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Sovereignty Conflicts as a Distributive Justice Issue

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Abstract

Most, if not all, conflicts in international relations have - to an extent- something to do with sovereignty. On the theoretical side, we learn at University that either considered as a strong concept or one that has lost relevance, it is still discussed. On the practical side, the prerogatives a State has over its people and territory appear to be the highest. Within these ideal and real backgrounds, there are various sovereignty disputes around the world that struggle between legal and political limbo, *status quo* and continuous tension with various negative consequences for all the involved parties (e.g. violation of human rights, war, arms trafficking, only to name a few). It is increasingly clear that the available remedies have been less than successful, and a peaceful and definitive solution is needed. This article proposes a fair and just way of dealing with certain sovereignty conflicts. The paper considers how distributive justice theories can be in tune with the concept of sovereignty and explores the possibility of a solution for sovereignty conflicts. I argue that the solution can be based on Rawlsian principles.

Keywords State sovereignty, sovereignty conflicts, distributive justice, Rawls

We are used to seeing and accepting as fact that in one territory there is one population governed by an ultimate authority, with a common legal bond or system of norms. What would happen if that one territory and population had two ultimate and hierarchically equal sovereigns (legally speaking) and, at the same time, two valid sets of norms? Would it be possible, for instance, that Israel and Palestine had sovereign authority at the same time over Jerusalem? Would it be possible that Argentina and the United Kingdom were at one time sovereign over the territory and population of the Falkland/Malvinas Islands? If the answer was positive, what would the consequences be—in terms of territory, population, government and law?[1]

The challenge is to present the agents with a solution that can acknowledge their individual claims without disregarding those of their competing parties. However desirable, such a solution may seem Utopian. I propose to see these conflicts from a different yet broad perspective rather than as conflicts between separate and independent rights. Therefore, I view the problem as a distributive justice[2] issue following the work of Rawls.[3] That is because distributive justice principles are a particularly appropriate tool to address sovereignty issues, just as they have previously been applied in assigning rights and obligations in other social institutions.[4] As a consequence, reviewing different theories (e.g. 'first come, first served'; just acquisition; the principle of equality) may help us to resolve the problem. This paper aims to explore if a solution that certainly is desirable can also be possible and may offer a peaceful way of solving sovereignty conflicts through the use of principles of distributive justice.

Setting the Stage for the Negotiations

Any community or population consists of individuals who are different in many senses—pluralism, as Rawls says[5]—is a permanent feature that cannot be ignored. The international community does not escape from this, since it includes several agents of very different natures. Although Rawls' *Theory of Justice* offers an insight on how to address conflicts of interest, it is one that

[1]For an account on State sovereignty see Jorge Emilio Núñez, "The Origins of Sovereignty in the Hellenic World" in *International Law, Conventions and Justice* (Athens: ATINER, 2011); Jorge Emilio Núñez, "About the Impossibility of Absolute State Sovereignty. The Early Years" in *International Journal for the Semiotics of Law* (Springer, 2013); and Jorge Emilio Núñez, "About the Impossibility of Absolute State Sovereignty. The Middle Ages" in *International Journal for the Semiotics of Law* (Springer, 2014).

[2]Distributive justice issues are those concerned with the allocation of benefits and burdens in relation to wealth and income. See John E. Roemer, *Theories of Distributive Justice* (Harvard: Harvard University Press, 1996); Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard: Harvard University Press, 2004); and many others.

[3]See John Rawls, *A Theory of Justice, Revised Edition* (Oxford: Oxford University Press, 1999).

[4]*Ibid*., p. 4.

[5]Referred to Rawls's idea of pluralism as a 'permanent feature of a democratic society'. See John Rawls, *Justice as Fairness* (Harvard: Harvard University Press, 2003), in partic. p. 84.

deals with them within civil societies and at an individual level and, hence, is not totally appropriate for international issues—at least not to the extent needed in this paper. That is because our principles will be concerned with a special case of conflicts: sovereignty disputes. Consequently, we need specific principles that determine how to assign sovereign rights and duties over a non-sovereign and populated territory. So, we need to adapt Rawls' approach from individual to State level.

