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Author(s): J. Alexis Galán Ávila

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REVIEW

of Brad R. Roth, *Sovereign Equality and Moral Disagreement – Premises of a Pluralist International Legal Order* (Oxford University Press, 2011)

By J. ALEXIS GALÁN ÁVILA*

Despite the many developments that we are witnessing, very much in front of our eyes, in respect of the changing structures that have, for the last centuries, underpinned political and social structures and which are reflected in how international law is evolving, it is easy to forget that sovereignty (at least in its normative sense) still plays a very important role in the conducting of international affairs. The current European financial crisis offers us a clear-eyed instantiation of the state of affairs in which we are situated. What we witness is that the tension and paradoxes inhabiting world affairs cannot be wished away. In this sense, Brad R. Roth's new book is timely and necessary. It is a refreshing book insofar as it purports to provide a defense of sovereignty as the basic institution for the continuing existence and maintenance of a plural international legal order. Whereas it is common to read of how sovereignty is diminished and faltering, Roth's approach provides us with a veritable account on the continuing significance of sovereignty. The purpose is to warn those that advocate for a more forceful intervention from international law, even if they have good intentions, like human rights movements, of the dangers that throwing sovereign equality would entail. In this sense, my sympathies lie with him in respect of the core of his argument, which is that 'the continued significance of state sovereignty, not exclusively as newly harmonized with supranational authority in the form of "sovereignty as responsibility," but also in continued tension with supranational authority in the form of a presumptive *domaine réservé*.¹ In other words, state sovereignty represents a common agreement among states whereby it provides them with the right to pursue their own good life in a situation in which there is ample moral and political disagreements concerning the 'right' good life. To do otherwise would mean to jeopardize the basic element of the international legal order and to give *carte blanche* to powerful states to impose their will upon weak states. There is a lot on which to comment in respect of this provocative book but I will focus on two issues with which he does not deal successfully or rather neglects to take into account in his defense of sovereignty. On the one hand, he wants to reconcile state sovereignty's prerogative in deciding what sort of good life the community wants to pursue, even if gross violations of human rights are involved. On the other hand, in focusing only on power as being coercive, Roth ends up ignoring other facets of power in which sovereignty as 'self-determination' is equally affected. These criticisms should not be seen as a clear indictment on the book rather than minor comments on an otherwise impressive piece of scholarship.

Before explaining my criticisms I will try to summarize Roth's argument. I hope I can do it justice as it is a subtle and intricate one and there is always the risk of omitting relevant parts in a short review. In a nutshell, he argues for sovereignty as

* PhD Researcher, Department of Law, European University Institute (Florence).

¹ Brad R. Roth, *Sovereign Equality and Moral Disagreement – Premises of a Pluralist International Legal Order* (Oxford University Press, 2011) 6.

the ability and right to pursue one's own conception of the good life by a political community, in contrast with discourses that simply pits sovereignty against international law or sovereignty as responsibility, represents the basic and constitutive institution of the international legal order. Sovereignty, then, in the discourse propounded by him, simply reflects the stubborn fact that the international community is so diverse and plural that there is no common understanding of what the good life is – that is, the notion of diverse political moralities. If this is not respected or its importance is desecrated, the potential result would be that the project of the international legal order would be imperiled because the basic agreement for respecting it would no longer exist. Likewise, powerful states would not have any normative restriction in simply imposing their will or conceptions upon weaker states by adducing that they are following the purposes of international law. Thus, (normative) sovereignty functions as a barrier that attempts to ensure the protection of political communities in developing their particular understandings of what the good life is (especially weak states)² In his own words, 'the sovereign equality of states [exists] as an institutional response to persistent disagreement about what constitutes a legitimate and just territorial public order.'³ Because there is pervasive disagreement concerning what justice is, it is better to accept the right of those sovereign to dictate their own way of life, even if there is violence involved. The lack of knowledge from external actors about the specific conditions in a territory or about the values that a certain community upholds, and a possible imposition of alien understandings of public order from powerful states, dictates that the moral thing to do is to let the communities to solve their conflicts on their own. To sum up,

where foreign exertions jeopardize a political community's capacity to defend its interests or to arrive at decisions in keeping with the distinctive values of its members, the imperative to maintain that capacity ... justifies coming to the defense of that community's sovereign prerogatives, even where those prerogatives have been exercised unjustly.⁴

This argument is repeated throughout the entire book. Without entering into much detail, he bases this reading of sovereignty and the international legal order in a non-culture based pluralism, that is to say, in an internal liberal reading of communities as comprising individuals that decide how to constitute themselves, rejecting any 'essentialism.'⁵ And to further his case he attempts to show that this reading of sovereignty is still pervasive when analyzing the practice and discourses surrounding the issue of 'Responsibility to Protect,' including issues of internal order like secessions, coups and effective control and international criminal law.

