjects as their personal slaves, as the ancient *ius gentium* allowed, human history, Bodin argues, has gradually moved away from seigneurial government and favoured instead *droit gouvernement*, an alternative style of rulership based on impersonal law (*droit*, *lex*), rather than seigneurial will (*souffrance*, *arbitrium*).

4 *Droit Gouvernement*

The contrast between *seigneurial* and *droit* techniques of government was perhaps best illustrated in Bodin's analysis of how sovereigns delegated authority to their

[16] Cf. Bodin, *République*, *supra* note 14, at 874; Bodin, *De Republica*, *supra* note 14, at 651. On the venality of office in Bodin's thought, see my 'Office Is a Thing Borrowed: Jean Bodin on the Right of Offices and Seigneurial Government', 41 *Political Theory* (2013) 409.

[17] Bodin kept a journal of the proceedings of the Third Estate: J. Bodin, *Recueil de tout ce qui s'est negotié en la compagnie du Tiers Estat de France, en l'assemblée généralle des trois Estats, assignez par le Roy en la ville de Bloys, au XV Novembre 1576* (1577) at 97–98 [hereinafter *Recueil*]. See, in general, O. Ulph, 'Jean Bodin and the Estates-General of 1576', 19 *Journal of Modern History* (1947) 289.

[18] Bodin, *République*, *supra* note 14, at 182; Bodin, *De Republica*, *supra* note 14, at 124, book 1, chapter 9; cf. Bodin, *République*, *supra* note 14, at 860; Bodin, *De Republica*, *supra* note 14, at 641, book 6, chapter 2. Bodin is most explicit in the Latin text, insisting that 'reges enim ac summi principes non modo praediorum publicorum dominium aut proprietatem non habent' ('[B]y no means do kings and sovereign princes have ownership or property over public lands').

[19] Bodin, *Recueil*, *supra* note 17, at 98; cf. Bodin, *République*, *supra* note 14, at 388; *De Republica*, *supra* note 14, at 269, book 3, chapter 2, showing that even with a *mandemant general* conferring power of attorney, the agent may not alienate or transfer property without securing first an additional *charge speciale* from the principal. Most striking about Bodin's claim here is that this doctrine is most often associated with radical Monarchomach lawyers, most notably François Hotman and Stephanus Junius Brutus, the pseudonymous author of the *Vindiciae Contra Tyrannos*. Bodin's analysis of the inalienability aligns him with the very radical Huguenots that so many commentators of this period have often juxtaposed him against. See Lee, 'Private Law Models for Public Law Concepts: The Roman Law Theory of *Dominium* in the Monarchomach Doctrine of Popular Sovereignty', 70 *Review of Politics* (2008) 370.

government agents – and, potentially, even to international agents by means of treaty. Seigneurial despots, like sultans and tsars accustomed to treating their subordinates like personal slaves, appointed agents to serve only at the pleasure and by the permissive will (*par souffrance*, *arbitrio)* of the sovereign. Because such appointments – what Bodin classified as 'commissions' – were revocable at will, Bodin compared them to precarious tenures (*precariat*) in civil law, which placed tenants at the mercy of their capricious lords. Use of such commissioners, Bodin argued, was a telltale sign of seigneurial rule.

Sovereigns choosing to govern according to law (*droit*, *lege*), by contrast, treated the appointment of subordinates as a strictly contractual relation, comparable to Roman real contracts such as the contracts of lease (*commodatum*), deposit (*depositum*) or pledge (*pignus*). Unlike commissions, these sorts of official appointments – what Bodin called 'offices' – activated bilateral obligations on both sides, burdening not only the officeholder, but also the sovereign, with obligations, the most important of which was a duty of non-interference. Like assets held in trust by lessees and depositaries for a fixed term, delegated authority too was held and exercised by officers for a legally fixed term of office, immunizing the officer from arbitrary interference or removal (without showing cause). The sovereign's duty, thus, translated into the officer's right, effectively activating something like a constitutional norm of political (and, in the case of judges, judicial) independence.

Bodin illustrated this point in narrating French constitutional history and even pinpointed a specific moment when the French monarchy abandoned seigneurial tactics and adopted instead *droit gouvernement*, when Louis XI codified the norm of judicial independence by making judgeships in Parlement tenable for life and effectively irrevocable and, thus, immune from royal influence. This French experience, mapping a transition from seigneurial rulership towards *droit gouvernement*, represented, in Bodin's view, a general pattern repeated in many other national contexts in the later Middle Ages.

The venality of office and the increasing use of revocable commissions in royal appointments during the final years of the Valois monarchy, however, signalled a worrisome backsliding to seigneurialism.[20] Bodin died in 1596 and wouldn't be able to experience and observe personally the excesses of Bourbon absolutism that Richelieu and Colbert would introduce and exploit. But he already predicted how the revival of seigneurial governance was a prelude to a different kind of politics, requiring of the sovereign a new role in its domestic and foreign affairs.

[20] Bodin's royal appointment in managing the forests of Normandy was a commission, thus lacking the full protections of tenure of office.