One of the first points that Rawls makes is that questions of distributive justice arise only under certain 'circumstances of justice'[1], that is to say limited resources and limited altruism. The territory under dispute—and all that it implies—is the one element around which the dispute is centred. In other words, what Rawls labels at the individual level as moderate scarcity or limited resources finds its parallel in sovereignty disputes in the non-sovereign third territory. Thus, what Rawls refers to as an individual's plan of life we may call a 'State plan of life'—each State's interest as a group is also represented by the exclusive rights it claims over the same piece of land.

Formal constraints. A 'Colourable Claim'

Before going into the negotiations to solve the sovereignty conflict we need to decide who will be able to be part of them—who is a legitimate claiming party. The agents should have what I call a 'colourable claim'.[2] That is to say, the represented populations must have a valid reason to claim sovereignty over the third territory—e.g. effective occupation[3], consent by the other agent in the dispute[4], consent by other States[5], and/or consent by the international community.[6] That reason should be 'colourable' enough to prove

[1]Rawls (1999), *op. cit.*, p. 109.

[2]A 'colourable claim' (in American English a colorable claim or colorable argument) is an expression used in the law of the United States to refer to a claim strong enough to have a reasonable chance of winning—i.e. the claim need not actually result in a win. There are many cases that can be quoted to illustrate the use of this expression in Courts of the United States. In the United Kingdom Criminal proceedings, for example, it is equivalent to the "is there a case to answer?" standards.

[3]The Island of Palmas Case (or Miangas), United States of America vs. The Netherlands, Permanent Court of Arbitration (1928), available on http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20+%20TOC.pdf accessed on 19/04/12 and The Legal Status of Eastern Greenland Case, Denmark vs. Norway, Permanent Court of International Justice (1933), available on http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm accessed on 19/04/12.

[4]The Temple of Preah Vihear Case, Cambodia vs. Thailand (1962), its merits available on http ://www.icj-cij.org/docket/index.php?sum=284&code=ct&p1=3&p2=3&case=45&k=46& p3=5 accessed on 19/04/12.

[5]The Legal Status of Eastern Greenland Case, Denmark vs. Norway, Permanent Court of International Justice (1933), available on http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm accessed on 19/04/12.

[6]Quincy Wright, "The Goa Incident," *The American Journal of International Law* 56 (1962): 617-632.

that their intended rights are at least sufficiently plausible to be acknowledged, and they can be based on any reasonable circumstances—e.g. political, historical, legal, geographical arguments to name a few. For example, in the case of the Falklands/Malvinas Islands dispute it would be unreasonable for Russia to participate in the negotiations in relation to their sovereignty since they do not have any colourable claim over that territory.

A party will have a colourable claim if *prima facie* they have the right to claim, that is to say they appear to have a probable cause to support their intended right to claim. That is different from saying that they have a right to sovereignty. In the latter case, there is indeed an argument that has weight but that may be later overcome by another more pressing one. So, to have a colourable claim means having at least an argument that offers surface legitimacy—that may or may not translate in the negotiations into granting sovereignty because it only secures the participation in them.

Original Position

The content of the original position is something we construct in order to reflect what we think is morally relevant and morally right—which is precisely what Rawls does. The 'veil of ignorance'[1] that Rawls uses at the level of individuals will be applied in the international scenario, being the populations of the sovereign States and the non-sovereign third territory—all through their respective representatives—the subjects of such a model.

I assume the individuals of the three populations in this article are free and rational beings[2] because our objective is to come up with an agreement that free and rational beings could not reasonably reject. Each and every individual has free will "[…] that is has also the idea of freedom and acts entirely under this idea."[3]

A further clarification is in relation to the way they interact with each other. In general individuals may be good intrinsically so they may want to help each other or they may be bad intrinsically so their decisions will be purely self-centred. Nevertheless, I will assume they are mutually disinterested.[4] Therefore, they intend to accomplish their individual aims but without interfering with those of others. This is particularly important in sovereignty disputes because these are often highly emotional, with the participants taking the view that 'victory for us is to see you suffer'.[5]

[1]Rawls mainly develops the veil of ignorance in his *Theory of Justice* but it is also present in his *Justice as Fairness, A Restatement* and *Political Liberalism*.
[2]*Ibid*., p. 10.
[3]T. Meyer Greene, ed., *Selections of Immanuel Kant* (London: Charles Scribner's Sons Ltd., 1929), p. 335.
[4]*Ibid*., pp. 12 and 131.
[5]Philip C. Winslow, *Victory for Us is To See You Suffer: in the West Bank with the Palestinians and the Israelis* (Beacon Press: 2007).

