The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks

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Introduction

This issue of *Theoretical Inquiries in Law* critically explores efforts to address the paradoxes of sovereignty. One paradox is internal, and was formulated by David Dyzenhaus in his contribution to this issue: "if the sovereign is the highest authority, and hence not answerable to any other authority, how can the sovereign be subject to law?"[1] The second paradox is external, and could perhaps be phrased, along Dyzenhaus's lines, as follows: "if the sovereign is independent, and hence not answerable to any other authority, how can the sovereign be subject to the duty to recognize and respect the independence of other sovereigns?"[2] Responses to both types of paradoxes have been reflected in states' claims to legitimacy from within, through, for example, their commitment to the rule of law; and to legitimacy from without, through their assertion of "statehood" as understood by the contemporaneous international

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1 David Dyzenhaus, *Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought*, 16 Theoretical Inquiries L. 337, 343 (2015); *see also* Michel Troper, *Sovereignty and Natural Law in the Legal Discourse of the* Ancien Régime, 16 Theoretical Inquiries L. 315, 317 (2015).

2 On the external and internal constraints on sovereigns, see F.H. Hinsley, Sovereignty 126-213 (2d ed. Cambridge Univ. Press 1986) (1966); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791, 1796 (2009).

legal order and their demand for external recognition.[3] These two parallel commitments to rules entail limitations on the exercise of authority.

While the sovereign's way of addressing the domestic paradox could be shaped by indigenous sensitivities (some communities would more appreciate a religious source of constraint on sovereigns, while others would prefer a liberal constitution), to gain external legitimacy, the sovereign has been required to signal its acceptance of a set of ground norms that has developed without much input from any distinct state. New states had to accept the external bounds as given. This external paradox is captured by the assertion of the Israeli Supreme Court that "[t]he independence of the State of Israel directly subjected it to the rules of international law."[4] We can appreciate this "direct subjection" to international law when we contrast the ubiquitous declaration of statehood that invariably endorses the inter-state normative sphere, to the recent claims made by the so called Islamic State that regards itself as a caliphate subject only to its vision of Islam while eschewing international law as a relevant source of authority.[5] It is the very lack of acceptance of the community norms which deprives that "state" of the legal standing of a state.

My motivation for convening the conference for which the articles in this issue were written was to explore both paradoxes and examine whether they permit an understanding of "sovereignty" as entailing responsibilities and obligations of states not only to their own citizens but also toward others who are directly or indirectly influenced by their acts and omissions. I framed the threshold questions as being whether the concept of sovereignty can be reconciled with obligations to others; what are the reasons — and, perhaps, moral duties — for attempting such reconciliation; and finally, what are these obligations and how are they to be operationalized. In my concluding remarks, I wish to outline a response to the threshold questions and reflect on the perils of emphasizing the duty toward "others."

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3 As David Armitage and others have shown, declarations of statehood are aimed invariably also at foreign audiences, seeking to obtain their recognition. *See* David Armitage, The Declaration of Independence: A Global History (2009); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010); Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 Suffolk U. L. Rev. 759 (2014).

4 HCJ 174/54 Stampfer v. Attorney Gen. 10(1) PD 5, 15 [1956] (Isr.).

5 Andrew F. March & Mara Revkin, *Caliphate of Law: ISIS' Ground Rules*, Foreign Aff. (Apr. 15, 2015), http://www.foreignaffairs.com/articles/143679/andrew-f-march-and-mara-revkin/caliphate-of-law.

I. Sovereignty Subdued: A Brief Survey of the External and Internal Limits on the Concept

Some of the contributions to this issue explore potential grounds for explaining why sovereigns are bound by morality or by law: theories about morality, the nature of law, human solidarity, the rule of law and human rights. They can be grouped into two groups: those who begin their analysis from outside the state (the external view, responding to the external paradox of sovereignty) and those whose starting point is the state itself (and who therefore address the internal paradox). For example, two contributions to this issue, by Benjamin Straumann and by Evan Criddle, explore Hugo Grotius's "external" approach, which saw human nature as a source of moral and legal obligations that provides a framework for imputing some immanent obligations to sovereigns, and have referred to states as temporary "guardians" of foreign nationals abroad who have suffered intolerable cruelties at the hands of their own state.[6] On the other hand, Lorenzo Zucca draws on Spinoza's "internal" view, according to which it is the self-interest in preservation and flourishing that requires states to contribute to a political community where peace and security is maintained.[7] Below is an attempt to outline the evolution of the idea of sovereignty as inherently subject to external or internal limitations.