The first thing that could spring to someone reading this book is that by emphasizing sovereignty as self-determination he is simply reverting to old notions in which the state was seen as a black box whereby it was of no interest for international law to discuss what is happening. In the book he assures us that this is not the case. He insists throughout the whole book that the acceptance of his sovereignty discourse cannot be equated to the condoning and acceptance of human rights violations. His reading of sovereignty does not intend 'to obscure the interests

2 Ibid., 127.

3 Ibid., 273.

4 Ibid., 122.

5 Ibid., chapter 4.

of human being grievously harmed by the abuse of sovereign prerogative.⁶ He merely wants to recalibrate the current discourses by pinpointing the morality that underpins sovereignty and to highlight that to disregard the pervasiveness of moral disagreement would have pernicious consequences.⁷ Furthermore, the acceptance of the fact of distinctive and divergent ideas of the good life does not also imply the embracing of moral relativism. For him, 'a commitment to pluralism in no way implies agnosticism about the wrongfulness of the other's conduct, nor need it assert that the conduct, albeit wrong "for us," may be right "for them." Rather, pluralism ... accords... certain basic prerogatives and inviolabilities that withstand the other's wrongful, but non-aberrant, conduct.'⁸ Despite Roth's assurances, it is neither clear nor evident from him how to restore the balance and when. My impression when reading the book is that in any confrontation between possible 'standards' from external actors and 'internal' standards, the latter always have preference. The limit of pluralism lies, according to him, in the need to ensure that the international legal order respects human dignity and that a 'violation of the physical integrity of the person is, it would seem, incompatible with such respect.'⁹ Now, from the reading of the book it would be hard to determine when that would occur. If we need to distrust universal applications of public order because of the level of generality of those norms, when do we know that human dignity is being violated? This determination would imply a reading of international legal order in a particular way. It seems that he has on mind an extreme case like the Rwandan genocide.¹⁰ But if we followed him, in my opinion, we would not at that moment necessarily be able to determine what was happening because there might perhaps have been two different ideas of public order; at that moment, we did not have the relevant facts. I simply cannot see how he can reconcile the respect for human dignity when he clearly acknowledges that his sovereignty discourse will protect the perpetrators of human rights violations.¹¹ He is at pains in asserting that we can respect a community's self-determination with an evaluation of the violations.¹² Nevertheless, it is never clear or obvious when that would happen and he does not provide us with any guidance beyond a mere comment that the system surely needs some reforms.¹³ Furthermore, any interpretation of human rights necessitates an understanding of what kind of public order is assumed. If we do not want to fall into the trap of determining a particular political morality that would impinge on a particular community, we need to accept at minimum a weak relativism that he seems to discard altogether. He expressly states that his unified account of sovereignty simply balances the external obligations with the internal standards. In any case, we can judge and evaluate if violations have been committed at the same time as we respect pluralism. This line of reasoning would go as follows: if in a country there is a civil war and violations have been committed we should respect that for several reasons – disagreements concerning the good life, we do not have sufficient knowledge of what is really happening and so forth. However, if there is lack of respect paid to human dignity we can assess it, or condemn it. But how? And with which consequences? The

6 Ibid., 6.

7 Ibid.

8 Ibid., 125.

9 Ibid., 117.

10 He states that to sustain "Hutu Power" (the ideology of the Rwandan *genocidaires*) as an admissible answer to the question of public order would be a grotesque parody of the pro-sovereignty argument advanced above. This suggests that there are somehow certain, however minimal, limits for the pursuing of a public order, *ibid.*, 117.