In order to have negotiations the three involved agents will have to select representatives within their communities. I will not dwell longer on detailing how the representatives are selected since for our purposes this process is irrelevant. It is assumed that the representatives do not know certain features. In other words, two limitations in relation to the representatives must be applied in order for the negotiations to start: firstly, for the negotiations to be just and fair the representatives will not know whom they represent but they know everything else—the history involved—who the three parties are, the difficulty of resolving sovereignty conflicts, and so on. By acting in this way they ensure that none of the agents is more or less advantaged or disadvantaged when choosing the principles upon how sovereignty will be allocated. Secondly, concerning the representatives in their individuality, they are pure rational beings and as such they "are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence […]."[1]

Reasons Leading to the Principles of Justice: The Rule of Maximin

We assumed that three populations have selected representatives who will participate in negotiations to allocate the sovereignty over a territory. These representatives do not know which of the three populations they represent and certain characteristics about themselves; they only know of the existence of the territory which sovereignty has to be allocated, that the populations they represent have somehow a right to claim it—i.e. colourable claim—and the nature of the negotiations they are involved in. Then, in order to allocate the sovereignty of the third territory they know they have to decide which principles are applicable. For that reason, they will analyse the implications certain principles may have in such allocation. However, the first thing the representatives will have to agree upon is the procedure they will follow in the negotiations, the applicable rule.

In terms of the rule the representatives will apply in the negotiations it is highly possible they will choose "the *maximin* rule for choice under uncertainty."[2] Bearing in mind how the original position in which the negotiations will take place has been characterised, it is reasonable that the representatives will have a prudent view making their choice—at least—conservative.[3] They apply *maximin* because it maximises the position of the worst off party, and since they may be the worst off party, that is what they would want to do. That is to say, the negotiations present a particular note: uncertainty—i.e. the uncertainty is not only with regard to outcomes but also with regard to who they are. Indeed, sovereignty disputes are under an

[1]Rawls (2003), *op. cit.*, p. 15.
[2]*Ibid*., p. 132.
[3]For a more detailed view about *maximin* and its application in conditions under uncertainty see Rawls (1999), *op. cit.*, in partic. pp. 130 and ff.

umbrella of incertitude since all of the agents start with a *status quo* and any decision in the negotiations may imply actions on either side that may result in gains but also losses for any of them. Indeed, *maximin* is not a general rule in cases of uncertainty. However, it is the desirable one in situations of high indeterminacy[1], when the stakes are high and the worst position is tolerable.

The Negotiations: Choosing a Principle to Allocate Sovereignty

The representatives in the original position will review a series of principles in order to allocate the sovereignty of the territory. A first limitation is given by the principles they will review as they will be offered a list or menu.[2]

Why 'Just Acquisition' cannot Work

Most—if not all—individuals—and any sovereign State—would think it obvious to apply Ulpian's maxim *Suum cuique tribuere*[3]—to give to each his due or to distribute to each one his share—in the case of any type of distribution. What can be fairer than to give everyone what is due to them? However, to give to each his due is not a task without difficulties.

Faced with the idea of applying any kind of principle based on a historical entitlement will confront the representatives with two main problems. First, they would need to agree upon a historical account—i.e. what actually happened, who was the first one to discover the territory, or to have a population there, etc. Second, they would need to decide what type of act makes their claimed rights just—i.e. the first one setting foot on the territory, the first one to have a permanent settlement, etc. Thus, in relation to the second problem, they would have to choose the theoretical background to decide what is just: *res nullius* or *res communis*—i.e. the originally uninhabited territory belonged to no-one or everyone had a certain right over it. Besides, if there were conflicts in the past we would need to decide whether they were just or not and whether the just side won.