A. Sovereignty and the External Paradox

The fundamental idea — that sovereignty functions as part of a system that assigns global resources among states and hence is subject to the rules of that system — can be found already in Greek thinking. Grotius refers in his *De jure belli ac pacis* to Cicero's metaphor of the globe as a theater where sovereigns' right to exclusive title resembles the right of theater goers to occupy their seats for the duration of the show.[8] Also for Christian Wolff and Emer de Vattel, sovereignty has a cosmopolitan purpose.[9] In Vattel's view, the

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6 Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 Theoretical Inquiries L. 473 (2015); Benjamin Straumann, *Early Modern Sovereignty and Its Limits*, 16 Theoretical Inquiries L. 423 (2015).

7 Lorenzo Zucca, *A Genealogy of State Sovereignty*, 16 Theoretical Inquiries L. 399 (2015).

8 *See* Hugo Grotius, De Jure Belli ac Pacis [On the Law of War and Peace] (1625), *reprinted in* 2 Classics of International Law 186 (James Brown Scott ed., Francis W. Kelsey trans., 1925).

9 *See generally* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295, 307, 309, 317 (2013).

"earth belongs to mankind in general" and therefore sovereigns are obligated toward humankind to use the resources under their control efficiently and sustainably.[10] More generally, Vattel stipulates a duty of fraternity: "one state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself."[11] Kant offered a secular basis for the same proposition, referring to the globe as the space in which all inhabitants must "tolerate one another as neighbors" based on equal entitlement to the surface of the earth.[12]

Even during the nineteenth century that saw the crystallization of the unfettered sovereign, some regarded sovereignty as "freedom that is organised by international law and committed to it."[13] International law itself was grounded by some not on state consent, but instead on an existing society of states,[14] a "community of states,"[15] or on a sense of "international solidarity,"[16] on state practice,[17] or on logical inference from "pure theory" that regarded the

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10 1 Emer de Vattel, The Law of Nations or the Principles of Natural Law § 203 (1758). For Wolff's view, see 2 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum §§ 156-189 (Joseph H. Drake trans., 1934) (1749).

11 2 Emer de Vattel, The Law of Nations or the Principles of Natural Law § 3 (1758).

12 Immanuel Kant, Toward Perpetual Peace and Other Writings on Politics, Peace, and History 82 (Pauline Kleingeld ed., 2006) ("[O]riginally no one has more of a right to be at a given place on earth than anyone else" due to "the right of common possession of the surface of the earth.").

13 1 Ferdinand Von Martitz, Internationale Rechtshilfe in Strafsachen 416 (1888) (cited by the German Constitutional Court with regard to the Lisbon Treaty judgment in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 ¶ 223 (Ger.)).

14 August Wilhelm Heffter wrote about a European society of states that was bound by a shared legal order, as translated by Henry Wheaton, Elements of International Law pt. I § 11 (Richard Henry Dana ed., 8th ed. 1866) ("A Nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated.").

15 Georg Jellinek, Die Lehre von den Staatenverbindungen [Theory of International Federations] 92-96 (1882) (as lucidly explained in Jochen von Bernstorf, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 Goettingen J. Int'l L. 659, 672-73 (2012)).

16 On "solidarity" as the basis of obligations toward others, see Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?*, 16 Theoretical Inquiries L. 367 (2015). *See also infra* notes 19-21.

17 Hedley Bull, Justice in International Relations: The 1983-1984 Hagey Lectures 11-12 (1984) ("The rights of sovereign states, and of sovereign peoples

state's legal order as necessarily derived from the international legal order.[18]

The devastating experiences of the two world wars dented the walls of sovereignty as promising human security and prosperity. Instead, faith in global processes to secure human flourishing slowly gained ground. In the interwar era, French scholars advanced the idea of solidarity,[19] probably born from the concept of *fraternité*,[20] which referred not only to fraternity within the French people but also to fraternity with all peoples.[21] And while during the interwar era the assertion that "the legal consciousness of the civilized world demands the recognition for the individual of rights that are immune from any interference on the part of the State"[22] remained the province mainly

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or nations, derive from and are limited by them.").

18 Hans Kelsen, Reine Rechtslehre (1st ed. 1934), *translated in* Hans Kelsen, Introduction to the Problems of Legal Theory (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992). In his second edition he revised his argument, suggesting that hierarchy between the two systems must exist, but his pure theory cannot resolve which system is superior to the other. *See* Hans Kelsen, Pure Theory of Law (Max Knight trans., 1960).

19 *See, e.g.*, Tourme-Jouannet Emmanuelle, What Is a Fair International Society? (2013); Nicolas Politis, *le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux Recueil des Cours* [*The Problems of the Limitations on Sovereignty and the Theory on the Abuse of Rights in International Relations*], *in* Collected Courses of the Hague Academy of International Law 1 (1925).

20 Danio Companelli, *Solidarity, Principle of*, Max Planck Encyclopedia of Public International Law, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2072?rskey=MaPoJK&result=1&prd=EPIL (last updated Mar. 2011) (by subscription).

21 In 1792 the French National Convention declared fraternity and assistance to all peoples who shall wish to recover their liberty, and promulgated a Decree Proclaiming the Liberty and Sovereignty of All Peoples (Dec. 15, 1792), which asserted that "In the countries which are or shall be occupied by the armies of the Republic, the generals shall proclaim immediately, in the name of the French nation, the sovereignty of the people . . . ."). *See* 2 John Debritt, A Collection of State Papers Relative to the War Against France (1794).

22 Institut de Droit international, Déclaration des droits internationaux de l'homme [Declaration on the International Rights of Man] (1929), *available at* http://www.idi-iil.org/idiF/resolutionsF/1929_nyork_03_fr.pdf. Article 1 of the Declaration stated: "Il est du devoir de tout Etat de reconnaître à tout individu le droit égal à la vie, à la liberté . . . ." ("*It is the duty of every State* to recognize to everyone the equal right to life, liberty . . . .") (emphasis added). André Mandelstam argued that "human rights exist, and it is the duty of each state to respect them." André Mandelstam, speech at the Inst. of Int'l Law (Oct. 8, 1921),

of thinkers and "civilizers,"[23] the Universal Declaration of Human Rights finally set a "common standard of achievement for all peoples of all nations."[24] It was then that the primacy of the individual as preceding the sovereignty of the state and serving as its purpose was invoked as the basis for external ties on states.[25] In 1955 Hans Kelsen presents a vision of sovereignty that derives its authority not only from the human beings forming the state, but from the whole of humanity:

> [T]he state is not a mysterious substance different from its members, i.e., the human beings forming the state, and hence a transcendental reality beyond rational, empirical cognition but a specific normative order regulating the mutual behavior of men. . . . By demonstrating that absolute sovereignty is not and cannot be an essential quality of the state existing side by side with other states, it removes one of the most stubborn prejudices which prevent political and legal science from recognizing the possibility of an international legal order constituting an international community of which the state is a member, just as corporations are members of the state.[26]

B. Sovereignty and the Internal Paradox

The thought of internal sources that bind the sovereign immediately brings to mind Ulysses tying himself to the mast. But as Michel Troper points out in his contribution to this issue, "self-limitations are not real limitation."[27] Ulysses could safely expect that he would eventually be released from his chains,

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quoted in Bruno Cabanes, The Great War and the Origins of Humanitarianism, 1918-1924, at 313 (2014); *see also* Helmut Philipp Aust, *From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights*, 25 Eur. J. Int'l L. 1105 (2014).

23 Term borrowed from Martii Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (2004).

24 Eleanor Roosevelt, U.S. Delegate, U.N. Gen. Assembly, On the Adoption of the Universal Declaration of Human Rights (Dec. 9, 1948).

25 Hersch Lauterpacht grounded the primacy of international law on its reflection of "the universal law of humanity in which the individual human being, as the ultimate unit of all law, rises sovereign over the limited province of the State." Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 Brit. Y.B. Int'l L. 1, 47 (1946); *see* Roman Kwiecień, *Sir Hersch Lauterpacht's Idea of State Sovereignty — Is It Still Alive?*, 13 Int'l Community L. Rev. 23 (2011).

26 Hans Kelsen, *Foundations of Democracy*, 66 Ethics 1, 34 (1955).

27 Troper, *supra* note 1, at 317.

and peoples retain the "supreme power" to retract their consent to be bound.[28] As both Troper and Dyzenhaus show, the way to overcome this pitfall is to ground the internal ties not in a metaphor of consent,[29] but in a conceptual understanding of sovereignty as a claim not to sheer power, but to authority.

As Troper explains, the idea of limited sovereignty was reconcilable even in the monarchy. In 1610, Sir Edward Coke, then the Chief Justice of the Court of Common Pleas, handed down two judgments that contested King James's assertion that the "[e]state of the monarchy is the supremest thing upon earth," equating kings with gods, because "they exercise a manner or resemblance of divine power upon earth.[30] In Coke's view, "the King cannot change any part of the common law . . . without Parliament,"[31] and even Parliament is not supreme but "controlled" by the common law.[32] In France, Troper explains, the *Parlements* claimed the right to refuse the registration of the King's laws when they conflicted with the fundamental laws of the realm.[33] But as Troper emphasizes, this limitation came from within: they decided "in the name of the people,"[34] or grounded their authority in the common law.[35]

Dyzenhaus explores another move that imposes inherent limits on any sovereign authority. Dyzenhaus follows Hermann Heller's refined treatment of the concept of the democratic *Rechtsstaat*. This is the idea that states are inherently bound by the concept of the rule of law — "the immanent legal rationality" that is "constitutive of the state, so that the sovereign is legally

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28 John Locke, Two Treatises of Government ¶ 149, at 366 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690):

> [Y]et the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end.

29 *See also* Eyal Benvenisti & Alon Harel, *Embracing the Tension Between National and International Human Rights Law: The Case for Parity* (Tel Aviv Univ., Global Trust Working Paper Series, Working Paper No. 2015/04, 2015), *available at* http://globaltrust.tau.ac.il/wp-content/uploads/2015/04/Benvenisti-and-Harel-Discordant-Parity-WPS-04-15.pdf.

30 2 James Harvey Robinson, Readings in European History 219-20 (1906).

31 The Case of Proclamations, 12 Co. Rep. 74, 75 (1611).

32 Dr. Bonham's Case, 8 Co. Rep. 113b, 118a-b (1610).

33 Troper, *supra* note 1, at 330-33.

34 *See id.* at 334; *see also* Armin von Bogdandy & Indo Venzke, In Whose Name? (2014).

35 *See* David Dyzenhaus, *Formalism's Hollow Victory*, N.Z. L. Rev. 525 (2002) (discussing the common law as a source of substantive norms and guarantee of freedoms).

bound to fundamental legal principles."[36] Dyzenhaus identifies in Heller's paradigm "a principle of humanity . . . [that] is about the obligations that attend any exercise of sovereign power that affects important individual interests. A claim to exercise sovereign power is a claim to authority over the person affected by the exercise."[37] And that authority, like any other exercise of authority, is subject to the requirements of the rule of law. Along similar lines of seeking a conceptual, internal limitation on sovereignty, Sergio Dellavalle offers an original argument for the inherent commitment of sovereign authority to "communication which occurs when individuals interact within the most general horizon . . . ."[38]

II. External/Internal Limits also Towards Outsiders?

The above outline suggests that there is nothing new in conceiving the sovereign as inherently limited. What is distinct in this issue is the focus on the limitations of the *sovereign in relation to foreigners who are not subject to its authority*. Obviously, the external approach is quite readily amenable to exploring such questions (e.g., Wolff, Vattel, Kant, and obviously Kelsen and Lauterpacht). The internal approach to such a concept is by definition more resistant to this move because the claim to internal legitimacy refers by definition to the internal stakeholders. But this doesn't mean that an internal, conceptual approach is irreconcilable with obligations toward outsiders, as both Dellavalle and Zucca show in their philosophical elaboration of the concept of sovereignty. Constitutional lawyers have also subscribed to such a vision. For example, as Jochen von Bernstorff elaborates, Georg Jellinek's theory viewed the will of the state as subject to a "logically inherent limitation" that is a reflection of the state's internally-based "elementary purposes," which are "to engage in relations with other States in an ever more interdependent international community."[39]

In my own research I have invoked the metaphor of "States as Trustees of Humanity." The main thrust of my project is not to explore how to improve the global protection of human rights or to examine whether and how equitable and sustainable exploitation of global resources can be ensured. Mine is not another articulation of the global justice debate. The project responds to the waning political power of the individual who is left with muted voice and no

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36 Dyzenhaus, *supra* note 1, at 349.
37 *Id.* at 361.
38 Dellavalle, *supra* note 16, at 394.
39 *See supra* note 15.

exit options, in the face of powerful foreign states, multinational corporations and global governance bodies. Its motivation is to explore the likelihood of providing more effective voice for and accountability to the diffuse voters, and thereby to allow them to mobilize for the sake of ensuring better respect of their rights and welfare. Global taxes that reallocate resources from the rich to the poor, or extraterritorially imposed human rights protection, continue to treat the poor, the outsiders, as objects rather than as agents. In this context, Evan Fox-Decent and Ian Dahlman cite C.S. Lewis's admonition:

> Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . to be put on a level of those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals.[40]

The admonition is apt when contemplating how to promote global justice. It reminds us that the key is effective voice in and meaningful accountability of both national and transnational decision-making processes.

III. In Defense of the Trusteeship Concept: A Response to the Critique

Even if sovereignty can be reconciled with inherent (external or internal) obligations toward outsiders, this does not mean that such a commitment is necessarily beneficial to the disadvantaged stakeholders. Indeed, several contributions have expressed deep concerns about such an approach, and particularly about my use of the trusteeship metaphor.

Andrew Fitzmaurice examines in his contribution whether the legacy of the history of empire sullies the concept of sovereign trusteeship beyond redemption.[41] He shows that the idea of humanitarian trusteeship served the economic interests of the imperial powers. In fact, the first time that Vattel invokes this concept he uses it to justify colonialism.[42] Dyzenhaus points to Schmitt's claim that there can be no other outcome because whoever invokes humanity has already a firm idea of what "humanity" requires.[43] Fox-Decent and Dahlman also take a critical look when they examine the history of the

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40 C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 228 (1953); *see* Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 Theoretical Inquiries L. 507, 508 (2015).

41 Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries L. 447 (2015).

42 Benvenisti, *supra* note 9, at 328.

43 Dyzenhaus, *supra* note 1.

trusteeship concept as applied to the domination of indigenous peoples by European powers.[44]

These are serious concerns. They betray a lack of faith in those who invoke them. It was after all Vattel, the one who invoked this term, who used it as justification for empire when he stated that "the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies."[45] Similarly, the 1885 Conference of Berlin, which formalized the allocation of African lands among European powers, invoked the desire to create the "conditions most favorable to the development of commerce and of civilization in certain regions of Africa, [while being] preoccupied with the means of increasing the moral and material well-being of the indigenous populations."[46] Later, the League of Nations used trusteeship to justify a new form of colonialism,[47] and the United States invoked its "right to protect" Central and South American republics from the aggression of European powers, thereby exercising its "obligation of civilization to ensure that right and justice are done by these republics."[48] Also the problematic relationship between occupier and occupied during armed conflicts has been referred to as trusteeship.[49]

Are these serious concerns about using the "trusteeship" concept fatal? My motivation for using the term "trusteeship" despite the historic baggage begins where the use of this term — originally a private-law concept — enters domestic public law. Trusteeship was the basis for John Austin's definition of administrative law, long before Dicey's approach gained prominence: "Administrative law determines the ends and modes to and in which the sovereign powers shall be exercised: shall be exercised directly by the monarch or sovereign number, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are *delegated or committed in trust*."[50]

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44 Fox Decent & Dahlman, *supra* note 40.

45 Vattel, *supra* note 10, § 209.

46 General Act of the Conference of Berlin Concerning the Congo, Feb. 26, 1885, 3(1) AJIL Supplement: Official Documents 7 (1909).

47 League of Nations Covenant art. 22.

48 Elihu Root, Roosevelt's secretary of state, expressed these principles in terms of sovereign responsibilities: all sovereignty in this world is held upon the condition of performing the duties of sovereignty. Luke Glanville, Sovereignty and the Responsibility to Protect: A New History loc. 2532-2541 (2013) (ebook).

49 Eyal Benvenisti, The International Law of Occupation 6 (2d ed. 2012). For a critique of this term in this context, see *id.* at 71.

50 John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 465 (Robert Campbell ed., 5th ed. 1885) (emphasis added).

Austin's view reflected a long-established practice of common-law judges who since the early seventeenth century invoked and refined the concept of trust to limit the authority of officeholders.[51] This traditional concept informed also the democratic vision of state authority as deriving from the people and therefore requiring the state to act as its trustee, as exemplified in the writings of John Locke,[52] as well as James Madison in *The Federalist*.[53] Similarly, the Virginia Declaration of Rights (1776) asserted that "all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them."[54] As Troper writes in his contribution to this issue, even monarchic France recognized the concept of trusteeship which limited the authority of the King.[55]

The trusteeship vision continued to inform the evolution of the domestic administrative law of several countries. Conceptualizing the government as a trustee offered courts grounds for extending the scope of administrative law obligations to encompass also the management of property owned by the state or other public agencies. In the United States, the "Public Trust Doctrine" provided a rationale for developing the law on environmental protection.[56] The Israeli Supreme Court reasoned in 1962 that administrative agencies must manage their property as trustees of the citizens.[57] The same concept explained

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51 E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 Geo. L.J. 1025, 1028-30 (1975) (citing English cases from as early as 1592 which "embraced the private law concept of trust and extended its application even further in regulating public offices"). Note that Dicey also emphasized delegation, but from the law, as being embedded in the logic of delegation. *See* Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 384-85 (8th ed. 1915) ("[A]uthority given him by the law.").

52 Locke, *supra* note 28.

53 The Federalist No. 46, at 294 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people."); *see also* The Federalist No. 65, at 397 (Alexander Hamilton) ("The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves.").

54 The Virginia Declaration of Rights of June 12, 1776, § 2.

55 Troper, *supra* note 1.

56 Joseph Sax, *The Public Trust Doctrine*, 68 Mich. L. Rev. 471, 521 (1970) ("[T]he PT has no life of its own and no intrinsic content. It is no more — and no less — than a name courts give to their concerns about the insufficiencies of the democratic process.").

57 HCJ 262/62 Israel Peretz v. The Municipality of Kfar Shmariahu, 16 PD 2101, 2115 [1962] (Isr.) (Justice Sussman).

why an agency could not irrevocably bind its own discretion, and why it had to exercise it "for the common good."[58] Interestingly, the concept of trusteeship as the basic concept of administrative law has garnered renewed attention in recent years from domestic administrative and constitutional law scholars.[59]

It should also be mentioned that there is nothing "Western" in the use of the trusteeship concept (although its main abusers have been Western). Gandhi invoked the concept of trusteeship to justify redistribution of resources between the rich and the poor, including between rich and poor states. In his rendition, trusteeship meant that "[t]hose who own money now, are asked to behave like trustees holding their riches on behalf of the poor."[60] As R. Neethu pointed out,

> per Gandhian trust philosophy, right holders must place a restriction on self-interest by finding a way to discharge the fiduciary obligation they have. The equitable distribution system under his philosophy requires "what is essential," no more and no less. A more concrete application of this approach would suggest that individual right holders should be required to limit self-interest in acting as a trustee.[61]

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58 Stone v. Mississippi, 101 U.S. 814, 820 (1879) ("The power of governing is a trust committed by the people to the government . . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights."); Black River Regulating Dist. v. Adirondack League Club, 121 N.E.2d 428, 433 (N.Y. 1954) (approving "the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good").

59 Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (2012); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. Pol. Phil. 178 (2012); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699 (2013); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. Rev. 1249 (2011); D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 672 (2013); *see also* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117 (2006).

60 M.K. Gandhi, Trusteeship 14, http://www.mkgandhi.org/ebks/trusteeship.pdf (last visited June 4, 2015) (compiled by Ravindra Kelkar).

61 *See* R. Neethu, *Gandhi, Trusteeship and Intellectual Property Law*, GlobalTrust Blog (Dec. 24, 2013), http://globaltrust.tau.ac.il/gandhi-trusteeship-and-intellectual-property-law/.

It is striking that Gandhi uses the term trusteeship, being fully aware of the devastating consequences of its invocation by its abusers over the years.

As Dyzenhaus is careful to point out,[62] the reference to the concept of "trust" refers to a "sense of trust" rather than to the doctrines of trust that can be found in domestic property laws of many countries, or to more specific doctrines such as the Special Trustee for American Indians,[63] the notorious Mandate System of the League of Nation,[64] or the United Nations' Trust Territories.[65] The concept of trusteeship does not venture to suggest that there should be an assumption that the trustee can be trusted. In fact, just the opposite is the case. It was Niklas Luhmann who elaborated on the fundamental difference between "trust" and "confidence" or "faith." He suggested that the concept of trusteeship has been invoked as a way to remedy the lost sense of confidence or of faith that people used to have in others. Once people have moved out of their closely-knit communities or become reliant on outsiders, they no longer have had direct information about those others, and cannot have confidence in their motives. The concept of trust therefore conveys that lack of confidence.[66] As Adam Seligman suggests, the concept of trust must be viewed as "an attempt to posit new bonds of general trust in societies where primordial attachments were no longer 'goods to think with.'"[67]

But these new bonds are grounded in deep suspicion. This remedial term is inherently suspect, because trust, as opposed to confidence or faith,

> involves one in a relation where the acts, character, or intentions of the other cannot be confirmed. . . . [O]ne trusts or is forced to trust — perhaps led to trust would be better — when one cannot know, when one has not the capabilities to apprehend or check on the other and so has no choice but to *trust*.[68]

Stated differently and poignantly, "[t]rust is most required exactly when we least know whether a person will or will not do an action."[69]

We should not trust our trustees; we have no confidence nor faith in them, and therefore we are entitled to an account from them because they are inherently

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62 Dyzenhaus, *supra* note 1, at 362 (referring to a "sense" of trusteeship).

63 *See* 25 U.S. Code § 4042 (Office of Special Trustee for American Indians).

64 League of Nations Covenant art. 22.

65 U.N. Charter ch. XIII (The Trusteeship Council).

66 Niklas Luhmann, Trust and Power (1979); *see also* Janne Jalava, *From Norms to Trust: The Luhmannian Connections Between Trust and System*, 6 Eur. J. Soc. Theory 173 (2003). I thank Neil Walker for elaborating on this point.

67 Adam B. Seligman, The Problem of Trust 15 (1997).

68 *Id.* at 21.

69 Virginia Held, *On the Meaning of Trust*, 78 Ethics 156, 157 (1968).

suspicious: "to trust is to take a risk."[70] Because trustees are inherently suspect, they carry the burden of proving that they serve our interest. Alternative terms such as "stewardship" or "fiduciary obligations" are even worse than trusteeship precisely because they do not carry the historic baggage that calls attention to potential abuse. The challenge is to come up with mechanisms that will effectively monitor the "trustees" and ensure that their discretionary authority is not abused, along the well-trodden path of administrative law[71] that now should extend to the international sphere as well, as noted by the emerging school of Global Administrative Law.[72] The promise of such an approach needs to be and will be tested in the coming years.

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70 Jalava, *supra* note 66, at 174.

71 Dyzenhaus, *supra* note 1, at 362.

72 Eyal Benvenisti, The Law of Global Governance (2014); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005).