11 Ibid., 6.

12 See *inter alia* *ibid.*, 41 or 67.

13 Ibid., 129.

intervention of the ICC or the Security Council would simply undermine what Roth wants to uphold. I would go even further, if the SC would act by unanimity that could mean that there is simply a coincidence of interest but not that there is agreement on how good life should be managed. Even more worrisome, under which standards? If human rights norms are universal and the details are elusive then no possible condemnation can be done except by our own morality.¹⁴ That is to say, we definitely condemn the action but because our own interpretation suggests this to us. Hence, we end up in a sort of weak relativism. We do not have to say that it is good for them what is not good for us but we undertake this assessment under our own conceptions. If we do not want to end up in this sort of relativism we need to have a sufficiently agreed public order and if that is not the case, according to Roth, then we have to either accept that sovereignty, which, as he puts it, should prevail, or we impose a certain notion of public order that involves the violation of human dignity. Human dignity and how to protect it inherently invokes a particular understanding of the good life. Thus, in my opinion, he ends up on the side of sovereign 'immunity' and human rights violations have to be in the majority of the circumstances an afterthought. There is nothing wrong with this position. In some occasions, the danger of intervening will be greater than not doing anything but Roth, contrary to what he argues,¹⁵ has to accept that violations will be the norm, besides the weak relativism associated with his position and which it brings to the table.

There is equally a second problem with Roth's focus on overt uses of 'power' that ends up obviating other forces that undermine sovereign as reflection of self-determination. By focusing on 'extreme cases' of violence, intervention, gross human rights violations he ignores how power, by seemingly leaving sovereignty intact, can affect the poor and weak that he wants to defend. His account ignores how power does not necessarily lie in the classical Dahlian reading of A making B do something that he otherwise would not do.¹⁶ Power is also about what has not happened. As Bachrach and Baratz noticed long time ago, sometimes there are certain issues that are never discussed or approved because the institutional structures are skewed towards the powerful, e.g., rules, voting, actors' position, and so forth.¹⁷ What I mean is that the current design of human rights, for instance, as I just stated, already implied a particular conception of what the good life is. This would imply that by subscribing to the different human rights conventions, the communities have to construct a specific morality that would run counter to Roth's normative commitments. True, he would counter that they are reflections of consensus and therefore they represent a minimum public order that has been accepted. But then the supposed pluralism of Roth's would be totally undermined because states would end up with the obligation to construct something akin to a liberal-democratic state. This accusation could be a little unfair to Roth, after all, he is aware of how sometimes sovereignty has been a mere façade and that interventions, abuses, coercions inhabit more than it should the world of international affairs. Hence, he is not naïve in this regard.¹⁸ But still he is surely conscious of what human rights bring with themselves. This is not by any metric a very novel claim. Unless for him human dignity is something else, I have to assume that he refers to current human rights treaties like the universal declaration of 1948. In my view, then, he has to simply

14 See his skepticisms towards universal norms at *ibid.*, 95ff.

15 See *Ibid.*, 117.

16 See R.A. Dahl, 'The Concept of Power,' 2:3 *Behavioral Science* 201 (1957).

17 P. Bachrach and M.S. Baratz, 'Two Faces of Power,' 56:4 *The American Political Science Review* 947 (1962).

18 See Roth (n 1) 53ff.

acknowledge that there is less pluralism than there should be or the 'disempowering' role that human rights can have on communities wanting to have their own good life.

Moreover, he also seems to be unaware of a different facet of power which has been introduced by Foucault: the so-called 'productive power' which refers to the ability to impose certain discourses and conceptions through the production of knowledge.¹⁹ Discourse brings with it certain prejudices, notions and readings of social life. Thus, it shapes our thoughts when we want to do something. This would imply that even if sovereignty seems to be respected, the actual 'ability' of those communities in self-determination would be rather limited. Hence, human rights could be considered one sort of discourse, and the same with bodies like the WTO or the IMF.²⁰ By producing certain knowledge they reduce the self-determination of the distinct political communities. In the end, sovereign equality, understood as the determination of how they should lead a good life, becomes a hollowed out concept. In this regards, sovereignty as a normative concept would unfortunately only be an empty shell.

Regardless of these inadequacies, Roth's book is a must read. We tend to forget in this age of 'constitutional language' that we are riddled with disagreements concerning our governance structures. This book is a timely reminder of the dangers associated with benign discourses that can wind up unraveling something more essential for the maintenance of peace and security.

19 See, for instance, M. Foucault, *The Order of Things: An Archeology of the Human Sciences* (Pantheon, 1971)

20 For a good analysis of the role of knowledge in 'producing' power see A. Lang, 'Legal Regimes and Regimes of Knowledge: Governing Global Services Trade,' *LSE Law, Society and Economy Working Paper Series*, WPS 15-2009 (at http://www.lse.ac.uk/collections/law/wps/WPS2009-15_Lang.pdf) (Visited last time 22nd May 2012).