The just acquisition principle has been previously related to territorial sovereignty since it has been maintained that "[a]mongst the objects to which this principle is meant to be capable of applying are portions of the Earth's surface, that is, areas of land."[4] And that is exactly the aim of this project: to find a peaceful way of allocating sovereignty over non-sovereign areas of land. However, the principle of just acquisition is not the answer to resolve these issues. Its main pitfall is that the information required to apply this principle is not epistemically accessible in sovereignty conflicts—e.g. how far back would we need to investigate so as to determine who the first inhabitants of the

[1]*Ibid*., p. 133.
[2]Rawls (1999), *op. cit.*, p. 118.
[3]Ulpian, *Digest*, 1.1.10.
[4]David Conway, "Nozick's Entitlement *Theory of Justice*: Three Critics Answered," *Libertarian Alliance, Philosophical Notes* 15 (1990).

Falkland/Malvinas Islands were? What would happen in the case of extinct civilisations? What about cultures that were in Ancient Times nomadic?

The principle of just acquisition may work for individuals. For States, it may solve one problem, what one has to do, i.e. mix one's labour. But leaves several other issues unresolved—e.g. a) who did it first? b) how much do you own? (new problem, e.g. if you dig, can you claim that plot, the field or the whole island?), and c) who inherits the property—the inhabitants or their 'mother community'?

The 'Best Interest of the Child' Principle

With recognition in International Law[1] the 'best interest of the child' principle is a particular variant of the 'best interest of the third party' principle. Many courts around the world use this principle to decide the fate of children—e.g. who will be their legal guardian in the case of divorce, adoption, criminal offences, etc. If we wanted to use the 'best interest of the child' principle in sovereignty conflicts, the role usually given to the adults—parents, legal guardian—would be played by the two competing sovereign States and that of the child would be given by the non-sovereign third territory. The idea is that the third territory is like a child, and therefore its interest in ultimate self-determination and self-realisation are paramount. So, it is possible—someone may put forward—the claim that whatever custody (sovereignty) arrangements are chosen these should be in the best interest of that territory.

At first glance, the adapted principle would secure the situation of the inhabitants of the third territory. Thus, it would limit the rights of the two sovereign States—the extent of these limits would have to be agreed. Moreover, the two sovereign States would have to fulfil certain obligations towards the third territory so as to secure the inhabitants' well-being—e.g. as they would be considered in a better situation than that of the third territory, they might provide the means for its defence.

There are critics of the 'best interest of the child' principle[2], but the main issue in this case is not the principle itself but its application to situations that, although having certain similarities, offer substantial differences that make it inappropriate. For instance, as the negotiators would not know which of the groups are representing, they would not choose a principle that could be translated in the best interest of only one of them—i.e. that would go against the *maximin* rule, since they may not be that party. Thereby, there is no reason to give one group priority over another. Moreover, the application of this principle does not always guarantee a just solution for sovereignty conflicts since it can be the case that the least advantaged or most vulnerable agent is one of the claiming sovereign States and not the population of the third territory—i.e. in family cases, the child is the most vulnerable subject always dependent on his parents or any other legal guardian.

[1]Art. 3 of the UN Convention on the Rights of the Child states "[…] the best interests of the child shall be a primary consideration."

[2]Lynne Marie Kohm, "Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence," *Journal of Law and Family Studies* 10 (2008): 337-376, 370.

Finally, the application of the 'best interest of the child principle' in sovereignty disputes denies that the rights of the other two parties are of equal importance to the right of the third territory. And unlike the case of parental right, these rights are at least as strong—arguably stronger—than the right of the third territory to self-determination.

The Difference Principle

At first glance, the difference principle states that whoever is a potential recipient in any distribution will receive an unequal share of whatever will be divided. It applies a prioritarian rule.[1]

However appealing, the difference principle presents us with a main obstacle. It is designed to apply to social and economic inequalities, so it does not lend itself well to sovereignty inequalities because of the particular characteristics of sovereignty conflicts and sovereignty itself as we will see in this section.

First, as the types of inequalities that can be permitted are not restricted[2], some of them may go against the interests of the represented populations. We have sovereign States and a third population who already possess wealth and who are likely to hold unequal amounts of wealth. In addition to wealth, all these parties will possess several other elements that are also likely to be unequal amongst them—e.g. power, geographical location, etc. Indeed, sovereignty is not merely a matter of wealth. So, when we think about dividing up whatever the third territory entails, we potentially have to think about what constitutes a fair allocation of additional wealth and any other elements that are attributes of sovereignty amongst parties who already have unequal holdings. In that context the difference principle would seem to have a quite different import than it does for Rawls' domestic case.

Second, Rawls argues the more advantaged will accept the principle because they need the cooperation of the least advantaged. But that is not true here. It fails to explain why the most advantaged population should agree to lower its benefits only because the least advantaged one needs to see its position improved.

Third, when we use the expression 'least advantaged' in sovereignty conflicts it is not clear in which sense or which criteria we would have to apply—e.g. less economically developed agent, less human rights acknowledged, smaller territory, smaller population, less developed legal system, etc. We have two problems here: a) which feature or element we consider to determine the least advantaged; b) variability. Thus, even if we agreed on the feature to be considered, to be the least and the most advantaged agent is a factual feature so it can vary in time.

[1] *Ibid*., p. 54.
[2] Rawls (1999), *Theory of Justice*, *op. cit.*, p. 55.

The Equality or 'Equal Shares' Principle

Strictly speaking, the principle of equality would see each individual with an equal share of whatever is to be divided. There is no consideration of their relative situations—i.e. it is not taken into account if they are the least or the most advantaged individuals in the society. From there, each and every agent in the dispute would have the right to the same relative portion of sovereignty.

What appears to be an easy solution—what is more just and fairer than to give to everyone the same share?—offers immediate complications. A problem to be expected is that we have to distribute different goods. For instance, sovereignty covers several different aspects of any territory, population, government and law that imply both rights and obligations. Then, it seems not possible to go with equal shares *stricto sensu*. Moreover, in itself attractive, the term 'equal' has hermeneutic problems: what is an equal division?[1]

There is then the first issue of how to interpret what is an equal share. However, that is not the only problem with the principle of equality applied in sovereignty conflicts. Even if we agreed upon criteria on how to define an equal share, as we have just pointed out, sovereignty implies an extensive range of rights and obligations that are difficult to be distributed following the same pattern.

There is still a further problem with the principle of equality and it is that of its application—i.e. the actual utilisation of the share of sovereignty. In other words, and assuming that we solved the issue of determining what an equal division is, to apply equality *stricto sensu* would mean that unequal parties in many aspects received equal shares of the sovereignty over the third territory and all that it implies in terms of rights and obligations. Therefore, some of these claiming parties would find themselves with a share of sovereignty that did not provide them any benefit.

Preliminary Requirements for a Fair Distribution

The solution reached must be one that, apart from being intuitively appealing in the negotiations under the veil of ignorance, can be applied when the veil is lifted in such a way that the three populations want to respect the agreement reached. Then, the solution must be somehow beneficial to the three agents, must recognise—to an extent—their claims and the result is not detrimental to any of the agents. Bearing in mind the previous discussions, it is reasonable for the representatives in the original position to agree on two basic points in order to share sovereignty before deciding how to do it:

Firstly, each agent will respect the liberties of the three populations; so no agreement reached can be interpreted in a way that curtails the basic non-political liberties[2] of any of these populations.

[1]Michael Otsuka, "Self-ownership and Equality: a Lockean Reconciliation," *Philosophy and Public Affairs* 27 (1998): 65-92.

[2]For a further analysis of basic liberties and its characterisation see Rawls (1999), *op. cit.*, p. 53.

Secondly, the agents will conduct their mutual relations in light of the principles recognised by the law of peoples.[1]

With these two pre-requisites agreed in this hypothetical situation, once the veil of ignorance is lifted the negotiators secure both that the individuals of each population safeguard their basic non-political liberties and that the three agents are free and autonomous from each other—i.e. in the case of the third territory—that does not mean independence, hence the use of the word 'autonomous'.

The 'Egalitarian Shared Sovereignty'

Instead of the difference principle and the principle of equality, what about working out the solution with all we have learnt so far? By acknowledging the circumstances in sovereignty conflicts—that is, different agents and an ample concept such as sovereignty—and the way in which the original position has been set up, a revised principle may offer comparable advantages that may make it a reasonable option.

Firstly, we must remind us of the fact that the representatives of the three parties are behind the veil of ignorance. Hence, they are deprived of knowledge in regard to which party they represent. So, it is reasonable for them and likely to agree that each party has a right to participate in each aspect of sovereignty, regardless of their particular circumstances because no one would want to be left out. In other words, they would agree that ideally they would have 'equal' shares of sovereignty over the third territory, which means that the three claimants would have equal standing or status.

A second point has to do with factual circumstances. The representatives would acknowledge that it would be hard to see how after lifting the veil of ignorance all the three parties had the same relative situations. So, it is reasonable to think that the representatives would agree that the degree of each party's participation would vary according to each party's ability to contribute. We also said in the previous paragraph that it is also reasonable to suppose that each party would as well have an interest in each aspect of sovereignty. Therefore, and bearing in mind these two circumstances—i.e. equal right to participate and different ability to contribute—it is reasonable to maintain that each party would have an interest in each aspect of sovereignty being handled in the most efficient manner.

A third point would be to determine the level of input and output of each party with regard to each objective/area/activity related to the sovereignty over the third territory. The representatives would realise that by making the output dependant on the level of each party's input this could result in a subterfuge for domination.

[1]For a more thorough account of the principles of the *Law of Peoples* see Rawls (1993), *op. cit.*, p. 46; Rawls (1999), *op. cit.*, p. 37.

But if we added a proviso in order to make sure that the party with greater ability-and therefore greater initial participation rights—would have the obligation to bring the other two parties towards equilibrium, the proposal becomes reasonable. That is because it ensures the most efficient current distribution of rights and obligations but also ensures the party that currently benefits most has an obligation to bring the other two parties up to a position where they can contribute equally.

In what matters the justification for the obligation owed by the more advantaged claimant, two clarifications must be made. Firstly, I do not claim that any obligation is *prima* facie owed amongst the parties and the egalitarian shared sovereignty does not claim that either. I believe the most advantaged party would accept the agreement or—better said, it would be unreasonable for this party to argue it is not fair to accept it. Whether the most advantaged party actually accepts the arrangement or not is a different matter. Secondly, it is reasonable to believe that if the three parties in the original position agree on: a) equal standing; b) making the nature and degree of participation dependent on efficiency; and therefore c) at first the party with more 'input' will receive more 'output'; the more advantaged claimant—whoever that turns out to be—will accept to have an obligation to bring about equilibrium in the shares since, in the absence of that equilibrium, the more advantaged claimant would or could dominate the other claimants so there would be hardly a good reason for the other two parties to accept any other arrangement that somehow did not contain a degree of equilibrium. That is because anything less than shares in equilibrium would potentially imply a smaller share in comparison to those of the other parties. Therein, the bigger the share, the riskier the case for any of the parties to have more control on a particular issue pertaining sovereignty or the sovereignty of the third territory as a whole. This is directly linked to the idea of non-domination since the possible monopoly of power with regards a particular issue pertaining sovereignty or the sovereignty of the third territory as a whole could degenerate into arbitrary power by the decisions being made mainly—only?—by the strongest party or in benefit only of the strongest party. In consequence, the freedom of the least advantaged parties with regards the choices they could make with their shares and the originally agreed equal standing could potentially be reduced to the 'rubber-stamping' of the decisions made by the strongest claimant. Therein, it is reasonable to believe that the representatives of the parties would find the equilibrium proviso a fair solution to safeguard the interests of the three populations involved.

This way of approaching sovereignty conflicts like the ones discussed in this paper I will call egalitarian shared sovereignty and can be stated as follows:

1) Equal right to participate (egalitarian consensus principle)
2) Nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency)
3) Each party receives a benefit (in terms of rights and opportunities) that depends on what that party contributes with (input-to-output ratio principle).
   PROVISO:
   But the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso)