Sovereignties

SOVEREIGNTIES

DISSERTATION
to obtain the degree of Doctor at the Maastricht University,
on the authority of the Rector Magnificus,
Prof. dr. L.L.G. Soete
in accordance with the decision of the Board of Deans,
to be defended in public
on Thursday 28 April 2016, at 12.00 hours

by

Antonia Maria Waltermann

Supervisors:
Prof. dr. J.C. Hage
Prof. dr. A.W. Heringa

Assessment Committee:
Prof. dr. A. Halpin (National University of Singapore)
Prof. dr. G.C.G.J. van Roermund (Tilburg University)
Prof. dr. J.M. Smits (Chair)
Prof. dr. J. Vidmar
Prof. dr. B. de Witte

To
E. & E.

Acknowledgements

As a student, I was asked by a professor what my plans for the future were. I responded that I wanted to go into academia, and while that professor encouraged me, he cautioned that money is tight and PhD places are limited. When asked if I had a back-up plan, I came up empty-handed and, I'm afraid, just blankly stared at him for a good minute.

This lack of alternative plans could have meant moving back in with my parents after my master studies to apply for as many positions as possible. Instead, I received an email while having dinner with a friend that a position of a lecturer would open up in the Public Law department of Maastricht University soon and would I be interested? The email also included words of caution: it isn't a PhD position and you haven't really done much constitutional law throughout your studies – but it also included encouragement to apply regardless.

I did. That was three and a half years ago. Today, my PhD is finished and my conviction to remain in academia strengthened, but I would not be where I am now without the support of many wonderful people. In the following, I'd like to acknowledge their contributions both to my general development and to this work.

First and foremost, I would like to thank my mother, Elisabeth Waltermann. In high school, I wrote a satirical piece blaming all the wrongs in the world on her that was published in the school magazine, and of which she keeps a copy to this day. It works the other way around just as well, if not far better because now I do not have to be satirical: my mother has encouraged me, supported me, and helped me become the person that I am, even when it meant letting me travel to far and foreign countries such as Ireland or the Netherlands. I have received the same steadfast support from my father, Ernst Disch. I wouldn't be where I am today without them. Thank you both.

Academically speaking, I owe a lot to Jaap Hage. Not only is he one of the supervisors of this PhD, but he also supervised my bachelor and my master thesis when I was a student at Maastricht University. From the first moment, the enthusiasm he has shown and the time he has invested in my academic development have been astonishing and incredibly motivating. My other supervisor, AW Heringa, might not have known me as a student, but his influence and importance should not be underestimated because of this. I consider myself incredibly lucky to have had two so interested and involved supervisors who were always there for me when I needed them, but who also gave me a great deal of independence in researching and shaping this work. I have always walked out of meetings with them with (renewed) enthusiasm. They have been incredibly supportive, but never uncritical of my work.

There are a number of individuals who have shaped the last three years for me and who have made writing this book possible, who listened and shared their opinions, and who provided friendship and distractions whenever necessary (and sometimes also when it wasn't). In no particular order, I would like to thank –

Vanessa Tünsmeyer, for being a wonderful friend and a great roommate. I'm glad you moved back to Maastricht and that our friendship has remained constant ever since we first realised the other existed after years in the same study. Thank you for your encouragement, understanding and company! Sascha Hardt, for being the person who sent me that fateful e-mail referred to in the second paragraph of these acknowledgements, for opening the doors to his office to me, and for becoming one of my closest friends over the course of the last three years. Hester van der Kaaij, for her friendship, the many coffees and long lunches and all the times in which we shared ideas, talked about theories of concepts and enabled each other to enjoy life by means of nachos and/or wine. Marcus Meyer, Mark Kawakami, and many more of my fellow PhDs at Maastricht University for the shared experiences, the lunches and drinks, movies, and everything else. Everyone in the Maastricht Law and Philosophy

Platform (MLP²) and the Philosophy Reading Club for sharing my love for legal theory and for the many evenings of engaging and often challenging discussion. Chris Backes, for having taken a chance on me. And lastly, Claudia Pachmann, for saving my sanity more than once and always lending an open ear, despite the distance. There are a million more individuals I could mention here, some who have only been in my life briefly and some I've known for a long time. In the interest of not turning these acknowledgements into an emotional speech to all my friends, or to everyone I admire, I will just say: thank you, you're wonderful.

I count myself very lucky to know all these amazing individuals and to have been given the opportunity to work and to continue to work in academia. If someone asked me today if I had a back-up plan, I'd most likely just stare at them blankly for a long time. And frankly? I'm very okay with that.

Antonia Waltermann
Maastricht, February 2016

Contents

Part 1: Preliminaries

1.1. Introduction

1.1.1. Why Talk About Sovereignty?

An MP of the British House of Commons, a Chinese delegate to the United Nations and an Indian citizen walk into a bar. Before pouring them their drinks, the bartender asks each of them who is sovereign. The British MP replies that it is, of course, Westminster Parliament, able to make or unmake any law whatever. The Chinese delegate says that autonomous states are sovereign under international law, and the Indian claims that it is the people and only the people that are sovereign because they constitute the legal system.

While in the format of a bar joke, there is no punch line to this except the conclusion that the three individuals in question think that "sovereign" refers to very different entities. A likely cause for this confusion is that they each have a different understanding of what "sovereign" and hence "sovereignty" means. In a similar vein, imagine a professor of public international law and a professor of constitutional law discussing sovereignty and what rights and duties it entails. Are they likely to agree, and will they be using the term "sovereignty" to refer to the same phenomenon?

Black's Law Dictionary defines sovereignty as supreme dominion, authority or rule, as well as independence.[1] However, this short and seemingly simple definition belies decades—centuries, even—of

[1] Bryan A. Garner (ed.), *Black's Law Dictionary* (3rd Pocket Edition: Thomson West, 2006) at 665.

academic and political discourse regarding the concept of 'sovereignty' and the meaning of "sovereignty".[2] As Schrijver summarises

> "Few subjects in international law and international relations are as sensitive as the notion of sovereignty. Steinberger refers to it in the *Encyclopedia of Public International Law* as 'the most glittering and controversial notion in the history, doctrine and practice of international law'. On the other hand, Henkin seeks to banish it from our vocabulary and Lauterpacht calls it a 'word which has an emotive equality lacking meaningful specific content', while Verzijl notes that any discussion on this subject risks degenerating into a Tower of Babel. More affirmatively, Brownlie sees sovereignty as 'the basic constitutional doctrine of the law of nations' […] As noted by Falk, 'There is little neutral ground when it comes to sovereignty'."[3]

This does not yet take into account notions of internal rather than external sovereignty or constitutional perspectives on the concept of sovereignty. In short, there is no consensus on the concept—or concepts—of sovereignty and the meaning of the word. Indeed, Michel Troper notably explains that

> "Scholars disagree about every aspect of the theories of sovereignty: whether they were first devised with the creation of the modern state after the end of the Middle Ages or have medieval origins; whether every state is sovereign or one can conceive of a non sovereign state; whether sovereignty is indivisible; whether there is a sovereign in every state; whether in the contemporary world sovereignty is compatible with the fact

[2] Quotation marks will be used where this is necessary to distinguish between the term and the concept for which it stands. 'Sovereignty' in single quotation marks refers to the concept, "sovereignty" in double quotation marks refers to the term.
[3] Nico Schrijver, 'The Changing Nature of State Sovereignty', *The British Yearbook of International Law*, 70/1 (1999), 65-98 at 78.

> that states are subject to international law, with the idea of the Rechtsstaat, the rule of law, or with fundamental rights."[4]

1.1.2. Research Questions

Not only is there disagreement about the aspects of sovereignty and theories thereof, sovereignty is also seen in ideologically divergent lights. Some have argued that sovereignty is necessary to safeguard peace, while others see it as a tool of colonialism or a means to justify inaction in the face of gross human rights violations. As Troper states,

> "[…] many of the writings on sovereignty are ideologically laden in very diverse ways. They do not focus on the question of whether states are actually sovereign and what it means or whether there is a sovereign in every state and who that sovereign is in a particular state, but rather whether it is a good or a bad thing that states are or were sovereign at some period in history."[5]

However, this book does not seek to answer an ideological question—rather, it takes as a starting point the assumption that before any value judgement regarding the concept of sovereignty can be made, it is necessary to define clearly that which is to be judged. The purpose of this book is then to answer precisely the question of what "sovereignty" means. By doing so, it will also be possible to answer questions such as whether states are actually sovereign, whether there is a sovereign in every state, and how to identify that sovereign. One further question that is often raised in the context of sovereignty is whether it can be limited. We will see, however, that this question rests on a conceptual confusion with regard to some concepts of sovereignty. The consideration of these questions and issues form the basis of a coherent theory on the meaning(s) of sovereignty, which answers the research question of this

[4] Michel Troper, 'Sovereignty', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) at 351.
[5] Ibid.

book and consequentially enables a critical study of existing theories and practices for the notion of sovereignty. In this manner, the reader will be enabled to make informed choices and judgements with regard to the ideological issues of the meanings of "sovereignty".

1.1.3. Limitation of Scope

The term "sovereignty" is used in various contexts, ranging from the autonomy of individuals, religion and the economic situation of states or international organisations to questions of the origin and *locus* of authority in a state or on the international level. For both practical reasons and conceptual reasons, not all these contexts can and should form part of this book. While the research question is phrased in a general manner regarding the term "sovereignty", the enquiry will concentrate on legal, and then more specifically on public law understandings of "sovereignty": constitutional law and international public law are of particular importance in this endeavour.

A further restriction is of a more practical than conceptual nature: given the wealth of literature on the subject of sovereignty, it is all but impossible to provide a comprehensive and exhaustive overview of the existing literature. While hardly any academic endeavours start from scratch and academia involves "standing on the shoulder of giants",[6] choices have to be made as to the relevant sources. In other words, one can only stand on so many shoulders at once and it is necessary to pick which giant to use to reach a little further. The method for choosing many of the sources used in this book is described in the next chapter, as is the justification for those choices. This book therefore is not and cannot be a comprehensive guide to the existing literature; rather, its arguments should speak for themselves and can be read in conjunction with existing literature or independently from it.

[6] This phrase was used by Isaac Newton in a letter to Robert Hooke in 1676.

1.1.4. Intended Outcome and Value

In order to answer the question posed in this book, a coherent theory of sovereignty is required. Such a theory must answer all of the above questions without internal inconsistency, while also cohering with states of affairs in reality. Given that 'sovereignty' is a constructed concept that depends on our use of it,[7] such a theory should be developed from—but not necessarily be identical to—the general and usual usage of the term in question.

The continued debate surrounding "sovereignty" demonstrates that, at the time of writing, there is no fixed definition and understanding of it yet which receives general consensus. This book hopes to add clarity to the debate and to facilitate further discourse, not by answering questions in which "sovereignty" plays a role, but by considering the concepts of 'sovereignty' as such. Conceptual clarity and transparency in use are important for several reasons and for different groups: in academic discourse, it is of scientific interest to be as clear and precise as possible and to distinguish between different—and possibly mutually exclusive—meanings of "sovereignty". In political debate, meanwhile, it may sometimes appear beneficial to remain ambiguous and vague, especially because "sovereignty" invokes strong reactions. However, making use of the ambiguity of the term in such a way opens one up to charges of fallacious rhetoric at best and deliberate misrepresentation of the conflict or issue at hand at worst. We will consider examples of this in part 4 of this book.

It should be emphasised that the purpose of this book is to provide an analytical framework within which discourses surrounding "sovereignty" can be held. The intended outcome is *not* to give answers to political or value-laden questions (e.g. "should humanitarian intervention be allowed?" or "should Member States transfer more competences to the European Union?") but rather to provide others with the tools to answer

[7] Cf. Section 1.2.3 on Concepts.

these questions in a conceptually clear manner, particularly in as far as "sovereignty" is concerned.

1.1.5. Structure

As stated above, the intended outcome of this book is a conceptually clear and coherent theory of sovereignty. In the following section (1.2.) of this book, we will consider the method used to arrive at this outcome. Part 2 expounds the theory of sovereignty which constitutes the main contribution of this work. This part distinguishes between internal constitutive sovereignty (2.1.), internal constituted sovereignty (2.2.), external constitutive sovereignty (2.3.), and external constituted sovereignty (2.4.). Each of these forms of sovereignty is analysed; section 2.5. considers their relationship with one another.

In Part 3, we will consider other accounts of sovereignty. Theories of monarchical sovereignty, parliamentary sovereignty, popular sovereignty and state sovereignty will be situated within the theory of this book, and the differences will be discussed. Part 4 of this book, meanwhile, applies the theory of this book to a number of current questions and discourses in which "sovereignty" is used. Both Part 3 and Part 4 are meant to clarify the theory of Part 2 and to show it in a more practical and less theoretical and abstract light.

We will conclude in Part 5 that there are four different meanings of sovereignty, and distinguishing between them will lead to greater conceptual clarity than currently surrounds the notion of sovereignty.

1.2. Methods

The purpose of this book is, as stated above, to develop a coherent theory of sovereignty or sovereignties, given that there is more than one concept of sovereignty, and in this way to contribute to academic and political

discourse on topics involving claims to sovereignty or invocations of sovereign rights. Different methods could be used to achieve this goal: a discourse analysis of existing academic literature and/or existing political discourse involving the term "sovereignty" could provide insight into the way in which the term is used and what meaning is assigned to it, for example. Alternatively, the starting point of inquiry could be the philosophical foundations of the term. The justification of any theory developed might rest on actual word usage or on something else entirely. The following answers the questions of method and justification used in this book.

1.2.1. Research Method

The research method on which the theory developed in this book and the conclusions reached will rest is rational reconstruction. "Rational reconstruction" denotes a method whereby the object of reconstruction—be it a terminological, methodological or theoretical entity—is presented in "similar, but more precise and more consistent formulation".[8] Rational reconstruction can be historical, i.e. considering the usage of the concept in question through history; it can be pragmatically oriented, considering the practice and application of the concept; or it can seek a standard concept.[9] As such, rational reconstruction can be descriptive or prescriptive. There is a certain tension between the two, as the criteria of good rational reconstruction are adequacy, in the sense of similarity to existing usage or practice, and precision and consistency, in the sense of logical and conceptual validity, clarity and coherence. Proximity to existing usage might lead to inconsistencies, while internal consistency of the reconstruction might mean departing from existing usage or

[8] Gregg Alan Davia, 'Thoughts on a Possible Rational Reconstruction of the Method of "Rational Reconstruction"', *20th World Congress of Philosophy* (Boston, 1998) at Semantic Preliminaries.
[9] Ibid.

practice.[10] Davia (1998) consequently distinguishes between rational reconstructions of the first and the second degree: those of the first degree focus on adequacy as a criterion and remaining close to existing usage and hence largely descriptive; those of the second degree focus instead on the criteria of precision and consistency, departing from existing usage where required by these criteria, and hence are largely prescriptive.[11] A rational reconstruction in the first degree of sovereignty might be based on an analysis of how the notion of sovereignty is used in legal, political and academic debate, on the basis that language and the use of it by competent language users constitute the concept.[12]

The purpose of this book is not a rational reconstruction of sovereignty in the first degree, however, but in the second degree. In answering "What does 'sovereignty' mean?" we will hence not rely solely on the discourse in which the concept is used and thus on sources in which it is used. Instead, the focus will be on ensuring consistency and coherency even where this may lead to a departure from existing usage. Nevertheless, the way "sovereignty" has been used historically and is currently used provides the starting point for the present enquiry. To ensure that this starting point is not arbitrary, the literature chosen to provide the starting point for the rational reconstruction of sovereignty rests not only on the author's own research, but also on the opinions of a number of scholars regarding the most authoritative sources in their field with regard to sovereignty to supplement and focus this research.[13] While the sources identified via this method provide the starting point of this book, its purpose is not to describe past and current usages of "sovereignty". In line with the method described above, deviation from existing discourse

[10] Ibid., at On the Problem of Normativeness.
[11] Ibid.
[12] Cf. J. R. Searle, *Making the Social World* (Oxford University Press, 2010).
[13] Inquiries were sent to and answered by Gráinne de Búrca, Damian Chalmers, Paul Craig, Gareth Evans, Hans Lindahl, Martti Koskenniemi, Adam Tomkins, Neil Walker, and Bruno de Witte. The author would like to thank everyone who contributed in this manner.

is necessary. However, a few words on the existing discourse may be necessary to elucidate why deviating from it is required.

1.2.1.1. State of the Art

It is indisputable that there is a great wealth of literature on the topic of sovereignty. It shall have to suffice here to sketch a few trends in the recent literature on the topic and to position this book against them.

One trend already mentioned earlier and identified by Troper is to evaluate sovereignty instead of determining its nature.[14] It is the express purpose of this book not to do so; instead, we will consider the nature of sovereignty by analysing the meaning of "sovereignty". This excludes answering ideological questions, and it equally excludes literature which seeks to prescribe a meaning of sovereignty that clearly does not correspond with states of affairs in the world (e.g. "only democracies can be sovereign" even though non-democracies are also considered sovereign).[15] Another trend is to consider "sovereignty" only in very specific contexts, such as the European Union,[16] the constitutional doctrine of a particular country, such as the United Kingdom,[17] or

[14] Troper, 'Sovereignty', at 351.

[15] By means of an example: Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', *Constellations*, 12/2 (2005), 223 - 44. A more in-depth analysis of this point can be found in sections 2.1.4 and 2.1.5. in particular.

[16] Cf. Paul Craig, 'The United Kingdom, the European Union, and Sovereignty', in Richard Rawlings et al (eds.) *Sovereignty and the Law* (Oxford University Press, 2013), Vincent Della Sala, 'Europe's Autumn: Popular Sovereignty and Economic Crisis in the European Union Beyond the Arab Spring: A New Era of Popular Sovereignty and Protest', *Whitehead J. Dipl. & Int'l Rel.*, 13 (2012), 35-44, Hans Lindahl, 'European Integration: Popular Sovereignty and a Politics of Boundaries', *European Law Journal*, 6/3 (2000), 239 - 56, Neil Maccormick, 'The Maastricht-Urteil: Sovereignty Now', *European Law Journal*, 1/3 (1995), 259-66, Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', in Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing, 2003).

[17] Cf. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999), Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010), Stuart Lakin,

humanitarian intervention.[18] To a certain degree, this book does the same: the scope of this book is limited in such a way as to focus on "sovereignty" as a concept of national and international public law. Nevertheless, the aim is to develop a framework that is capable of encompassing and clarifying several different discourses and contexts.

A last trend to be considered here is to frame inquiries into the nature of sovereignty as dialogical or discursive. This presupposes a particular understanding of law and legal concepts that this book does not uphold (see section 1.2.2. on concepts). Walker, for example, defines sovereignty as "the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity **qua** polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity."[19] Walker's understanding of sovereignty as a speech act[20] is picked up by other literature.[21] While we will see that some of the conclusions that follow from this understanding of sovereignty are similar to some conclusions we will arrive at in this book,[22] and shares much with the notion of constitutive sovereignty put forward in this book, this understanding of sovereignty either conflates the world of law with that which constitutes it, and constitutive with

---

'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution', *Oxford Journal of Legal Studies*, 28/4 (2008), 709-34.

[18] Cf. Theresa Reinold, *Sovereignty and the Responsibility to Protect* (Routledge, 2012), Chengqiu Wu, 'Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises', *Journal of Chinese Political Science*, 15/1 (2010), 71-97.

[19] Neil Walker, 'Late Sovereignty in the European Union', in Neil Walker (ed.), *Sovereignty in Transition: Essays in European Law* (Hart Publishing, 2003) at 6.

[20] Cf. Ibid., at 7.

[21] Jan Willem Van Rossem, *Soevereiniteit En Pluralisme: Een Conceptuele Zoektocht Naar De Constitutionele Grondslagen Van De Europese Rechtsorde* (Kluwer, 2014) at 413. "Soevereiniteit is een claim – een 'speech act'. Niet een waarneembaar feit." ("Sovereignty is a claim – a 'speech act'. Not a perceptible fact.")

[22] A useful comparison here might be ibid., at 409-23, and 423-26 (English summary). and Section 4.1. on the European Union in this book.

constituted sovereignty,[23] or simply seeks to achieve a different goal than this book, namely to describe the use of sovereignty in legal discourse rather than to analyse how the notion(s) of sovereignty could be used more clearly. Given that in this book we are interested in the meaning of "sovereignty", we will not consider sovereignty as a speech act.

Regardless of similarities or differences between this book and other works on sovereignty, the ultimate justification of the rational reconstruction presented in this book depends on it fulfilling the criteria of consistency and precision, that is, on the strength of the arguments and the clarity of the outcome. The aim of presenting such an account of sovereignty is to provide the conceptual tools for greater precision and specificity in discourse and to make new insights into the concept itself possible. To achieve this aim by means of rational reconstruction requires an understanding of concepts as such. For this reason, we will look at what concepts are in the first place and how they can be analysed in the next two sections.

1.2.2. Concepts

Concepts and conceptual analyses have a certain role to play in legal scholarship and theory—Hart's most famous work is not titled *The Concept of Law* by accident.[24] However, even decades later, there is no consensus as to what concepts are, how they are put together and how they influence our thinking, or are influenced by it in turn, if at all.[25] Entire books have been written on concepts in law,[26] and this book could

[23] Cf. Section 2.2. of this book.
[24] H. L. A. Hart, *The Concept of Law* (Clarendon Press, 1994).
[25] For an overview of various theories of concepts, cf. Eric Margolis and Stephen Laurence, 'Concepts', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2012 edn.; http://plato.stanford.edu/archives/fall2012/entries/concepts/, 2012).
[26] Jaap Hage and Dietmar von der Pfordten (eds.), *Concepts in Law* (Law and Philosophy Library: Springer, 2009).

have been about concepts in law as well. However, it is not. It does not even wholly enter into the discussion. Instead, it will suffice here to say the following about concepts, and concepts in law:

Firstly, there are concepts of things that are, depending of course on one's ontological beliefs, real, such as chairs and tables and the Eiffel Tower. Sovereignty is not one such concept; rather, sovereignty is the kind of concept that is constructed by language and how it is used in discourse.[27] For legal concepts, being constructed by language and how they are used in discourse means being constructed by the law and by being used in legal discourse.

Secondly, concepts in law can be divided into a great many categories,[28] but this book will operate with only two main categories of legal concepts: internal legal concepts, which are constituted by the law itself, and doctrinal legal concepts, which are constructed by doctrinal discussions and can be used to express legal ideas, to catalogue internal legal concepts, etc. Internal legal concepts are by necessity system-dependent, in that they are constituted by a legal system. Doctrinal legal concepts are not system-dependent, which makes them particularly useful also in comparative law.

The same term can stand for both an internal legal concept and a doctrinal one. Take the example the concept of murder. "Murder" is by no means a term used solely within legal discourse, but the system-dependent concept of murder is defined in the criminal codes of the legal system in question:

> "The act of wilfully causing the death of another person constitutes murder." – *Article 221-1 Code Pénal, France.*

[27] Cf. Searle, *Making the Social World* and a great many others.
[28] See e.g. Åke Frändberg, 'An Essay on Legal Concept Formation', in Jaap Hage and Dietmar von der Pfordten (eds.), *Concepts in Law* (Law and Philosophy Library: Springer, 2009).

> "A murderer is he who, out of lust for killing, for the satisfaction of his sexual drive, out of greed or otherwise for base motives, heinously or cruelly or by means dangerous to the public or to make possible or conceal another offence, kills another human being." – *§221(2) Strafgesetzbuch, Germany.*
>
> "He who intentionally and with premeditation takes the life of another person is […] guilty of murder, […]" – *Article 289 Wetboek van Strafrecht, Netherlands.*[29]

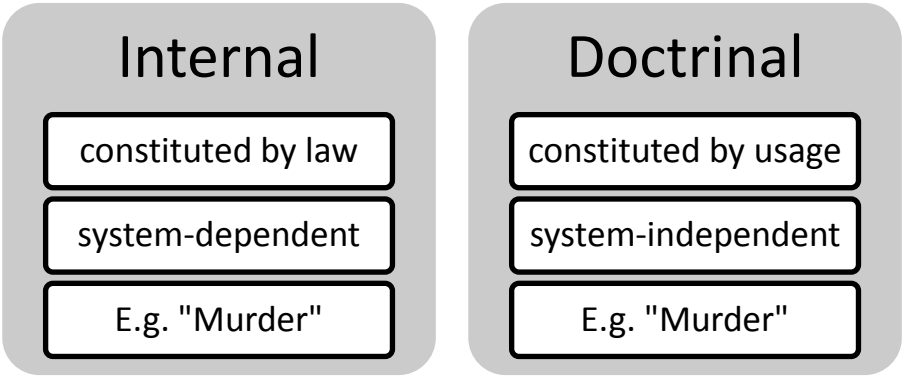
Each of these provisions contains the elements of the concept of murder within the legal system.[30] Legal practitioners are used to analysing the elements and testing whether they apply in a specific case in order to determine which, if any, legal consequence applies. This demonstrates how legal systems define their own concepts and how the legal rules themselves constitute the concept—or this specific form of the concept—and it furthermore shows that internal legal concepts are (usually) structured in elements of individually necessary and jointly sufficient 'building blocks', all of which must be fulfilled in order for the concept to be present. These building blocks may at times consist of cumulative or disjunctive conditions.

At the same time, scholars and practitioners alike will sometimes talk about "murder" without referring to one specific system—in comparative law, in textbooks or in doctrinal debate. The question might arise what all the internal legal concepts have in common, and the answer to this question cannot be system-dependent. Instead, any concept used in such

[29] Translations are taken from Nicole Kornet and Sascha Hardt (eds.), *The Maastricht Collection: Selected National, European and International Provisions from Public and Private Law* (3rd edn.: Europa Law Publishing, 2013).

[30] This is, of course, a simplified representation, as other provisions will also play a role and a complete conceptual analysis of murder would need to take e.g. matters of self-defence into account as well. However, the aim here is not to provide such a complete analysis, but rather to use this example to demonstrate several points regarding internal legal concepts in general. For these reasons, it is hoped that the reader will excuse this simplification.

discourse will be system-independent and the type here referred to as doctrinal legal concepts. Doctrinal legal concepts are constituted not by the law, but by how scholars and practitioners talk about the law, by how the law is used.



It hardly bears mentioning that there are many examples of terms other than "murder" that stand for both an internal and a doctrinal legal concept. Equally, there are terms that stand for doctrinal concepts only or for concepts that are generally doctrinal and internal only to a few select legal systems. Think of keywords and classifications put in the margins of compilations of laws, there to help students or even practitioners, sometimes defined by the law itself and sometimes by legal practice and scholarship.[31]

The term "sovereignty" is used in different senses and stands for different kinds of concepts, depending on the sense in which it is used. The distinction between internal and doctrinal legal concepts will aid us in classifying the different senses, situate them, and serve as a reminder of how the different senses in which sovereignty is used have come into being. By making the distinction, we can tell if sovereignty is constituted

[31] The lines between "the law itself" and "legal practice" and "legal scholarship" cannot always be clearly drawn, and the above paragraph is not meant to imply that they can in all cases. Legal practice impacts and changes the law, arguments by practicing lawyers are taken into account and reproduced by courts, and sometimes the same holds true for arguments by legal scholars.

by legal provisions or case law, or whether it is a construct of scholarship and general legal discourse. The different concepts of sovereignty we will develop in the following section of this book are all doctrinal in the sense that they are system-independent.

1.2.3. Hohfeld Explained and Revisited

> "Chameleon-hued words are a peril both to clear thought and lucid expression."[32]

Having made the distinction between different kinds of legal concepts, the question arises how we can analyse which concepts the term "sovereignty" stands for.

In 1913 and 1917 respectively, Wesley Newcomb Hohfeld published two articles titled "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning".[33] In these articles, he argues that there is a lack of clarity and transparency in legal thought and that the way in which legal practitioners and scholars alike conceptualise legal rights and duties is the main contributing factor to this muddling of thought and speech. He sought to remedy this situation and for that purpose developed two sets of related concepts which can be used to break down traditional legal concepts—e.g. ownership or trust, or in this case, sovereignty—and which can be used to analyse these traditional concepts more clearly. Hohfeld himself applied his work to private law, but the conceptual schemes are equally valid for issues of public law.[34] Hohfeldian terminology has the further advantage of allowing the analysis of theories regarding legal concepts—here, of course, that of sovereignty—and the

[32] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale L.J.*, 23 (1913), 16-59 at 29.
[33] Ibid.; Wesley Newcomb Hohfeld, 'Fundamental Legal Concepts as Applied in Judicial Reasoning', *Yale Law Journal*, 26/8 (June 1917), 710-70.
[34] H. Newcomb Morse, 'Applying the Hohfeld System to Constitutional Analysis', *Whittier Law Review*, 9 (1987), 639-62.

subsequent comparison of such theories despite the fact that they might use varying terminology. By applying Hohfeldian terminology to existing theories, potential differences between these theories in terminology are mitigated and the theories become comparable despite such differences.

The aim of making theories with potentially differing terminology comparable could also be achieved by means of an alternative terminological system. Hohfeld's choice of two sets of four correlatives and opposites each is not uncontroversial, with some scholars arguing that eight terms are too much or not enough.[35] Nevertheless, Hohfeld's system of analysis is widely accepted, particularly in Anglo-American scholarship.[36] Furthermore, Hohfeld's system of analysis is not only close to legal practice and education, but it allows for insights into the content of concepts, thus leading to greater clarity and transparency. As transparency and clarity in definition are part and parcel of this research, the end justifies the means—or rather, the method. This does not mean, however, that Hohfeld's conceptual schemes are not critically considered; in fact, a later section suggests a point of improvement which is subsequently applied to the analysis of sovereignty.

1.2.3.1. Hohfeld's Conceptual Schemes

The terminology Hohfeld employs consists of words that exist in regular (legal) English. However, these words should not be considered with preconceptions as to their meanings, but rather they should be considered on their own merit and definition.[37] For this reason, the eight correlatives and opposites Hohfeld developed for his conceptual schemes are

[35] Andrew Halpin, 'Rights, Duties, Liabilities, and Hohfeld', *Legal Theory*, 13/01 (2007), 23-39.
[36] Leif Wenar, 'Rights', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2011 edn.; URL = <http://plato.stanford.edu/archives/fall2011/entries/rights/>, 2011) at 2.
[37] Incidentally, the same also holds for the concepts of sovereignty developed in this book.

explained and defined first in this section, before they will be refined for the present purposes.

Figure 1 shows the two conceptual schemes side by side, with the white arrows denoting correlations and the black cross denoting opposites. Written out, this means that a claim correlates to a duty, its opposite being a no-claim and vice-versa. A privilege correlates to a no-claim and its opposite is a duty. A power correlates to liability, with its opposite being a disability. An immunity correlates to a disability and its opposite is a liability.[38]

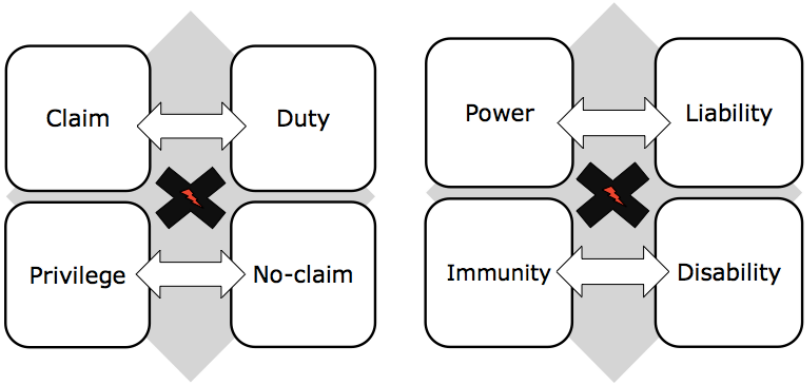


Figure 1

1.2.3.2. The first conceptual scheme

The first of Hohfeld's two conceptual schemes, containing "claim", "duty", "privilege" and "no-claim" is concerned with both factual and juridical acts. The distinction between factual and juridical acts requires a brief explanation. Hage (2011) considers that

[38] Hohfeld, 'Hohfeld 1913', at 30. Note that Hohfeld uses the term "right" instead of "claim". The term "right" however carries manifold connotations and many a right can indeed be broken down into claims, duties, powers, etc. It is for this reason that the present work will substitute the term "claim" instead. Hohfeld himself suggests that this is more specific: ibid., at 32.

> "Juridical acts may be characterized as intentional changes in 'the world of law', where the world of law is the set of all facts and things brought about by the law."[39]

In other words, it is helpful to distinguish between the world of law and the physical world. This presupposes a view of law not as a discursive practice but rather as an institutionalised part of social reality.[40] When "factual acts" are mentioned, what is meant are things that take place outside of the world of law, whereas "juridical acts" take place within it.

This first conceptual scheme is depicted in Figure 2. Having a claim means that a person A has a claim to the performance or non-performance of a particular kind of factual or juridical act. This correlates to a person B's duty to perform—or to abstain from performing—that very same kind of act. An example of this is a contract between two persons for the sale of a computer for $300. Person A has a claim that Person B hands over the computer, correlating to B's duty to hand over the computer. Likewise, B has a claim against A to a payment of $300 and A has a duty to pay $300 to B. If X has a claim against Y that Y shall not walk on X's land, this correlates to Y's duty not to walk on X's land.

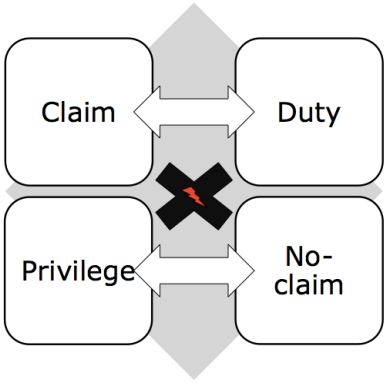


Figure 2

A privilege is the absence of a duty. Staying with the example of X and Y, X is privileged to walk on the piece of land, not having a duty to stay

[39] Jaap Hage, 'A Model of Juridical Acts: Part 1: The World of Law', *Artificial Intelligence and Law*, 19/1 (2011), 23-48 at 24.
[40] Ibid., at 25-27.

off it. Here, it must be specified that, while a privilege is the opposite—the absence—of a duty, this is true only where they are precise opposites in content. As the owner of the land, X is privileged to be on the land, in that she does not have a duty to stay off the land. If, however, X contracts with C that X will walk on her own land, X has a duty resulting from this contract to walk on the land. The duty to walk on the land is perfectly consistent with the privilege to do so.[41]

A no-claim is perhaps best understood in light of its correlative and opposite, as "no-claim" is a term invented by Hohfeld to describe something for which there existed no terminology prior.[42] While "the correlative of X's right that Y shall not enter on the land is Y's duty not to enter […] the correlative of X's privilege of entering himself is manifestly Y's "no-right" [no-claim] that X shall not enter."[43] In other words, a no-claim describes a legal situation in which, as the terminology already suggests, the other person has no claim to the performance or non-performance of the factual or juridical act in question.

A further specification must be made with regard to the relationship between privilege and claim: the existence of a privilege does not necessitate the existence of a claim. While this may initially appear counterintuitive, it is logical that a privilege can exist without a claim; Hohfeld uses the example of shrimp salad to illustrate this. If A is the owner of a shrimp salad and tells X that X may eat the salad, this gives X the privilege of eating the salad. This privilege does not, however, mean that X has a claim that A will not interfere with X eating the salad. A has a no-claim regarding X not eating the salad, but A has no duty not to interfere with X. Likewise, if X eats the salad he has not violated any

[41] Hohfeld, 'Hohfeld 1913', at 32.
[42] Ibid., at 33.
[43] Ibid.

right of A, but if he does not succeed in eating the salad because of A's interference, this does not violate any right of X.[44]

1.2.3.3. The second conceptual scheme

The second of Hohfeld's sets of concepts, containing "power", "liability", "immunity", and "disability", is concerned with juridical acts, i.e. acts which (have the potential to) bring about a change in legal relations.[45] It is depicted in Figure 3.

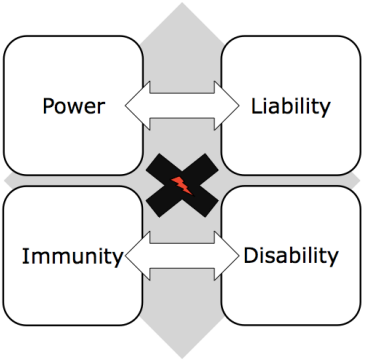


Figure 3

Hohfeld defines power as having the (legal) ability to effect a change in a particular legal relation.[46] Examples of a power are that the owner of a thing T has the power to extinguish his own legal interest in the thing by abandoning it. Equally, the owner could transfer his interest to another person, thereby changing both his own legal situation as well as that of the other person.[47] The correlative of a power is the liability to have one's legal relation or situation changed by someone else who has the ability to effect the change in question, i.e. who has the power to do so. Those qualifying for jury duty in the U.S., for example, are liable to have their legal situation changed in such a way that court officers, by acting on a *power*, create a duty on them to serve as jurors. The opposite of liability is immunity, which is largely synonymous with exemption.[48] Power and

[44] Ibid., at 35.
[45] There is some ambiguity regarding this point, however, which is discussed in the following section.
[46] Hohfeld, 'Hohfeld 1913', at 44.
[47] Ibid., at 45.
[48] Ibid., at 53.

immunity have a similar relationship with one another as claim and privilege:

> "A right [claim] is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation."[49]

The correlative of an immunity is disability, i.e. no-power or the absence and negation of power. Having ownership of a piece of land, as in the example above, X, the land-owner, has the power to alienate his piece of land to Y or to any other party. Y is thus liable to have his legal relation/situation changed by X acting on this power. X, meanwhile, has a number of immunities against Y and other parties, because Y does not have the power—i.e. is subject to a disability—to transfer the ownership of X's piece of land either to himself or any other party.[50]

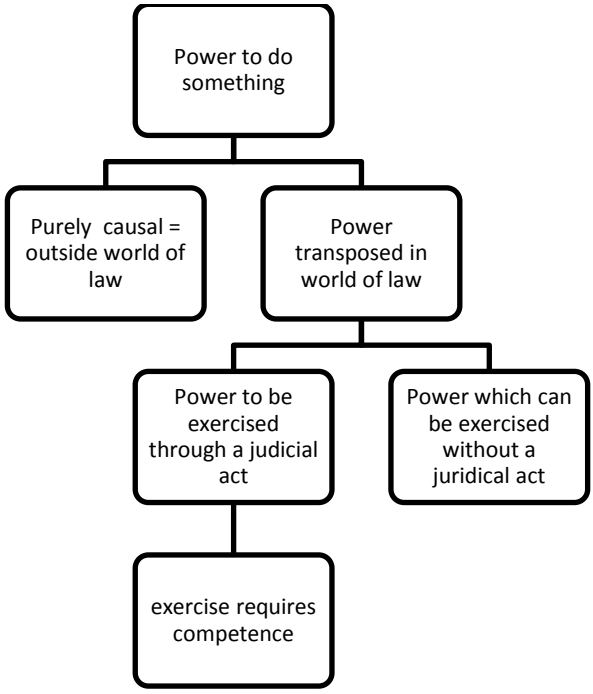
1.2.3.4. Hohfeld Refined

On a few points, Hohfeld's conceptual schemes can be refined and their implications more clearly delineated. One such point of refinement is Hohfeld's conception of "power". While Hohfeld's definition—"having the power to effect a change in a particular legal relation"—and the placement of "power" in the second rather than the first of the two conceptual schemes suggest that he considers "power" to be something

[49] Ibid., at 55.

[50] Ibid. One question arising from this example used by Hohfeld is whether a liability is dependent always on others or whether a liability can arise also from one's own (potential) conduct: can I be liable to change my own legal situation, i.e. can power and liability coincide? Hohfeld's texts seem to suggest that this is not the case, yet the example used regarding the transfer of ownership of land suggests otherwise: such a transfer requires—at least dependent on jurisdiction—action not only on the side of the previous owner but also on the side of the potential future owner.

located in the world of law and solely concerned with the creation of juridical acts. However, this point remains ambiguous. It is equally possible that power is not, or not only, concerned with juridical acts, but rather with the ability—"power"—of changing a legal situation by a factual act, such as moving across the borders of a municipality in the Netherlands to change the tax regime that one is subject to. There is, however, a distinction between something depending on one's will and ability to perform a factual action, even where such an action satisfies a legal condition, e.g. on the basis of counts-as rules, and having the legal power to perform a juridical act.[51] Hohfeld does not distinguish between these two scenarios, but the difference is crucial in the sense that power in the first sense does not presuppose the existence of a legal system, while power in the second sense requires it. Therefore, with regard to the term "power", the following distinctions can be made:



[51] For more on this distinction, see Andrew Halpin, 'The Concept of a Legal Power', *Oxford J. Legal Stud.*, 16 (1996), 129-52 at 140 ff.

For our present purposes, two distinctions are of particular interest: the first is between purely causal/physical powers, which are not translated (e.g. via counts-as rules) into the world of law and powers which are transposed into the world of law. We will call the first "causal powers" and the second "legal powers". A "causal power" might be, for example, that, for physical reasons, a person is able to lift her arm. The second distinction concerns "legal powers". Here, we can distinguish further between powers which do not require competences to be exercised (i.e. powers not exercised through juridical acts) and powers that do. The distinction is useful because one can have a legal power, and the corresponding competence, without necessarily having the causal power to do that for which one has the legal power. One example would be the United Kingdom's exit from the European Union: it is undeniably true that any EU Member State has the competence to leave the Union. This is laid down in Article 50 Treaty on European Union (TEU), which holds that "any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements" and thereafter specifies the procedure that shall be used to negotiate the withdrawal and future relationships. Equally, Westminster Parliament is competent to repeal the European Communities Act 1972, according to the United Kingdom's constitutional rules. The UK thus has the competence to leave the EU and, as such, also has the legal power to do so, as it has the ability to perform the juridical act in question.[52] It is another question entirely—and one on which people's opinions might differ—whether the United Kingdom can *actually* leave the European Union, in terms of economic tenability or political willingness, i.e. whether it has the causal power to leave. For the actual exercise of a legal power, the causal power is always necessary as well.

[52] Nota bene, however, that an important aspect of British constitutional doctrine was and is that even before the introduction of the withdrawal clause into the EU framework by the Lisbon Treaty, the competence and legal power existed, i.e. Westminster Parliament's power to do so does not depend on a competence granted by the legal framework of the European Union.

Another example is the aforementioned situation in which a person moves from one Dutch municipality to another and thereby changes the tax regime to which she is subject. The factual act of moving does not require a competence or even a juridical act; it only requires the causal power to move house. The act of changing one's tax regime, conversely, requires at least one juridical act, namely registering in the new municipality (conscientious citizens will also de-register at the old municipality). This further requires the competence to do so. What, then, if someone does not have the money to move house? The competence theoretically still exists, as does the legal power, even if in a hypothetical rather than an actual sense. The causal power to move to another municipality, however, is lacking.

That the distinction between power and competence is of relevance also becomes apparent when studying immunities, as defined by Hohfeld. The opposition between power and immunity, as well as the correlation between immunity and disability only makes sense when one considers power here to mean competence. Immunities cannot be violated—a point which Hohfeld does not explicitly make but which can be derived from his definition of immunity as well as the relationship between immunity, disability and competence respectively. Looking at these relationships and defining an immunity in terms of them, if A has immunity Z vis-à-vis B, this corresponds to B's disability to do Z. A disability is the opposite of competence, i.e. the absence of competence to do Z. In other words, if A is immune from Z, B *does not have the competence* to do Z. The notions of immunity, disability and competence are all concerned with the performance of juridical acts; a juridical act cannot be performed without competence. This in turns means that if A has an immunity Z and B therefore has no competence to do Z, whereby Z stands for a juridical act, B *cannot* do Z. It is impossible to violate an immunity because the immunity by definition makes the performance of acts which would theoretically violate it impossible. The absence of competence does not automatically imply the absence of the power to perform the (factual) act

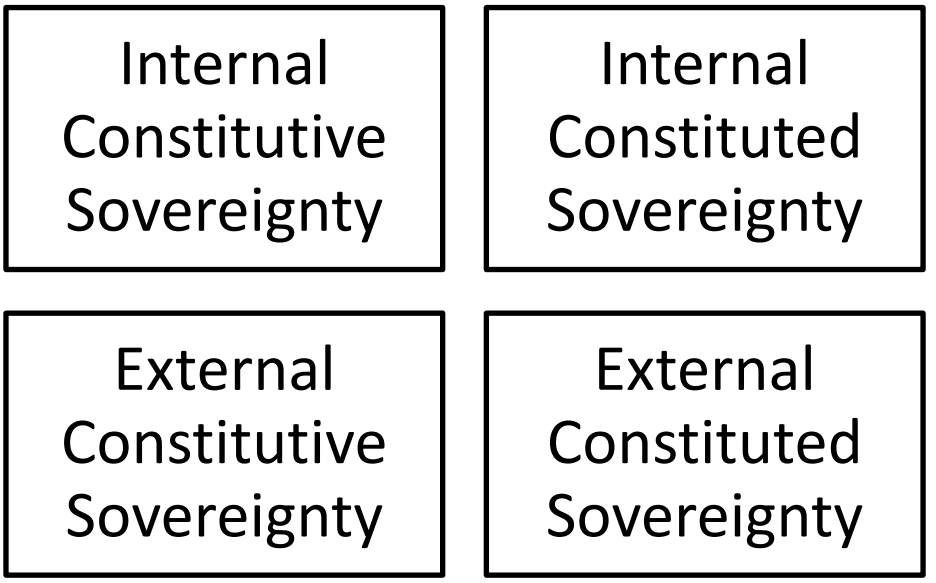
which, had the competence been present, would have counted as the performance of the juridical act: A legally incompetent person, James, has the power to lift a pen and to sign his name on a piece of paper. However, James does not have the competence to conclude a contract, so, even though his signature would count as the conclusion of a contract in a situation in which he would be competent, no contract can be concluded in this case. This also shows how power is not necessarily dependent on legal rules, while competence must be: the rules for when someone is competent to perform a juridical act are part of the world of law, i.e. part of the normative system of legal rules which are applicable on the territory in which James happens to be. Another example would be the creation of a text, adopted pursuant to the general steps usually required to create legislation, by a federal state where legislating on the subject matter of the text is a competence attributed to the federal legislator.

Part 2: Meanings of "Sovereignty"

When studying the notion of sovereignty, it soon becomes clear that the term "sovereignty" has more than one meaning. Distinctions are made in the literature, *inter alia* between "political" and "legal",[53] "empirical" and "legal",[54] "internal" and "external", "absolute" and "limited", "unitary" and "divided",[55] "international" and "behavioural" sovereignty;[56] sovereignty is called "territorial",[57] "parliamentary",[58] a quality of state, nation, people, or individual state organs. There exists a veritable jungle of sources, terms and classifications of sovereignty. This book suggests an analytical framework with two main types of sovereignty—constitutive and constituted—both of which can be found on different levels, such as the internal and the external level. Constitutive sovereignty is not a legal concept, constituted sovereignty is. We will see that separating the two conceptually is necessary and helps to avoid misunderstandings.[59] Within both constitutive and constituted sovereignty, a distinction is made between internal and external sovereignty. While it would be possible to distinguish between internal and external sovereignty first, and constitutive and constituted second, the fact that constitutive sovereignty is not a legal concept, whereas constituted sovereignty is, suggests the prior order.

---

[53] Samantha Besson, 'Sovereignty', in Rüdiger Wuolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, 2011) at 59.
[54] Troper, 'Sovereignty', at 352.
[55] Besson, 'Sovereignty', at 59.
[56] Richard H. Steinberg, 'Who Is Sovereign Commemorative Issue - Balance of Power: Redefining Sovereignty in Contemporary International Law', *Stan. J. Int'l L.*, 40 (2004), 329-46.
[57] 'Island of Palmas Case (Netherlands, USA)', (Permanent Court of Arbitration, 1928).
[58] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn.; Macmillan, 1915).; Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*.
[59] Cf. Bert Van Roermund, *Legal Thought and Philosophy: What Legal Scholarship Is About* (Edward Elgar, 2013) at 144.



In this part of the book, each of the four meanings of sovereignty will be explained and their relationship with one another analysed. The first chapter will be on constitutive internal sovereignty, followed by constituted internal sovereignty. Pursuant to this, external constitutive sovereignty and finally external constituted sovereignty will be considered. The order of consideration deviates from the conceptual distinctions made above (constitutive sovereignty both internal and external, then constituted sovereignty both internal and external) for ease of comprehension, as the relationships between the four types of sovereignty are most easily understood in this order.

2.1. Internal Constitutive Sovereignty

Albert Venn Dicey wrote in 1915 that "the actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations" one of which is "the possibility or certainty that [the sovereign's] subjects, or a large number of them, will disobey or resist his laws."[60] The constitutions of some states contain provisions which seem to refer to a similar notion, namely the one that all state power emanates from the people.[61] There is, it seems, something from which state power emanates and that, at the same time, posits limits to the exercise of sovereignty. This "something" is internal constitutive sovereignty (ICVS). In short, internal constitutive power is concerned with constituting a legal system and with the outer boundaries of the legal sphere within a state. As the moniker suggests, internal constitutive sovereignty *constitutes*; the name is derived from the French *pouvoir constituant*, that is constituting power.[62]

How can this be done, however, and who holds the power to do so? The answers to these questions concern the origins of legal systems and so theories of political philosophy and legal theory are both employed to define internal constitutive sovereignty. Once internal constitutive sovereignty has been defined, some pitfalls with regard to it will be discussed as well: namely, the relationship between internal constitutive sovereignty and situations in which the people of a state are subject to severe restrictions of freedom and systematic human rights violations, the question whether internal constitutive sovereignty is exclusive in the

[60] Dicey, *Introduction to the Study of the Law of the Constitution*, at 30.
[61] Cf. e.g. Art. 20(2) of the German Constitution, Art. 3 of the Portuguese Constitution, Art. 1 of the Brazilian Constitution, Art. 3 of the Russian Constitution, Art. 1(2) of the Greek Constitution.
[62] A note on terminology: The words "constitutive", "constituting" and "constituent" should be seen as synonymous. While "constitutive" will be used throughout this book, the term "constituent" is also used in the existing literature and may thus appear in quotes.

sense of allowing no other concept of sovereignty next to it, what the link between it and democracy is, and also who is sovereign in this manner.

2.1.1. What is internal constitutive sovereignty?

This section considers, in greater detail, what is meant by internal constitutive sovereignty. Andreas Kalyvas has developed a theory of constitutive sovereignty in *Popular Sovereignty, Democracy, and the Constituent Power* which is taken as a starting point here. Although this book departs from his theory in fundamental points, the juxtaposition will serve to illuminate the concept of internal constitutive sovereignty as employed in this book clearly and it is useful for this reason.

Kalyvas summarises sovereignty as constitutive power as follows:

> "From the perspective of the constituting act, the sovereign is the one who makes the constitution and establishes a new political and legal order. In a word, the sovereign is the constituent subject. For this reason, I define the sovereign as the one who
>
> > determines the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety."[63]

The concept of internal constitutive sovereignty thus captures a *power*, namely that to establish the legal order of a state. This is and can only be a *power* and never a *competence*, as *competences* are created and attributed by law and therefore cannot exist before the existence of the legal system of which they are part.

> "Since the power to constitute refers to the origins of higher constitutional norms, the very foundation of any valid legal

[63] Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', at 226.

> system, it cannot be traced back to any juridical norm, simply because such a norm does not yet exist."[64]

Internal constitutive sovereignty is by necessity extra-legal, as is the exercise thereof. With regard to the exercise of internal constitutive sovereignty, a distinction must be made between the exercise of constitutive power in a legal vacuum and the continuous acquiescence to or recognition of the constituted legal system, which has explanatory and potentially justificatory and legitimising value.[65] Winterton (1998) points out these two uses of constitutive sovereignty in his article regarding the notion of popular sovereignty in Australia. He considers that the Australian Constitution might derive its authority either from the moment of constitution, that is, from the one specific point in time in which the Australian electors of the time—no longer alive today—accepted the Constitution in a referendum, or it might derive its authority from the continued and continuous acquiescence with the Constitution by the current Australian people.[66] This dual view on constitutive sovereignty is acknowledged also by judges of the Australian High Court:

> "The present legitimacy of the Constitution … lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people."[67]

The decisive factor for an exercise of constitutive sovereignty is recognition or acquiescence. That this must be the case becomes apparent when one asks what makes a constitution a constitution—is it the act of

---

[64] Ibid., at 117. This corresponds to a point famously raised by Hans Kelsen, cf. Andrei Marmor, 'The Pure Theory of Law', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition edn.; URL = <http://plato.stanford.edu/archives/fall2010/entries/lawphil-theory/>, 2010).

[65] We will see at a later stage that there is also a third way of exercising ICVS beyond constituting from a legal vacuum and acquiescing to an existing system, namely deconstructing an existing system.

[66] George Winterton, 'Popular Sovereignty and Constitutional Continuity', *Fed. L. Rev.*, 26 (1998), 1-14 at 7.

[67] Ibid., at 4. citing *Theopanous* (1994) 182 CLR 104 at 171.

writing a document which contains provisions which, by virtue of their content, are constitutional, or does it take something else? Anyone can write such a document, but it takes something extra to make that document into a true constitution which *constitutes* a new legal order. This *extra* is recognition, acquiescence, acceptance, or consent—all these words, used in various theories, point towards the same thing. Jean Hampton (1997) has formulated a sophisticated theory of different degrees of recognition and acquiescence which fundamentally account for constitutive sovereignty.[68] This theory, substantiated and ameliorated by discoveries in analytical philosophy, offers a convincing and exhaustive account of the source of political authority, the basis of a legal system and, most importantly for the current project, the nature of constitutive sovereignty.

2.1.2. Origins of the State & Legal System[69]

We have said so far that internal constitutive sovereignty is extra-legal, that it is recognition, acquiescence, acceptance, or consent, and that it constitutes the legal system. The question of what constitutes a legal system has been raised in various contexts: in legal philosophy and theory, famously Hart and Kelsen talked of the ultimate rule of recognition or *Grundnorm* respectively.[70] In political philosophy, the source of authority has been found for example in the social contract[71] or in reason.[72] We will see that the question these theories answer, and the

[68] Jean Hampton, *Political Philosophy* (Dimensions of Philosophy Series: Westview Press, 1997).
[69] In this section, and some of the following, the term "power" is used in a different sense than previously introduced. Where it contrasts with "authority", it is not the Hohfeldian term "power".
[70] Hart, *The Concept of Law*.; Hans Kelsen, *Pure Theory of Law* (University of California Press, 1970).
[71] Cf. John Locke, *Two Treatises of Government* (Awnsham and John Churchill).
[72] Cf. J. Finnis, 'Aquinas' Moral, Political, and Legal Philosophy', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition edn.; URL = <http://plato.stanford.edu/archives/sum2014/entries/aquinas-moral-political/>, 2014).

question of the nature of sovereignty in the particular sense described here, are closely aligned.

This section considers Hampton's theory of the sources of political authority, combined and supplemented by jurisprudence, to offer a comprehensive account of internal constitutive sovereignty. To understand why Hampton's theory is useful to understanding the concept of internal constitutive sovereignty, it is necessary to explore the link between this concept and that of political authority with which Hampton is concerned. A close reading of Hampton's theory reveals that the questions she raises and subsequently answers with regard to political authority can equally be asked for the authority, constitution, and justification of a legal system. Indeed, political authority and states are largely—though not entirely—synonymously used in her theory, and states are systems that generate legal norms. Her theory on political authority seeks to answer questions about the reason a state can exert (legal) authority over those on its territory. Internal constitutive sovereignty is concerned with the origin of a legal system. In this way, political authority and internal constitutive sovereignty interact and overlap.

Hampton identifies three types of power structures, differentiating between what she calls mastery and two forms of political authority based on agency, namely convention consent leading to political authority and endorsement consent leading to morally legitimate political authority. Political authority can be defined as "an authority that demands obedience in order to *secure order*".[73] In any given society, it is desirable to have some form of political authority for the purpose of securing order within that society and on a given territory. Both Hampton and Raphael make a distinction between *power* and *authority*, with power being

[73] Hampton, *Political Philosophy* at 73. A later section of this book reveals that it is indeed the main function of a state to secure order, underscoring the close link between political authority and the state.

factual in the sense of being able to force someone to do something, e.g. at gunpoint or by overpowering them in another manner, whereas authority is recognised.[74] Raphael argues that "supremacy of coercive power is not *sufficient* to substantiate a claim to supreme authority"[75] because no ruler can rely on coercive power alone: no ruler can constantly hold a gun to the heads of all their subjects. Hampton makes a similar point, holding that authority is "not the same as (sheer) power".[76] The factor distinguishing between power and authority is the added element of recognition or acceptance.

To understand the role recognition or acceptance plays, the example of chess is quite helpful.

2.1.2.1. Chess, Recognition and Valid Law

In 1958, Alf Ross used the example of chess to explain valid law. An outsider unfamiliar with the rules of chess, observing a game, might deduce from the general behaviour of the two individuals playing that it is a game but not the entirety or even the majority of the rules governing the game.[77] A descriptive outsider's perspective is therefore not helpful to understanding chess. The rules of chess, according to Ross, are directives.

> "These directives are felt by each player to be socially binding; that is to say, a player not only feels himself spontaneously motivated ('bound') to a certain method of action but is at the same time certain that a breach of the rules will call forth a reaction (protest) on the part of his opponent. And in this way

[74] D. D. Raphael, *Problems of Political Philosophy* (Revised Edition edn.; Macmillan Press Ltd, 1976) at 61-65.
[75] Ibid., at 61.
[76] Hampton, *Political Philosophy*, at 4.
[77] Alf Ross, *On Law and Justice* (1958), as reproduced in Lord Lloyd Of Hampstead, *Introduction to Jurisprudence* (Fourth Edition edn.; London: Stevens & Sons, 1972), at 852.

> they are clearly distinguished from the rules of skill contained in the theory. A stupid move can arouse astonishment, but not protest."[78]

In order to establish which rules or which directives govern the game of chess, an introspective method must be adopted. Two criteria are relevant: the first is one of effectiveness or adherence. The rules are observed, if not all the time then by and large, and instances of non-observance are met with protest. The second criterion is the motivating force of the rules as felt by the players.[79] In short,

> "[…] we can say: a rule of chess 'is valid' means that within a given fellowship (which fundamentally comprises the two players of an actual game) this rule is effectively adhered to, because the players feel themselves to be socially bound by the directive contained in the rule."[80]

This conclusion equally holds for law. Both chess and law are constructs, in that

> "[t]he phenomena of chess and the norms of chess are not mutually independent, each of them having their own reality; they are different sides of the same thing. No biological-physical action is as such regarded as a move of chess. It acquires this quality only by being interpreted in relation to the norms of chess. And conversely, no directive idea content has as such the character of a valid norm of chess. It acquires this quality only by the fact that it can, along with others, be effectively applied as a scheme of interpretation for the phenomena of chess. The

[78] Ibid., at 852.
[79] Ibid., at 853.
[80] Ibid., at 853.

> phenomena of chess become phenomena of chess only when placed in relation to the norms of chess and vice versa."[81]

In other words, the game of chess only exists because the rules of chess constitute it, and the rules of chess only make sense because the game of chess exists. The same is true for law. Applying the conclusion from chess to law, we hold that the norms of law are "effectively followed, and followed because they are experienced and felt to be socially binding."[82]

Hart's *rule of recognition* is based on a similar idea. The rule of recognition tells us which rules are part of the system, i.e. which rules are valid. The rule of recognition itself, however, is a social rule in the same way the rules of chess are social rules. The rule of recognition is, then,

> "[…] constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance'."[83]

In other words, the rule of recognition which determines which norms count as norms of the legal system is constituted by its efficacy and acceptance. Hart makes it clear that the matter of efficacy does not concern individual rules, but rather the system as a whole:

> "If by 'efficacy' is meant that the fact that a rule of law which requires certain behaviour is obeyed more often than not, it is plain there is no necessary connection between the validity of any particular rule and *its* efficacy, unless the rule of recognition of the system includes among its criteria, as some do, the provision (sometimes referred to as a rule of obsolescence) that no rule is to count as a rule of the system if it has long ceased to be efficacious.

[81] Ibid., at 854.
[82] Ibid., at 854.
[83] Hart, *The Concept of Law*, at 255.

> From the inefficacy of a particular rule, which may or may not count against its validity, we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it has ceased to be the legal system of the group."[84]

If the rule of recognition is accepted, the norms of the system are recognised as valid. Why, however, should the legal system—which we can identify via the rule of recognition—be accepted? Raphael identifies order and security as the reason to have law.[85] Hampton considers the following rationale for state creation:

> "So far we have established the kinds of problems facing people in a state of nature and the way in which a political authority would provide a remedy to those problems. The people thus have moral and self-interested reasons to create a government."[86]

More specifically, the problems people face in the state of nature

> "[…] do not merely threaten people's ability to preserve their lives. They ensure impoverishment insofar as they make fruitful cooperation impossible, and they make impossible the sort of interaction and exchange necessary for all sorts of valuable activities, from artistic pursuits to sports pursuits. Without a state that will address these problems, not only personal safety but the foundations of a valuable life will be missing. Hence the quality of life in a state of nature would be consistently miserable and insecure. The convention-based model makes an important assumption with respect to these problems, namely, that people in

[84] Ibid., at 103.
[85] Raphael, *Problems of Political Philosophy*, at 46.
[86] Hampton, *Political Philosophy*, at 79.

> a territory are justified, on grounds of both morality and rationality, in generating a remedy for them."[87]

There is, in other words, a strong case for a consequentialist approach to having law. Nevertheless, whether we ought to accept the rule of recognition or not is a very different question from whether we do, in fact, accept it. Only the latter is relevant for our present purposes. More important than the question of whether we ought to accept the rule of recognition is what it means and what its relationship is to the object of our inquiry, internal constitutive sovereignty.

2.1.2.2. The rule of recognition or governing convention

In 1997, Jean Hampton wrote *Political Philosophy*, in which she questions the source of political authority and in particular consent models such as the social contract as the source of political authority. She develops a convention model of political authority that accounts for the extension of political authority also over those individuals who have not explicitly (or tacitly, for that matter) consented to it.

Hampton argues that for political authority to exist, a governing convention is necessary. Her governing convention can be regarded as roughly equivalent to Hart's rule of recognition. The governing convention can come about via a democratic process, but equally without one, for example via conquest and warfare. Bringing about a governing convention via a democratic process could mean that people in a given community vote on leadership candidates until a salient option emerges and the convention is formed. In the case of warfare, the choice is one

[87] Ibid., at 72 f. She seems, here, to take a slightly more muted approach than Hobbes that is nevertheless reminiscent of his grim view of the state of nature. Cf. Thomas Hobbes, 'Leviathan', (1651).

between accepting the conqueror's leadership and receiving protection or rejecting it and being harmed.[88] Hampton argues that

> "Most philosophers interested in state creation haven't used this warfare scenario in their arguments because it does not serve their justificatory interests. Any theorist interested in showing what kind of state we *should* create and maintain does not want to use stories of state creation such as the warfare scenario in which the mightiest but not necessarily the most just leadership faction would prevail. It is natural to present a just government, which takes account of the rights of each individual subject, as the product of an agreement process in which those rights are respected. But even an unjust scenario is appropriate if that scenario is a way of understanding the structural forces that have actually precipitated the creation of states, and hence political authority, in human communities throughout history."[89]

The governing convention is the source of authority for the governing institution; authority "comes from the people; it is invented by them and bestowed upon rulers through the governing convention".[90] In short: the governing convention, created by the people, constitutes the system of government. In order for the governing convention to exist, a number of criteria have to be fulfilled, namely

1. There exists a convention to regard the norms created by the governing institution(s) as pre-emptive[91] and final.

[88] Hampton, *Political Philosophy*, at 78-86.
[89] Ibid., at 84 f. One theorist who very strongly made use of the warfare scenario is, of course, Thomas Hobbes.
[90] Ibid., at 90.
[91] The term pre-emptive is taken from Joseph Raz, taken to mean that "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them." Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), at 46.

2. There are means to enforce the norms created by the governing institution(s) and the willingness to use them; in other words, enforcement is possible and actual.
3. Individuals consider the norms created by the governing institution(s) as a reason to act accordingly; in other words, individuals recognise the authority of the governing institution(s).[92]

The last condition is not a necessary one, whereas the first two are. We will consider the reasons why this is the case in more detail later. Taking into account both Ross' and Hart's view, the second condition could be rephrased in the following way.

> The norms created by the governing institution(s) are by and large observed, possibly because there are means to enforce them and the willingness to use those means: the norms are efficacious.

If the first two conditions are fulfilled, the legal system exists and continues to exist, i.e. it is constituted and remains so. If these conditions are not fulfilled, or fulfilled to such a small degree that the legal system cannot be said to exist, it is not constituted or, if they are no longer fulfilled, for example because after a revolution no one recognises the norms of the system anymore, it is deconstructed. Let us call the creation, maintenance and deconstruction of the governing convention or rule of recognition the exercise of internal constitutive sovereignty. Connecting "sovereignty" to the rule of recognition or governing convention makes sense for the following reason: Internal constitutive sovereignty is concerned with the creation, maintenance and limits of the legal systems and the conditions for the existence of a governing convention or rule of recognition explain how this is achieved. This allows us to distinguish between different types or phases of internal constitutive sovereignty: the creation phase, the maintenance phase and the deconstruction phase.

[92] Hampton, *Political Philosophy*, at 97 f.

Respectively, these phases of accepting a legal system and recognising it, following (by and large) the rules of the system, or partaking in a revolution, are all different means of exercising internal constitutive sovereignty.

Connecting internal constitutive sovereignty to the governing convention or rule of recognition furthermore enables us to understand that while internal constitutive sovereignty can come in degrees—the conditions for the existence of the governing convention are not always fulfilled to the fullest degree—this does not have an impact on whether the rules of the system hold. In other words, if we examine individual rules of the system, we must take the internalist approach, accepting the existence of the governing convention as a given. However, taking a step back, we can argue to what degree, if at all, the conditions for the governing convention are fulfilled. This is a very different question and argumentation takes place on a very different level, namely outside the world of law. Once we move inside of it, we have to take the internal viewpoint—presuppose, if you will, the existence of the rule of recognition/governing convention. It is this distinction of levels and different viewpoints that allows us to understand that legal norms within a system are always considered pre-emptive reasons for action, seen from the internal point of view, but taking an external point of view to the whole system, it might be a matter of degree. In many legal systems, this issue does not arise, simply because, even from an external viewpoint, most people will agree that the conditions of the governing convention are fulfilled, if not absolutely then to a great degree. However, the question very much arises in cases where there are two conflicting claims to authority or with regard to international law.[93] In cases of two conflicting claims, e.g. in cases where it is unclear who has won an election or in cases where there are two parliaments and governments with competing claims to authority, people who accept and recognise the

[93] We will return to this point as applied to international law in a later section of this book, namely when it comes to external constitutive sovereignty.

claim of A take an internal viewpoint to the norms created by A, holding that they are valid norms. People who accept and recognise the claim of B take an internal viewpoint to norms created by B and are therefore not motivated by the norms of A, allowing them to hold that norms created by A are not valid, because there is no governing convention or rule of recognition saying that rules created by A are valid. The latter deny the existence of the governing convention A. Examining all these individuals taken together, some recognising a governing convention A and some accepting the governing convention B, we can see that the governing conventions are a matter of degree. Where A is accepted to a far greater degree and its norms more efficacious e.g. because there are strong enforcement mechanisms for the rules of A, eventually (or even immediately) it will cease to matter for those accepting and enforcing A whether an individual also accepts A and takes an internal viewpoint to the norms created by A. The law would be applied to this individual anyway. In this context, the more efficacious system 'wins' over the objections of individuals who do not take the internal viewpoint to the system.

Returning to the example of chess, if a player in the middle of a game were to say that the rules of the game no longer applied to him, and would act accordingly, others would argue that the rules do apply even if she rejects them and would exclude her from the game. The difference between chess and law is, of course, that for chess you can decide whether or not to play. The same is not true for law.

To summarise, the argument so far has been that one form of sovereignty—here called internal constitutive sovereignty or ICVS—is concerned with the origins, upkeep, and possibly also deconstruction of legal systems. Internal constitutive sovereignty is concerned with *pouvoir constituant*. For the (continued) existence of a legal system, the (continued) existence of a governing convention or rule of recognition is required. This convention or rule tells us which norms are valid norms of

the legal system thus constituted. In order for a governing convention or rule of recognition to exist, two main conditions need to be fulfilled, namely *efficacy* and *acceptance*. Efficacy often, but not necessarily, has to do with enforcement—it is theoretically possible that, in a society, there is perfect compliance with the law even without the threat of enforcement. Acceptance is concerned not with compliance or a lack thereof, but with social attitudes.

Any act which has an effect on the efficacy and acceptance of the legal system in question is an exercise of internal constitutive sovereignty. It is the sovereignty that leads to the creation and the deconstruction of national legal systems, but equally it is what maintains them. Furthermore, internal constitutive sovereignty is a matter of degree: there can be more or less acceptance, and a rule of recognition can be more or less efficacious.

2.1.2.3. Different Relationships between the Governed and Governing

As mentioned earlier, Hampton identifies three types of power structures or relationships between those governed (i.e. subject to laws) and those governing (i.e. creating laws). Two of these relationships are authoritative and one of them is based on "mere" power. In the following, each of these three types of relationships between the government and the governed will be discussed.

Hampton distinguishes between two types of situations in which political authority is given and situations of mastery in which there is no political relationship between the governed and the governing.[94] What Hampton calls situations in which political authority is given corresponds to

[94] Hampton, *Political Philosophy*, at 90 f.

situations in which the governing convention is, by and large, both efficacious and accepted.[95]

However, note that the fact that these conditions are fulfilled, i.e. that political authority is given, does not necessarily mean that there is a claim to *legitimate* political authority. Hampton distinguishes between states in which only convention consent is present, and those in which both convention consent and endorsement consent are given.

The existence of convention consent is largely explanatory: it explains why a regime exists with its particular governing convention as it is.[96] It is, however, "exceedingly limited" in its justificatory strength.[97] Hampton understands convention consent only as behaviour supportive of a governing convention and considers that

> "[…] political authority isn't *conferred* by this sort of consent from particular individuals; instead, it is a consent that, insofar as it is involved in constructing and maintaining the governing convention, is part of the collective act of *inventing* that authority. Moreover, given that this authority will (in general) have been invented by our societies long before we are born, this analysis also allows us to admit that Hume is right to say we are all, in a sense, born into a political system whose authority over us is not of our own making. Yet when we reach adulthood, our participation in this political system—in particular, our support of the rulership conventions that compose it—is what will sustain this invented authority during our lifetimes. In this sense, each of us is involved in maintaining (and perhaps at times reforming) this system of power and authority."[98]

[95] In the following, Hampton's terminology will be used.
[96] Hampton, *Political Philosophy,* at 94.
[97] Ibid.
[98] Ibid., at 95.

Furthermore, Hampton argues that convention consent posits the outer limits of the competences of the governing body, be it a person or institution:

> "Convention consent does not merely result in the empowerment of particular rulers; more fundamentally, it is responsible for the scope and structure of political authority in any particular regime."[99]

Convention consent, then, is what is necessary for constitutive sovereignty—it constitutes the governing convention and maintains it. The explanatory strength of this theory is supported further by its coherence with e.g. Australian case law[100] and with influential theories of internal sovereignty such as those of Dicey or Goldsworthy, both of which hold that it is the people that determine the outer limits of parliamentary (read: internal) sovereignty.[101]

Irrespective of its explanatory strength, convention consent does not equal endorsement of the normative system it creates and maintains, nor does it need to. Furthermore, individuals do not always act in accordance with the norms created by the governing institution(s). There may be situations in which self-interest outweighs the motivating factor provided by recognition of the rules. For some individuals, this may mean that

> "[f]ulfilling one's political obligations may be joyless and without enthusiasm; one may accept that one ought to obey a regime that one otherwise quite dislikes. The failure to give endorsement consent may prompt behaviour aimed at reform—which, in the extreme case, may result in actions of civil disobedience. But all

[99] Ibid.
[100] Cf. Winterton, 'Popular Sovereignty and Constitutional Continuity'.
[101] Cf. Dicey, *Introduction to the Study of the Law of the Constitution*.; Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*.

> such reformist action presupposes that the regime to be reformed is authoritative and needs to be improved rather than deposed."[102]

In other words, the existence of an accepted and efficacious governing convention makes no statement of justification or justness of the constituted system. What Hampton calls endorsement consent, on the other hand, is an indicator of justification, i.e. an indicator of the difference between "mere" political authority and good political authority. What, however, is endorsement consent? Hampton considers that

> "[a] regime that receives what I call *endorsement consent* gets from its subjects not just activity that maintains it but also activity that conveys their endorsement and approval of it. A regime that has endorsement consent from most of its citizens will do more than simply survive: The considerable support from its subjects will make it vibrant and long-lived, capable of withstanding attacks from without and within. Beyond a kind of *attitude* toward the state, endorsement consent is a *decision* to support it because of one's determination that it is a good thing to support. By giving this form of consent, the subject conveys her respect for the state, her loyalty to it, her identification with it, and her trust in it."[103]

It is important to note that a state is not by definition legitimate and justified because it receives endorsement consent from its citizens. Endorsement consent is an *indicator* of legitimacy, not the source of legitimacy.[104] However, a state which receives the endorsement consent of most of its citizens is most likely one that is reasonably just; how justified the state is depends on how just it is.[105]

---

[102] Hampton, *Political Philosophy*, at 98.
[103] Ibid., at 96.
[104] Unless one subscribes to a theory which makes legitimacy contingent solely on the attitudes of subjects towards the normative system.
[105] Hampton, *Political Philosophy*, at 96.

So far, it has been considered that the creation and safeguarding of order and security are the reasons to have a legal system on a given territory and that law is based fundamentally on social convention, meaning on something that is by and large followed (efficacy) and regarded as pre-emptive and final (acceptance) by the population of that territory. What about, however, situations in which individuals do not follow the convention and indeed disagree with it? What about situations in which the legal system is employed no longer for the purpose of safeguarding order and security but for other purposes? Hampton calls situations in which coercive control—power rather than authority—is used to govern "mastery". In a state of mastery, the element of acceptance so vital to internal constitutive sovereignty is missing.

Hampton defines being mastered as "to be subject to the use of coercion in a way that disables one from participating in the process of creating or changing a governing convention"[106] and goes on to say that, in systems of mastery, no governing convention exists between the master and the mastered.

> "[T]he master rules not because he has been rendered authoritative by virtue of the people's participation in a governing convention but because of his superior coercive power. That coercive power may come about because of his superior technology or because of his control over a brutal enforcement cadre that is prepared to inflict terror on the population at his command. (Notice that there will have to be a convention within this cadre to follow only this master's commands, meaning that there will be a political relationship between the master and these henchmen. […] However, there is a non-political relationship of mastery between the master and the rest of the population.)"[107]

[106] Ibid., at 90.
[107] Ibid., at 90 f.

Hampton mentions several examples of situations she identifies as mastery: The situation of blacks in South Africa until 1994, treatment of left-wing Chileans in the Pinochet regime, and that of Tibetans by China all prevent(ed) their involvement and participation in the creation, maintenance, or changing of the governing convention.[108]

In summary, Hampton identifies three forms of states, or rather three forms of relationships between governing and governed, all of which can be present in any given state at a given time to various degrees: mastery, meaning that there is no political relationship between ruler and "governed" (read: mastered), because the people have no influence on the governing convention and thus no constitutive power; political authority based on convention consent, meaning that there is a political relationship between government and governed, without making any statement about the justification of the state; and political authority based on convention consent with additional endorsement consent, meaning that not only is there a political relationship but also one of approval, indicating—but not proving—that the state is one which is just and therefore justified. In those relationships that are characterised as political—i.e. in relationships where at least convention consent and possibly also endorsement consent is present—the people have what Hampton calls an influence on the creation and maintenance of the governing convention. This is, in essence, internal constitutive sovereignty. In other words, the people have the *power* to constitute and maintain a normative system—but not the competence, as that would presuppose the very normative system the people have the power to constitute. This does not necessarily mean that it is the people who actually write the constitution, but that the political authority of the system is created and maintained by the people. There is an on-going relationship of acquiescence, recognition, and maintenance between the people and the system: the governing convention. The governing

[108] Ibid., at 91.

convention is at its core extra-legal, in that the people have the power to rebel against the system, to replace it with another—that is, to constitute a new one—or to be involved in reforming the existing system. Modern democracies also provide *legal* ways to involve the people, for example via voting or referenda, and thereby seemingly blur the lines between constituting and constituted.[109]

2.1.3. The Two Sides of Internal Constitutive Sovereignty

Hampton's theory of sources of political power shows one side of constitutive sovereignty: it explains how the people have the power to constitute the normative system to which they are subject. This is here termed the positive side of constitutive sovereignty; positive because it posits something, namely the normative system, not necessarily because it is generally a positive thing. However, that is not the full extent of what internal constitutive sovereignty means, as there is also a negative side. The negative side of constitutive sovereignty is the power to deconstruct the normative system.[110] This can, for example, take the form of revolution, of violent uprisings, or of widespread disobedience and resistance to the current regime. The positive and negative side of constitutive sovereignty are intertwined in that the negative side creates the legal vacuum required for the creation of a new normative system. However, Hampton's argument regarding the continuity of convention consent shows that the exercise of particularly the positive side of constitutive sovereignty is not momentary. In other words, it does not take place only at one moment in time and then, once the new normative system has been constituted, any exercise of constitutive sovereignty becomes impossible until the people decide to exercise the negative

[109] This matter is discussed further under the heading of constituted sovereignty, as the reader should gain an understanding of what is meant both by constitutive and constituted before the lines between both can be clearly delineated.

[110] The term "negative" here was chosen as a contrast to "positive", not to imply any kind of value judgement.

power of constitutive sovereignty, that is, to tear the old system down. Rather, the acquiescence to and support of the existing constituted system is also an exercise of internal constitutive sovereignty. There are three possible forms of internal constitutive sovereignty: that of creation, that of maintenance, and that of deconstruction.

The moment of creation or of deconstruction of a legal system might be more conspicuous than the on-going maintenance of the legal system. Nevertheless, creation, maintenance, and deconstruction are all equally the results of internal constitutive sovereignty. However, Hampton has shown that in any given legal system at a given time, there can be individuals giving their endorsement consent, some giving only convention consent, and others which are mastered. The very existence of situations of mastery, as well as that of state apparatuses with growing military strength and growing possibilities for censure and the enforcement thereof and supervision of citizens can make both the coordination needed for an uprising and the actual uprising (i.e. the negative side of constitutive sovereignty) and the partaking in the creation and maintenance of the governing convention (i.e. the positive side of constitutive sovereignty) difficult if not impossible. As constitutive sovereignty is a power—rather than a competence—things such as censure or a military apparatus can severely limit it, just as the fear of repercussions can severely limit the willingness of those who have to exercise it. Therefore, it is accurate to consider that internal constitutive sovereignty comes in degrees. This is a statement of fact; that constitutive sovereignty itself *should not* be thus inhibited is another matter entirely.

The impact that situations of mastery have on the constituted normative system is considered later in this book, as an understanding of not just constitutive but also constituted sovereignty is necessary.

Until now, we have considered what internal constitutive sovereignty is. In the following, a few questions related to it will be discussed, such as

whether internal constitutive sovereignty allows any other concepts of sovereignty next to it, whether internal constitutive sovereignty necessarily implies democracy, and who is sovereign in this sense.

2.1.4. Exclusivity

Kalyvas claims that

> "The notion of the constituent sovereign discredits any sovereign ambitions that the legislative branch may entertain. Parliamentary sovereignty finds in the constituent power its own impossibility. It is exposed as a usurpation of the constituent power by a constituted power, which reduces popular sovereignty to parliamentary representation and to the powers of elected officials."[111]

It is theoretically possible that sovereignty means only constitutive sovereignty. The element of supremacy, or prevalence, that appears to be part of what sovereignty means, would suggest that indeed there is exclusivity to it, that no other sovereign can exist next to constitutive sovereignty. However, this does not cohere with how authors such as Dicey, Goldsworthy, or Winterton, *inter alia*, use the term sovereignty. As sovereignty is a concept constructed by how it is used, there need to be good arguments to disregard common usage.

Logical impossibility or contradiction would be a good argument; however, Kalyvas' theory fails to provide this, as theories of constituted sovereignty do not deny the existence of constitutive sovereignty. Quite the opposite is true: both Dicey and Goldsworthy, for example, hold that parliamentary sovereignty comes with an external limit. The people have the *power* to disobey Acts of Parliament, and they equally have the

[111] Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', at 229.

power to revolt—or to change the rule of recognition/the governing convention more gradually.[112]

Holding that there is only constitutive sovereignty at the exclusion of theories of parliamentary or monarchical sovereignty and even some theories of popular sovereignty, as will be shown, denies the fact that sovereignty is ascribed to these entities in constitutional theory and political reality. This is admittedly done with a different meaning, but nevertheless the term is used. Kalyvas does not appear to be making an argument for distinguishing clearly between types of sovereignty and labelling them differently for clarity's sake; rather, he falls prey to conceptual confusion and fails to realise that there can be—and are—different types of sovereignty. What is meant by parliamentary sovereignty differs from the theory of constitutive sovereignty he describes, just as state sovereignty is again different. Proponents of parliamentary sovereignty do not claim that parliament has the powers Kalyvas considers part and parcel of constitutive sovereignty, so there is no logical conflict between the two types of sovereignty. The competences of parliament do not usurp the power of the people or vice versa. In fact, they are very much compatible—one is sovereign in the constituting sense, the other is constituted.

2.1.5. Constitutive Sovereignty and Democracy

Hampton argues that convention consent leads to political authority, but that it need not necessarily be the outcome of a democratic process.[113] Kalyvas, in contrast, argues that

> "[b]ecause the concept of the constituent sovereign resituates the normative ideals of political freedom and collective autonomy at

[112] See Part 3.2. of this book for a closer look at their theories.
[113] Cf. Hampton, *Political Philosophy*, at 84 f.

> the center of democratic theory, it points at a distinctive theory of democratic legitimacy."[114]

He goes even further to consider that

> "[n]ot any act can claim to be constituent and not any actor can claim to be a founder, even if the actor and the act have been successful, that is, effective in creating a new constitutional document. Should a person or group appropriate the power to constitute a legal order at the exclusion of all those who will be its addressees, the ensuing constitutional document should be regarded as invalid, unauthorized, the result of an arbitrary act of usurpation that violates the normative prescription of the constituent act. Such an act would not only amount to an incorrect use of the term to constitute, but it would also violate the normative content of its semantic meaning."[115]

There are various possibilities as to how one should understand what is meant by effective or successful constitution. One possibility is that it is merely the writing of a constitutional document. However, this does not seem very likely, as it is the effects of the document that are more relevant than the document itself. Another possibility, then, is that the decisive factor is whether or not the attempt succeeds in constituting a normative system; in other words, whether the constitution is recognised. As Hampton's theory of political authority shows, recognition can come in degrees, from convention consent to endorsement consent. The connection between constitutive sovereignty and democratic legitimacy that Kalyvas insists on suggests that he does not consider convention consent sufficient.[116] One could stipulate that democracy, legitimacy or

[114] Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', at 237.
[115] Ibid., at 239.
[116] Kalyvas' wording of "at the exclusion of all those who will be its addressees" suggests that he means to exclude situations of mastery from successful constitution. This point is not in contention. What is, however, is that the alternative situations to

endorsement consent, or any combination of the three, is a necessary part of the concept of constitutive sovereignty; this is what Kalyvas does here. As a political or ideological argument against morally unjust governments, this holds persuasive appeal. However, the question must be raised whether it truly manages to capture the reality of how the concept of sovereignty is used, as the purpose of this book is not to stipulate an ideal political theory, but rather to explore which concepts of sovereignty exist. As such, ideological appeal is secondary to explanatory strength. It cannot be denied that sovereignty has been claimed—and this claim accepted by both people and other nations—by non-democratic governments.[117] Hampton's theory of convention consent explains this. It falls outside the scope of this book to discuss whether Kalyvas' stipulation should become part of the concept of sovereignty, but the existence of not or not very democratic states which are nevertheless recognised as sovereign by other states and their own people shows that, at the time of writing, it is not. In other words, a theory which does not *necessarily* link constitutive sovereignty to principles of democracy has more explanatory power, even though it may be less desirable politically and ideologically speaking. Therefore, the following statement from a commentary on German constitutional law captures the relationship between constitutive sovereignty and democracy more accurately when it holds that (mere) recognition of a new constitution by the majority of the people subject to it says very little about the democratic content of the constitutive process:

> "*Eine verfassungsgebende Gewalt, die als dem Grundgesetz vorausliegend gedacht wird, muss sich nicht notwendig von der*

situations of mastery are necessarily democratic. Hampton's argument shows that this is not the case.

[117] Freedom House reports that of 195 countries in the world, 122 were electoral democracies in 2013, resulting in a total percentage of 63%. This is not taking into account the degree to which they are classified as free by the same NGO. In other words, it does not take into account whether there are any factors limiting the exercise of constitutive sovereignty. Freedom House, 'Number and Percentages of Electoral Democracies, Fiw 1989-2014', (2014).

> *Volkssouveränität im Sinne der grundgesetzlichen Ordnung herleiten. Die bloße Anerkennung einer verfassungsgebenden Gewalt oder einer neuen Verfassung durch die Mehrheit des Staatsvolkes sagt noch wenig über den demokratischen Gehalt des Verfassungsgebungsprozesses aus*."[118]

While denying the absolute necessity of a link between internal constitutive sovereignty and democracy, this statement nevertheless manages to capture that internal constitutive sovereignty is (at least partly) a matter of acceptance; that it is a social convention. In other words, there can be no legal order without a governing convention or rule of recognition, to use the terminology of Hampton and Hart respectively. It furthermore captures the spirit of the outer limits of constituted sovereignty which are provided by internal constitutive sovereignty, namely the power to disobey, to revolt, or to stage a coup.[119] That a legal order needs to be accepted or recognised does not necessarily imply that the legal order's conception needs to have come about in a democratic process. The existence of the legal order is contingent on the recognition of those with the power to either recognise or not recognise it.

One link that needs to be investigated, however, is that between the existence of a legal order and mastery. Mastery means that there is no recognition of the legal order and no governing convention between mastered and government, and yet countries such as Chile under Pinochet or South Africa before Mandela were states and undeniably had legal

[118] Matthias Herdegen, 'Verfassungsgebende Und Verfassungsändernde Gewalt', in Maunz/Dürig (ed.), *Grundgesetz-Kommentar* (69. Ergänzungslieferung; Beck-Online, 2013), Rn 7-12 at 10.: A constitutive power, assumed to exist prior to the constitution, does not necessarily derive from popular sovereignty within the meaning of the constitutional order. The mere recognition of a constitutive power or a new constitution by the people does yet say little about the level of democracy of the constitutive process. (*Translation provided by Dr Sascha Hardt*.)

[119] Here, the negative side of internal constitutive sovereignty is used to demonstrate how internal constitutive sovereignty can posit the outer limits. The positive side of internal constitutive sovereignty would, conversely, be the power to obey the law. On the next page, we will elaborate on this.

systems. This issue is considered in greater detail in Part 2.5. of this book.

2.1.6. Who is sovereign?

The constitutions of a variety of countries contain provisions attributing constitutive sovereignty to a—more or less well-defined—body, namely the people:

> "Sovereignty shall be single and indivisible and lie with the people." – Article 3, Portuguese Constitution
>
> "All power emanates from the people." – Article 1, Constitution of Brazil
>
> "The bearer of sovereignty and the only source of power in the Russian Federation shall be its multinational people." – Article 3, Constitution of Russia
>
> "Popular sovereignty is the foundation of government." – Article 1(2), Constitution of the Hellenic Republic of Greece
>
> "The sovereign power belongs to the Thai people." – Section 3, Constitution of Thailand

It makes sense to attribute constitutive power to the people, as it is majorities which have the power to overthrow governments and entire legal orders and to posit new constitutions.[120] However, it is clear that it is not "the people" that write constitutions. Despite the preamble of the Constitution of the United States of America proclaiming that "We the People" ordain and establish the Constitution, it was written by the Founding Fathers, or more specifically the Framers of the Constitution.

[120] One need not look far back in history to find examples of popular uprisings, some more successful than others.

Even the Constitutional Convention[121] cannot be considered to represent the entirety of the people. If constitutive sovereignty was exercised only at the moment of constitution, it would be either the writers of the constitution or those accepting it at the time, i.e. those creating the governing convention that are sovereign in this sense. However, the exercise of constitutive sovereignty is an on-going process: internal constitutive sovereignty captures not only the moment of creation and of destruction, but also the on-going maintenance of the normative system. Any act taken by an individual which contributes to the efficacy and acceptance of the governing convention falls under the positive side of internal constitutive sovereignty and any act detracting from efficacy and acceptance falls under the negative side. In other words, any individual act, such as obeying the law, is an instantiation of the governing convention, and any individual act of disobeying the law detracts from its efficacy. This also demonstrates how internal constitutive sovereignty is collective, although it is composed of individual instantiations, and how individuals need not necessarily be aware of the fact that they are exercising internal constitutive sovereignty in order to do so.

Furthermore, as Hampton shows, the creation of the governing convention and its subsequent maintenance is not a contract between each individual citizen and the government. Rather, it is the people collectively which create political authority and constitute the legal system via a constitutive convention.[122] The delineation of a people is not an easy task and an in-depth discussion of this falls outside the scope of this book. What can be said is that, in most cases, at least in a legal (theoretical) context, "the people" is equated with enfranchised individuals. However, there is some debate, at least in Germany, whether this is not too limited, as it allows only those who are of age and not

[121] Also called Philadelphia Convention or Federal Convention.
[122] Hampton, *Political Philosophy*, at 95.

otherwise disenfranchised[123] to exercise "popular sovereignty", which is the topic around which the discussion is framed, rather than constitutive sovereignty.[124] It must be noted, however, that this discussion centres on popular sovereignty and an understanding thereof that is largely confined to what Hampton describes as the maintenance and perhaps even reformation of a constituted normative system. Thus, this discussion does not take into account that constitutive sovereignty is exercised also—and most conspicuously—in situations of constitution or revolution. Particularly in the latter case, an equation of the people with enfranchised citizens is nonsensical. As internal constitutive sovereignty is, in essence, extra-legal, searching for a legal definition of the people as its holder is bound to be a fruitless endeavour. Nevertheless, as the constitutional provisions quoted above show, some states—particularly democracies—contain statements of attribution of internal constitutive sovereignty to the people. This does not take away from the fact that the law does not—and indeed cannot—stipulate who the people in the sense of the holder of internal constitutive sovereignty is, as internal constitutive sovereignty is not a legal concept but by definition and necessity extra-legal. Rather, it betrays a confusion regarding the concepts of sovereignty.

Instead of searching for a definition of the internal constitutive sovereign in a constitution—which presupposes the very process of constituting done by the sovereign we are searching for—we must look toward factual processes. The process of constituting a legal system to govern a people can—and often does—constitute the people at the very same time. Constitutional provisions (or other legal norms) attributing sovereignty or franchise might be an expression of this, but such an expression is usually made after the fact. Lindahl (2000) puts forward the view that the people's identity is constituted, to some degree, by the legal power, that

[123] Think for example of the disenfranchisement of criminals in the United Kingdom. Cf. 'Hirst V the United Kingdom (No 2)', (European Court of Human Rights, 2005).
[124] Lore Maria Peschel-Gutzeit, 'Unvollständige Legitimation Der Staatsgewalt Oder: Geht Alle Staatsgewalt Nur Vom Volljährigen Volk Aus?', (NWJ 1997, 2861, 1997).

is that the people are constituted and the legal system is constituted with regard to a people's identity.[125] However, it is not the legal power which "constitutes the people by creating its identity";[126] rather, it is the people which creates its identity by constituting the legal system. This does not take away the impact that the legal system has on the identity of a people, but it suggests that the constitution of the legal system and the people goes hand in hand, that a people constitutes itself by constituting the normative system applicable to it.

2.1.7. Concluding Remarks

Constitutive sovereignty has two sides: the positive is the power to constitute and maintain a legal order (or any normative system, to be more accurate), and the negative is the reverse, namely to deconstruct the legal order. Aside from these, constitutive sovereignty also describes the maintenance of an existing system by recognition. Both the positive and the negative hinge on acceptance or recognition—the positive side is the power to grant it, the negative side is the power to take it away again. Furthermore, the recognised governing convention must also be efficacious. Recognition, or convention consent, does not make any claims regarding the extent to which the normative system it constitutes is—or is not—justified. Equally, it makes no statement regarding the extent to which the process of constitution is democratic. If the people in a territory not only give convention consent but also endorsement consent to the constituted system, this is an indicator—although not a conclusive one—that the system is just and therefore legitimate. On the other end of the scale, there is mastery, which means that there is no relationship of political authority, legitimate or not. There are systems, however, in which mastery replaces the existence of a governing

[125] Lindahl, 'European Integration: Popular Sovereignty and a Politics of Boundaries', at 248.
[126] Ibid.

convention. On the national level, the constitution of a legal system usually implies the constitution of political authority.

It is not individual citizens but a people as a collective entity which constitutes the normative system by means of a social convention: the governing convention or rule of recognition. While "the people" in a constitutional-legal context is often equated with enfranchised citizens, this equation is not applicable to internal constitutive sovereignty, as the power to revolt against the system especially is not held only by the enfranchised and the power is necessarily extra-legal, making it impossible to define its holder by legal means. While legal norms can express the identity of a people, the identity of a people is not created nor limited by them. Instead, where no people exist prior to the constitution of a new legal order, the exercise of internal constitutive sovereignty constitutes not only the legal order but also the people itself. Indeed, internal constitutive sovereignty is—by definition, and necessarily—extra-legal. Realising this and understanding that the extra-legal internal constitutive sovereignty and the legal internal constituted sovereignty are conceptually distinct is the answer to the "chicken-and-egg" problem of sovereignty, needing to be both that which constitutes and itself constituted, which often proves to be an analytical stumbling block when it comes to theories of sovereignty.[127]

[127] Consider for example Pavlos Eleftheriadis, 'Law and Sovereignty', *Law and Philosophy,* 29/5 (2010), 535-69.

2.2. Internal Constituted Sovereignty

Internal constitutive sovereignty (ICVS) is the *power* to constitute a legal system; as such, it is necessarily extra-legal. Internal constituted sovereignty, by contrast, is a concept that is constituted by the legal system which is in turn constituted by ICVS, as the name already implies. As such, it is a legal concept rather than an extra-legal one. In the following, we will consider what internal constituted sovereignty (ICDS) means. In doing so, we will answer who is sovereign in this sense, where ICDS is situated, and in what ways the internal constitutive sovereign, the people, are involved in exercises of internal constituted sovereignty.

2.2.1. What is ICDS?

Dan Philpott holds that "[s]ome scholars have doubted whether a stable, essential notion of sovereignty exists. But there is in fact a definition that captures what sovereignty came to mean in early modern Europe and of which most subsequent definitions are a variant: *supreme authority within a territory*."[128] This definition immediately raises a number of questions. Firstly, what does "supreme" and what does "authority" mean? Secondly, is this a matter of fact or a matter of law?

Let us first consider why ICDS is a matter of law, rather than a matter of fact. Some scholars have argued that, ultimately, sovereignty is a matter of fact, rather than a matter of law. Schmitt's argument in *Political Theology* can lead to this conclusion.[129] Schmitt's view on sovereignty as

[128] Dan Philpott, 'Sovereignty', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition edn.; URL = <http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>, 2010) at 1.

[129] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago University Press, 2005) at 5. While political convictions and academic arguments may be divorced from each other, this author would nevertheless like to expressly distance herself from Schmitt's views on national socialism.

the power to decide in cases of emergency and outside the operation of law is largely in line with internal constitutive sovereignty:[130] we have seen that ICVS entails, *inter alia*, the power of a people to deconstruct the legal system. This is by definition a power outside the operation of law. However, considering sovereignty as not solely extra-legal is not indefensible, even on the basis of Schmitt's writing: the law of any system can determine which agent or institution has the competence to interpret and apply the law even in cases of emergency.[131] Legal systems often attach sovereignty to entities; this sovereignty is then necessarily not extra-legal, but a legal concept. In this way, internal constituted sovereignty is distinct from internal constitutive sovereignty: it is constituted, as the name already suggests, by the legal system. While the rules that constitute ICDS may differ from one legal system to another, differences that are too great would suggest that we are no longer talking about the same thing.[132] In the following, we are interested, therefore, in the doctrinal concept of internal constituted sovereignty.

This leads us to the first of the two questions asked above. What does "supreme authority" mean in this context? ICDS describes the notion that the state's authority is recognised (often because of its enforcement mechanisms, but not necessarily) above the authority of any other organisation, such as the church, a sporting association or any other body or entity that might make a claim to authority. In other words, if an individual might ask herself what to do, ICDS on the state level holds that legal norms (rather than moral or religious ones) are final in the sense that they replace all other reasons for action this individual might

[130] However, Schmitt argues that, although he who decides in extreme cases stands "outside the normally valid legal system, he nevertheless belongs to it". Ibid., at 7.
[131] Cf. Ibid., Lars Vinx, 'Carl Schmitt', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition edn.; <http://plato.stanford.edu/archives/spr2016/entries/schmitt/>, 2016) at 2.
[132] For a more in-depth argument on this point, see Jaap Hage, 'The Meaning of Legal Status Words', in Jaap Hage and Dietmar von der Pfordten (eds.), *Concepts in Law* (Springer, 2009).

have.[133] This is a status assigned to states which is based on the legal norms of the legal system. This status describes nothing more and nothing less than that on a given territory, the state's authority—expressed in legal norms and legal sanctions—is supreme to any other claim to authority. This does not take away that another organisation might make a claim to authority, but it does mean that the state's status as a supreme authority is recognised and enforced above these other claims to this status, because the state's claim is based on the legal system constituted by the people.[134]

However, a different account of ICDS is also possible: it can also be equated with the power to legislate in final instance. This might be a power of a constitutional legislator, competent to amend the constitution, or it might be a court competent to rule on constitutional matters, or it might simply be the King-in-Parliament, as in the constitutional doctrine of the United Kingdom summarised by Dicey as having

> "the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[135]

In this sense, ICDS answers the question which particular institution is supreme within a state. But which of these two accounts is more accurate, and better suited for our purpose to clarify and reconstruct the concept(s) of sovereignty? Raphael touches on this question when he writes that

> "A much disputed question […] is where the sovereignty of a State is located. Does it reside in a legislature which is empowered to make statutes that can override rules of common law or repeal earlier statutes? Or in a supreme court that can

[133] Cf. Raz, *The Morality of Freedom*, at 46.
[134] Raphael, *Problems of Political Philosophy*, at 54 – 58.
[135] Dicey, *Introduction to the Study of the Law of the Constitution*, at 3 f.

> determine whether an Act of the legislature is constitutional? Or does it reside in the constitution itself, or in the body that is empowered to amend the constitution? […] The activities of the State are divided among different bodies, none of which may be supreme in all respects. In relation to other associations, however, and to other States, the State as a whole is regarded as sovereign."[136]

We will see that situating ICDS on the level of an organ of the state is a conceptual mistake. In order to arrive at this conclusion, however, we must first consider the implications of that view. We will do so in the next section on the basis of the question who is sovereign.

2.2.2. Who is sovereign?

We have seen that when it comes to internal constituted sovereignty, there are two different accounts of it. One talks about the internal sovereignty of the state as a whole, the other of the sovereignty of one entity within the state. Let us call the former "state level" and the latter "organ level" and answer for each one who is sovereign.

On the state level, the answer to this question is already implied in the nomenclature: it is the state that has the status of the supreme authority to that of any other organisation or entity that might claim authority. This is relatively straightforward. The same cannot be said for the organ level.

On the organ level, the testing criterion for the determination of which entity in a legal system is sovereign is whether that entity is the supreme legal authority and whether there is any other entity in the legal system with the competence to annul, set aside, or amend rules created by that entity. Employing this criterion, gleamed from theories of parliamentary and monarchical sovereignty, it is clear that, in many states, the ordinary

[136] Raphael, *Problems of Political Philosophy*, at 54 f.

legislator is not sovereign, although in some states it is: in the United Kingdom, there is no distinction between ordinary legislator and constitutional legislator. As Dicey says about Parliament:

> "*First*, there is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character."[137]

> "*Secondly*, there is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional."[138]

In legal systems, such as the German legal system, which provide for ample checks and balances and procedural safeguards, there are forms of legislation which cannot be set aside or annulled (easily)—namely constitutional rules.[139] While the constitution's normative force stems from its social acceptance and recognition by the internal constitutive sovereign, most constitutions provide for a procedure in accordance to which they can be changed. Such changes to the constitution mean that the standard for review of ordinary legislation against the constitution changes, although the change itself is not under review.[140] In many

[137] Dicey, *Introduction to the Study of the Law of the Constitution*, at 37.
[138] Ibid.
[139] The term "constitutional rules" is somewhat ambiguous in that it can describe, on the one hand, rules which are contained in a document called "The Constitution" (or Basic Law, or equivalent) or, on the other hand, rules which have a certain content, namely one that regulates the most fundamental functions of a state. These two often—but not necessarily—go hand in hand, with rules of such importance enshrined in a constitutional document. The foregoing statement uses, due to the hierarchy of norms, the first sense of "constitutional rules".
[140] This statement must be qualified. There is, for example, an ongoing academic debate in Germany on whether or not the *Grundgesetz* could be changed so as to no longer include the eternity clause and subsequently amend the *Grundgesetz* in such a way as would have violated the eternity clause if it were still included. The general consensus

countries, therefore, it would be the constitutional legislator that is sovereign in the constituted sense, if ICDS were to be situated on the organ level. It bears mentioning that, if this were the case, the determination of which body, institution, or entity is the constitutional legislator and hence sovereign in this manner remains a determination which must be made after a detailed study of the system in question and cannot be generalised without qualification. The United Kingdom is an example of this: as mentioned, no distinction is made between the ordinary legislator and the constitutional legislator, as there are no procedural hurdles—such as raised majorities—for the amendment of statutes of constitutional nature. Indeed, Dicey dedicates a number of pages to showing precisely that the two functions are fulfilled identically in the United Kingdom.[141] However, taking into account the European Union membership of the United Kingdom, it is no longer possible to truthfully claim that there is no entity in the United Kingdom which can set aside Acts of Parliament: courts are now obliged to do so where Acts of Parliament are in violation of EU law. This has raised the question whether Westminster Parliament remains sovereign or if its sovereignty has been lost or transferred to the European Union. The answer from constitutional doctrine is that the former is the case for as long as Parliament retains the power to withdraw from the framework of the European Union again, thereby withdrawing the competence of courts to set aside Acts of Parliament.[142] Thus, if the European Communities Act 1972 is considered part of the constitutional framework of the United Kingdom, and legislation in violation of European Union legislation is

---

appears to be that this is not possible, justified not by the explicit wording of the eternity clause which contains no such prohibition, but rather by reference to the constitutive sovereign and the inclusion of the eternity clause in the *Grundgesetz* in the first place. Cf. Hauke Möller, *Die Verfassungsgebende Gewalt Des Volkes Und Die Schranken Der Verfassungsrevision : Eine Untersuchung Zu Art. 79 Abs. 3 GG Und Zur Verfassungsgebenden Gewalt Nach Dem Grundgesetz* (Hamburg University, 2004).

[141] Dicey, *Introduction to the Study of the Law of the Constitution*, at 36 ff.

[142] This argument has also been codified in Section 18 of the European Union Act 2011 on the status of EU law as dependent on a continuing statutory basis.

not, the constitutional legislator remains sovereign in the internal constituted sense. In other words, Westminster Parliament, acting as an ordinary legislator is not sovereign because its legislation can be set aside by courts in case it violates EU law, but Westminster Parliament acting as constitutional legislator is sovereign, because it can amend or annul the European Communities Act 1972 on the basis of which courts set aside ordinary legislation in violation of EU law, thereby taking away the competence of courts to set aside legislation. Given that there is no distinction between Westminster Parliament acting as an ordinary legislator and Westminster Parliament acting as a constitutional legislator, Westminster Parliament is generally said to be sovereign.

Using the criterion of supreme legislative authority—used here as shorthand for legislative power of one body going hand in hand with a disability of any other body to do so— one can determine the sovereign (in the sense of ICDS on the organ level) in a legal system. Oftentimes, but not necessarily, this will be the constitutional legislator. However, the procedure for constitutional amendments can differ greatly, depending on the legal system in question, as can the number and identity of the bodies involved in that procedure. In Australia, for example, both the Houses of Parliament and the people need to be involved, as Section 128 of the Australian Constitution stipulates that constitutional amendment bills pass both Houses of Parliament and are put before the people in a referendum. In Germany, meanwhile, the procedure requires the Bundestag and Bundesrat to pass amending bills with raised majorities.[143] The French Constitution allows for constitutional amendments subject to either approval by the people via a referendum or by raised majorities in Parliament—that is, National Assembly and Senate—convened in Congress.[144] What constitutes a raised majority also differs; in some states it means two-third majorities, in others three-fifth. What even just these few examples show is that, while it is possible to talk of the

[143] Art. 79(2) German Basic Law.
[144] Art. 89 French Constitution.

constitutional legislator as one entity, in most cases the constitutional legislator is in fact several bodies acting together in accordance with a specified procedure. Taking this into consideration, it becomes obvious that where Westminster Parliament is mentioned above, it really means "King-in-Parliament", or the monarch, the House of Commons, and the House of Lords acting together. This raises the question, however, whether it is indeed one entity—the constitutional legislator—that is sovereign or whether sovereignty is distributed among several bodies.

There are two possibilities. Either, several bodies acting in accordance with a specific procedure constitute one entity, in which case sovereignty is not divided, or they do not, in which case sovereignty is not indivisible. While theories of sovereignty generally treat several bodies acting together in accordance with a specified theory as one for the sake of sovereignty,[145] this complication must nevertheless be considered in more detail, because the bodies regarded as one entity remain capable of acting independently from one another. As such, an individual body of the entity considered as a whole to be sovereign can influence the outcome of the constitutional amendment procedure. The example in the following paragraph showcases this complication.

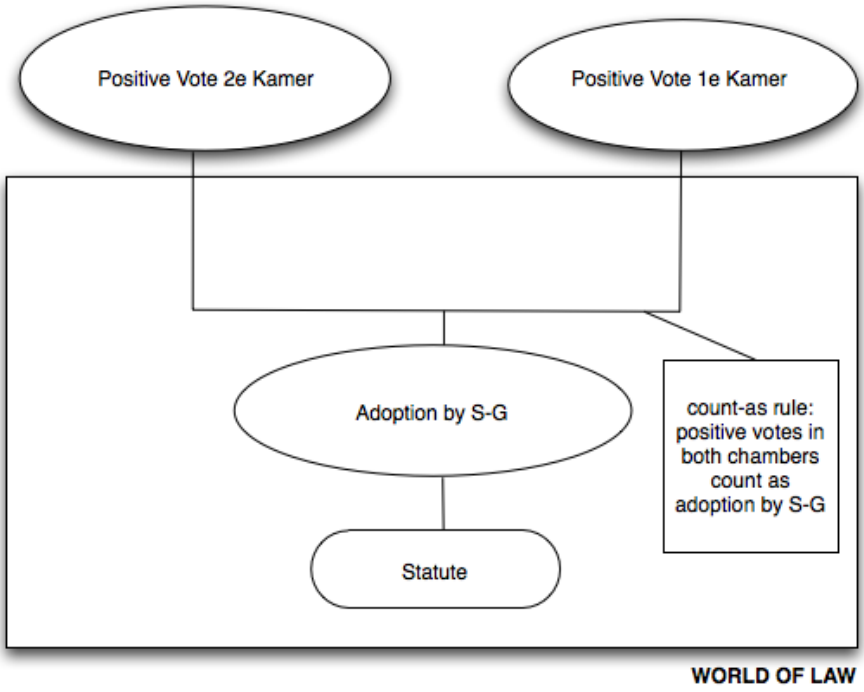
The Dutch Constitution specifies the procedure for its amendments in Article 137 and following. According to these articles, the constitutional legislator must be identified as consisting of the States-General, that is, the Second Chamber [*Tweede Kamer*] and First Chamber [*Eerste Kamer*], and the King. The amendment procedure is relatively straight-forward: a statute proposing an amendment must be passed in both Chambers. After dissolution and subsequent elections of the Second Chamber, the proposed amendments are considered in a second reading and may be adopted only with a raised majority of two-thirds of votes cast in both Chambers. This means that a Chamber acting alone cannot amend the Constitution, but it also means that either of the Chambers,

[145] Cf. Dicey, *Introduction to the Study of the Law of the Constitution*.

acting alone, *can* prevent the Constitution from being amended. Is it possible to consider the constitutional legislator as sovereign if one of the bodies of which it consists can prevent it from acting? The conventional answer to this question is clear: entities consisting of several bodies are considered to be one for the sake of sovereignty.

The conventional answer can be explained and supported by the assumption that constituted sovereignty is—in contrast to constitutive sovereignty—not concerned with social facts, such as acceptance and recognition, but also individual acts and voting patterns, what Dicey calls the internal limitation of sovereignty.[146] Rather, constituted sovereignty takes place entirely in the legal world.[147] This means that, for internal constituted sovereignty, the actions of individual bodies do not matter so much as the counts-as rules and the legal consequences attached to them which transplant factual acts into the legal world. It is possible to hold this assumption in a conceptually clear and consistent manner: constituted sovereignty, both internal and external, is a type of sovereignty which is *constituted by the legal system* and as such depends on the legal world. This is shown in the—very simplified[148]—picture below. The raising of hands in both the Second and First Chamber takes place in the physical and social world. A counts-as rule exists which holds that by raising your hand it counts as voting, and that these events taken together count as a singular event in the legal world, namely the adoption of a statute by the States-General.

[146] Ibid., at 32.
[147] Cf. Hage, 'A Model of Juridical Acts: Part 1: The World of Law'.
[148] It ignores, for example, the role of government and monarch and narrows down the process to just one event in the physical and social world, whereas it of course takes several. However, it should serve to illustrate the point.



While it remains true, regardless of the counts-as rule that allows the move into the world of law, that a negative outcome to the vote in one of the chambers would mean that the sovereign—here the States-General—will not act and thus one of the chambers acting individually can keep the sovereign from acting, to interpret this to mean that the constituted sovereign is not sovereign after all is to misunderstand the nature of constituted sovereignty as playing out in the world of law, rather than the social and physical reality. Extra-legal matters such as voting behaviour do not impact the *competence* of, for example, a constitutional legislator. This is a matter of *causal power*, not *competence*, but constituted sovereignty is not concerned with *causal powers* but rather with *legal powers* and *competences*.

Following this line of argument, it can be determined that, for example, in Germany, it is the *verfassungsändernde Gewalt* which is sovereign, a term referring to Bundestag and Bundesrat acting together in accordance

with the procedure of Article 79 of the Basic Law, stipulating raised majorities in both Bundestag and Bundesrat. In India, equally, it is not the ordinary legislator, but rather the legislator acting under the procedure of Article 368, who is sovereign in the constituted internal sense. In the United Kingdom, it naturally is Parliament which is sovereign in the constituted internal sense, meaning King-in-Parliament, and therefore the monarch, the House of Commons and the House of Lords together, as defined by Dicey. All of these entities are sovereign, provided we seek the internal constituted sovereign on the organ level.

In most states, certainly at this time, it is not the case that one individual is sovereign in this sense, but rather a number of individuals acting together in a way that counts as one entity, or even several individuals of several entities, acting together in a way that counts as one larger entity acting. To say that the constitutional legislator is sovereign, even though the constitutional legislator is made up of several entities and those entities are made up of a number of individuals, is no different than to say that parliament has passed a law even though parliament is made up of several individual members of parliament. Not only is this how actions by legal institutions composed of individuals are usually described, it is also—and more importantly—how the law itself refers to them.

This argument as to why the States-General in the Netherlands, or the King-in-Parliament in the United Kingdom, is sovereign despite the fact that they are composed of several entities can also be applied, *mutatis mutandis*, to the question whether sovereignty should be situated on the organ level or on the state level. We will consider this in the following section.

2.2.3. Two levels: A mistake?

If internal constituted sovereignty is to be situated on the organ level, and if there is to be one organ within the state which is sovereign to the

exclusion of all others, the entity most likely to be sovereign in this sense is the constitutional legislator. The argument made to support this conclusion requires the assumption that indeed it is one organ or one entity within the state which is sovereign: that the question of sovereignty is asked on an organ level and attribution of sovereignty takes place on that level as well.

However, an alternative view on the matter is that this question should not have arisen in the first place. In the same manner that one can argue that it is not the House of Commons which is sovereign, but rather the "King-in-Parliament", a composite entity acting in accordance with a particular procedure, one could argue that the composite entity "state" is sovereign, with each of its organs acting in accordance with the competences given to them by the legal system. Sovereignty is, then, not attributed to one organ within the state but rather a status and power conferred to the state as a whole through the attribution of competences. The attribution of these competences is done by the legal system constituted by the people of that state, showing the link between internal constitutive and internal constituted sovereignty. In this sense, the meaning of sovereignty is, as Philpott held, "supreme authority within a territory".[149] It belongs to the state as a legal person, rather than to one of the representatives of this legal person—namely, its organs. The state is just as much a composite entity as Westminster Parliament; it no more makes sense to attribute sovereignty to a sub-entity of the state than it makes sense to attribute it to a part of Westminster, rather than the King-in-Parliament.

Here, the method of this book as a rational reconstruction in the second degree becomes relevant again: the decisive criterion is not proximity to historical and present discourse; instead, it is about conceptual clarity and coherence and consistency. Situating ICDS on the state, rather than the organ, level accounts for phenomena such as the separation of powers

[149] Philpott, 'Sovereignty', at 1.

and checks and balances within the state. ICDS on the state level is a quality or characteristic attributed to the state by the legal system over other associations, such as churches, companies, or chess clubs.[150] While the argument of this section indicates that situating ICDS on the organ level is a conceptual mistake, it is clear that the historically different developments of common law and civil law have led to the distinction.[151] Nevertheless, we will proceed with a closer look at ICDS as something situated on the state level only.

2.2.4. Sovereignty as a legal status

Sovereignty in the constituted sense, be it internal or external, is a status assigned to an entity by a legal system. With regard to legal statuses, there are different ways in which we can refer to them: first, we can describe how one gains the status, what consequences are attached to having that status, and how one loses the status. To know how one gains a status, we need entrance rules; to know what consequences are attached, we need consequential rules; and to know how one loses the status, we need exit rules.[152] Consequentially, we find the answers to the question of how to gain a status, what consequences it has and how to lose it by studying these rules. What these rules do not quite tell us, however, is what it means to have that status. We have already considered what the status of internal constituted sovereignty attributed to a state means. What is noteworthy, in addition, is that individual entrance, consequential and exit rules could be changed without the status losing its meaning.

For the status "ownership", Hage (2009) considers that "'ownership' stands for ownership, and "owns" stands for a relation between a person

[150] Raphael, *Problems of Political Philosophy*, at 56 f.
[151] Olivier Beaud, 'Conceptions of the State', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) at 271-73.
[152] Hage, 'The Meaning of Legal Status Words', at 61 f.

and some object (in a broad sense) namely that this person owns that object",[153] with ownership in this case being the institutional status for which 'ownership' stands.[154] While logically and linguistically precise, to say that "sovereignty" stands for sovereignty does not tell us much about sovereignty, only about "sovereignty". Does it make sense for us to consider sovereignty in this way, then?

One reason why it does make sense is that defining the legal concept of sovereignty in terms of necessary and sufficient conditions is bound to fail and to lead to conclusions that run counter to all our intuitions about sovereignty. An example might help clarify this point. Let us say that sovereignty is defined in terms of the legislative power of one entity (be it a state or an organ within the state) and the disability of any other entity to create norms of a higher status than those of the aforementioned entity. The conditions of "supremacy" and "legislative power" would thus be individually necessary and jointly sufficient for sovereignty. This is quite reminiscent of the definition of parliamentary sovereignty in the United Kingdom. Let us also say that we will still call the primary entity sovereign when it has transferred some of its legislative power to another entity (e.g. the European Union) and also created the power for yet another entity (let us say courts) to overrule acts by the sovereign entity (let us call it Westminster). However, we still consider Westminster sovereign, because Westminster could at any time take back the power it has given the courts and the power it has transferred to the EU. Therefore what matters for sovereignty is not that Westminster has all the power but that it has the power to distribute power and to take distributed powers back. The only necessary condition for sovereignty is the power to legislate in this particular sense. Further, let us imagine that Westminster were to transfer all of its legislative power to an

[153] Ibid., at 65 f.

[154] Another view would be to assume that "ownership" like "Tû-Tû" is meaningless. However, this author agrees with Hage's analysis that entities exist in the social world—including in the institutional world of law. Ibid., at 59 ff.

international organisation (for example the European Union) but would retain the power to reclaim the transferred powers, if desired. Members of Westminster Parliament would have only one issue left to debate: do we want to take power back from the European Union or not? The European Union would take care of every other issue. Would we still consider Westminster sovereign under these circumstances? Technically, the necessary and sufficient condition for sovereignty is given: Westminster would still have the legal power to withdraw the transferred powers from the EU again. Nevertheless, it would be counterintuitive to say that under these conditions Westminster would still be sovereign.

Perhaps we might be inclined to say that it is possible for a state to remain sovereign if the state transfers some but not all of its sovereign powers. This does not solve the issue, however, it only begs the question which or how many sovereign powers can be transferred without a loss of sovereignty. For this reason, it makes sense to divorce the status of sovereignty from its consequences. Divorcing the status from its consequences and thus distinguishing between sovereignty and sovereign powers clarifies many issues, but it also poses one problem: what is the meaning of the status without its consequences and, if most, or even all, sovereign powers are transferred or lost, should an entity still retain the status without them? Is a pincushion without pins in it still a pincushion? Does a pincushion need to have some pins in it? And if so it is irrelevant which ones? And if all the pins from the pincushion have been placed in a bowl, does that bowl become the new pincushion (or pinbowl) eventually? Despite the fact that these questions remain, we argue here that the distinction between the status of sovereignty and its consequences should be made.[155] There are two main reasons for this: one

[155] But cf. de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', at 456., arguing equally that sovereignty as only the ability to unilaterally withdraw transferred sovereign rights again is an implausible claim, but concluding that the distinction is nevertheless not tenable, ibid., at 460. Section 4.1. of this book examines this point in more detail and, it is hoped, provides the conceptually satisfactory account that de Búrca considers is lacking.

is that ICDS is attributed by and dependent on the legal system and to equate the status with its consequences would make legal systems inconsistent; the second is the explanatory and clarifying nature of a separation between status and consequences. We see that a conceptual separation between status and consequences is not always maintained, particularly in the discourse surrounding European Union membership and the sovereignty of its Member States. One example of this—and a good argument why it should be maintained—is the recent communication between the Second Chamber of the Dutch parliament and the *Raad van State*. The Second Chamber asked for advice regarding the democratic control of a transfer of competences and sovereignty to the European Union. To this the *Raad van State* replied:

> "*In de motie worden zowel de overdracht van soevereiniteit als die van bevoegdheden genoemd. Hoewel beide begrippen doelen op een overdracht van beschikkingsmacht, is er toch sprake van een meer dan gradueel verschil. In de volkenrechtelijke context betekent soevereiniteit dat staten niet tegen hun wil kunnen worden gebonden (een afspraak vooronderstelt immers instemming). In staatsrechtelijke zin wordt met soevereiniteit gedoeld op de bevoegdheid van de staatsgemeenschap om de eigen staatsinrichting en wetten te kunnen wijzigen. In beide kaders wordt de soevereiniteit van staten als één en ondeelbaar beschouwd: een staat is soeverein of hij is dat niet. Dit sluit niet uit dat soevereine bevoegdheden verdeeld kunnen zijn; binnen een staatsverband, zoals bij federale staten, of in internationaal verband, zoals bij de Europese Unie. Een dergelijke verdeling van bevoegdheden impliceert echter geen verlies van soevereiniteit en zal veelal juist een bevestiging of versterking daarvan opleveren.*
>
> *Gelijkstelling van verlies van soevereiniteit aan iedere beperking van beschikkingsmacht om eigen aangelegenheden autonoom te*

> *regelen en daarover te beslissen, zou betekenen dat er geen soevereine staten (meer) zijn*."[156]

In other words, the Raad van State considers that while both sovereignty and the competences in question relate to decision making, there is more than a gradual difference between the two. According to the Raad van State, sovereignty is an all-or-nothing matter: one is either sovereign or not. To equate a transfer of competences with a transfer of sovereignty, then, would mean that there are no (more) sovereign states in the world. The Raad van State notably also distinguishes between "sovereignty" (*soevereiniteit*) and "sovereign competences" (*soevereine bevoegdheden*). The latter can be transferred, or shared, but this does not impact the location of sovereignty.

[156] Raad Van State, 'Voorlichting Inzake De Democratische Controle Bij Overdracht Van Bevoegdheden En Soevereiniteit', (Algemene zaken; Kamerstukken II 2013/2014, 33 848, nr 15, 2014): Both the transfer of sovereignty and that of competences is mentioned in the motion. Even though both terms refer to a transfer of power, the difference is not just one of degree. In the context of international law, sovereignty means that states cannot be bound against their will (after all, an agreement requires the parties' approval). In constitutional law, sovereignty refers to the competence of the state community to change the organisational setup of that state and its laws. In both fields, the sovereignty of the state is considered unitary and indivisible: a state either is or is not sovereign. This does not exclude that sovereign competences can be distributed: either within the state, as is the case in federal systems, or internationally, as in the European Union. However, such a distribution of competences does not imply a loss of sovereignty. Rather, it can often result in its confirmation or reinforcement.

Equalising every limitation of the power to regulate and decide on domestic affairs autonomously to a loss of sovereignty would mean that no sovereign states exist (any more). (*Translation provided by Dr Sascha Hardt*)

2.2.4.1. Limitations

One question often asked with regard to sovereignty is whether it is absolute or limited. We will consider in this section why asking that question is a conceptual misunderstanding for constituted sovereignty.

With regard to limitations in general, a (terminological) distinction must be made. On the one hand, there are *legal* limitations—constituted by the legal order—which can be considered in terms of duties, no-claims, competences, or disabilities. On the other hand, there are limits such as those which Dicey termed the internal and external limit of sovereignty—the threat of the constitutive sovereign exercising its power by revolting and the fact that the constituted sovereign consists of people who are the product of their time and upbringing. Particularly the latter limitation—internal—belongs to sociological studies rather than legal studies, influencing behaviour without being in any way recognised in the world of law. Let us first consider whether the internal constituted sovereign can be subject to legal limitations.

With regard to legal limitations, it is possible to further distinguish between limitations which are procedural in nature and those which are material. Historically, subjecting the internal constituted sovereign to legal limitations appears to have gone from procedural to both procedural and material.

> "*In der Entwicklungsgeschichte des modernen Verfassungsstaates hat die Bindung der verfassungsändernden Gewalt zunächst in formalen Schranken Ausdruck gefunden, etwa in besonderen Zustimmungserfordernissen (Zweidrittelmehrheit in beiden Häusern des Kongresses und Dreiviertelmehrheit der Einzelstaaten) und der Dokumentation von Änderungen in Verfassungszusätzen (amendments) in der Verfassung der USA (Art. V). Materielle Schranken der verfassungsändernden Gewalt formulierte schon zu Beginn des 19. Jahrhunderts die Verfassung Norwegens (§ 110 Satz 3) von 1814. In Deutschland hat sich erst*

mit dem Grundgesetz eine materiell-rechtliche Beschränkung des verfassungsändernden Gesetzgebers (Art. 79 Abs. 3 GG) durchgesetzt."[157]

Procedural limitations on the constituted sovereign can be found even in the United Kingdom, where Acts of Parliament must be passed in accordance with the legislative procedure. In other words, not any act of Westminster Parliament has the force of an Act of Parliament—motions, for example, do not. Substantive limitations such as eternity clauses are less common than procedural limitations. Both are justified in the same manner, however, namely by reference to the constitutive sovereign. This is the argument which was also made by the Indian Constituent Assembly when they decided to depart from parliamentary sovereignty to a legal order in which Parliament could not, in the ordinary legislative procedure, claim sovereignty for itself, in which a constitutional court could assess and—if necessary—annul statutes on grounds of unconstitutionality, and in which the procedure for constitutional amendments differs significantly from the ordinary legislative procedure, with procedural limitations imposed on the constitutional legislator.[158]

The question of limitations brings us back to the distinction between the status of sovereignty and its consequences. We can only consider ICDS subject to limitations if it is not a status but a number of powers. The

[157] Herdegen, 'Verfassungsgebende Und Verfassungsändernde Gewalt', at 7.: In the historical development of the modern constitutional state, the constitutional legislator being bound as an emending power first found expression in formal limitations, such as special approval requirements (for instance a majority of two thirds in both Houses of Congress, in addition to a majority of three quarters) and the documentation of changes made in the form of constitutional amendments to the US Constitution (art. V). Material limitations to the power of the constitutional legislator were already formulated at the beginning of the 19th century in the Norwegian constitution of 1814 (§110, 3rd sentence). In Germany, a material limitation of the amending powers of the constitutional legislator was only introduced with the Basic Law of the Federal Republic (art. 79 (3) GG).

[158] Cf. Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (Oxford University Press, 2011) 224.

latter can certainly be limited or transferred. Many scholars consider that there may be no undue limitations on sovereignty or that there is an inherent paradox between sovereignty and constitutionalism, with the latter limiting the former.[159] Perhaps this (alleged) inherent paradox is the best argument against an understanding of ICDS that equates the concept of sovereignty with the presence of preferably absolute and unlimited sovereign powers. Sovereign powers can be—and are—subject to both procedural and possibly material limitations. This does not affect the status of sovereignty, however.

A further dilemma is often said to exist with regard to the concept of sovereignty: how can it be subject to any kind of limitation if sovereignty is that which constitutes? This dilemma describes the assumption that sovereignty cannot be subject to legal limitations, because such limitations presuppose the legal system which sovereignty constitutes. However, this is a conceptual confusion that cannot arise when the distinction between constitutive and constituted sovereignty is made and it is recognised that these are two different concepts of sovereignty.

2.2.5. Involvement of the People

Making the distinction between ICVS and ICDS means that we have until now also made a clear distinction between the holders of sovereignty, namely the people on the one hand and the state on the other hand. We have also seen, however, that ICDS is attributed to organs of the state in some jurisdictions, particularly those of common law countries, and that the people—or more accurately, the enfranchised—can be one of the parties which form part of the composite entity that is sovereign in the internal constituted sense on the organ level.[160] Does this

[159] Cf. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*.; Eleftheriadis, 'Law and Sovereignty'.

[160] E.g. Australia, where the constitution can be amended only via a process that involves a referendum.

blur the lines between constitutive and constituted sovereignty? Do democratic participation and the involvement of the (enfranchised) people in processes that are part of constituted sovereignty mean that the distinction between constitutive and constituted sovereignty does not exist after all?

The answer to these questions hinges on the distinction between causal and legal powers and understanding what takes place in the world of law and what is outside of it. Where the people are involved in the constitutional amendment procedure, this is first and foremost the exercise of a competence, given to them by rules that are part of the legal system. The action of ticking a box *yes* or *no* or otherwise voting in some manner counts as something in the world of law and it is within the world of law and because of the world of law that these actions have relevance. Of course, there is an exercise of causal power involved as well, namely the lifting of one's arm to tick the box, but this takes place outside the world of law. The actions and competences of voters acting within the framework of an electoral democracy are constituted and guided by the rules of the legal system. The fact that those actions which count as something within the world of law of the constituted normative system might at the same time be instances of following a social convention does not take away from the fact that such an action means very different things on two very different levels. To give an example: Section 128 of the Commonwealth of Australia Constitution provides in its first paragraph that

> "[t]he proposed law for the alteration [of the Constitution] must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."

Even if we situate ICDS on the organ level, none of the individual bodies mentioned are sovereign in the internal constituted sense but, acting together in accordance with the procedure of Section 128, they count as the constitutional legislator, i.e. as the entity which is sovereign in this sense. As such, it is wrong to say that the Australian people is sovereign in the constituted sense or that the electors are. They are no more sovereign than those of the Houses of Parliament is, in this case. Instead, they have certain competences and their actions in voting on a referendum count as something else in the world of law. At the same time, however, the electors participating in a referendum are giving what Hampton would qualify at least as convention consent. This takes place on another level and strengthens the social convention constituting the legal system as a whole; one of the conditions for the existence of that convention is, after all, that it is normally followed. It is not dissimilar from democratic participation in elections for representatives, only here the electors do not even take part in the process of the actions of the constituted internal sovereign. Nevertheless, during elections, they are both acting in a way constituted by law and following the constitutive convention. That these things take place on different levels can perhaps best be understood by reference to the fact that the constitutive convention does not cease to exist if an individual—or even several individuals—fail to go to the elections, be it due to indifference, out of a sense of dissatisfaction and meant as an act of civil disobedience, or for reasons of mastery.

2.2.5. Concluding Remarks

The preceding sections have looked at the meaning of internal constituted sovereignty. We have encountered a number of issues, of which the two most important are whether ICDS is situated on the organ level or the state level and whether ICDS is a legal status. The answers to these

questions have important implications for our understanding of internal constituted sovereignty.

In common law jurisdictions, sovereignty answers the question as to which organ of the state is supreme vis-à-vis all other organs; it posits that the organ with supreme legislative power is sovereign.[161] However, we have seen that, even though the state plays less of a role in common law constitutional doctrine, it is a conceptual confusion to situate sovereignty on the level of a state organ. This is because the state is a composite entity comprising its organs, just as its organs comprise other organs—Westminster, for example, as two Houses. We would consider attributing sovereignty to one of Westminster's Houses a conceptual mistake, just as we would consider attributing sovereignty to one of Westminster's MPs a mistake. Attributing sovereignty to Westminster, rather than the state, is the same kind of mistake. We have therefore argued that ICDS is a status that states have.

What does this mean, however? Are states only sovereign in this sense if they have all and unlimited legal power? This is not the case, because ICDS is a status attributed to the state by the legal system. This status needs to be distinguished from the consequences of sovereignty, that is from the sovereign powers a state has. These can be limited, transferred or reclaimed. The status of sovereignty, meanwhile, means "supreme authority within a territory". This is due to the fact that a state's authority is recognised (often because of its enforcement mechanisms, but not necessarily) above the authority of any other organisation on that territory, be it the church, a sporting association, or any other body or entity that might make a claim to authority. ICDS holds that legal norms (rather than moral or religious ones, or any other kind of norm) are final in the sense that they replace all other reasons for action an individual might have.

[161] Legislative power, here, means norm-creation; this does not necessarily need to be by a formal legislator.

Making the distinction between sovereignty as a status and sovereign powers clarifies discourses such as that surrounding the European Union and the sovereignty of its Member States.[162] It also shows why it is a mistake to talk about limitations of sovereignty, rather than about limitations of sovereign powers, thereby solving an alleged paradox between constitutionalism and sovereignty.

A further distinction is crucial for our understanding of constituted sovereignty, particularly as it relates to constitutive sovereignty: that between the world of law and the external world. This distinction becomes particularly pressing where processes within the world of law that might be considered an exercise of sovereignty involve the people. Such processes do not blur the lines between constitutive and constituted sovereignty, because actions instantiating, on the one hand, the social convention that is the basis of constitutive sovereignty and, on the other hand, counting as certain acts in the world of law that are part of the process of action by the internal constituted sovereign, mean very different things on very different levels.

We have, until now, focused on internal sovereignty only. In the next two parts, we will turn to external sovereignty.

[162] More on this in Section 4.1. of this book.

2.3. External Constitutive Sovereignty

The distinction between a state's international sovereignty and its internal sovereignty is not new, and often internal and external sovereignty are called "two sides of the same coin". This phrase is applied to concepts of sovereignty corresponding to internal constituted sovereignty and external constituted sovereignty. However, the concepts of internal constitutive and external constitutive sovereignty can be similarly linked. Here, it must be stated that external constitutive sovereignty does not correspond to one of the traditional uses of the word "sovereignty". Nevertheless, introducing this concept and delineating its scope can lead to new insights into our understanding of external (or international) sovereignty, its origins, and much of the controversy regarding the obligatory nature of international law.

Comparing internal constitutive sovereignty with external constitutive sovereignty, we find that, for each, the sovereign in the respective sense constitutes the legal system in question: the national legal system for internal constitutive sovereignty and international law for external constitutive sovereignty. Who the sovereign is differs as well, of course: this is the people for internal constitutive sovereignty and states for external constitutive sovereignty. On the internal plane, the people—i.e. the ICVS sovereign—are subject to the norms created by the state or by state organs—the ICDS sovereign. On the external plane, however, governed and governing, that is ECVS sovereign and ECDS sovereign, seem to be identical sets: in both cases, it is states. Nevertheless, we must distinguish between, on the one hand, the set of all actors on the international plane taken together and, on the other hand, individual states. Individual states are sovereign in the sense of external constituted sovereignty, but an individual state is no more sovereign in the sense of external constitutive sovereignty than an individual in the sense of internal constitutive sovereignty. It is the set of states, or more generally the set of all actors on the international plane (with currently still an emphasis on states), which is sovereign in this sense. The distinction

made on the internal plane between the level on which we talk about sovereignty and on which we situated actions of the entities in question also applies *mutatis mutandis* to the external plane and is useful for the sake of clarity.

To reiterate, some of the most important conclusions from internal constitutive sovereignty and its relationship with internal constituted sovereignty were the following: firstly, constitutive sovereignty is the *power* to constitute, maintain, and deconstruct a legal system. Secondly, constitutive sovereignty is not situated in the world of law, whereas constituted sovereignty is. Thirdly, constitutive sovereignty requires two main elements, namely efficacy and acceptance.[163] Fourthly, constitutive sovereignty is a matter of degree, both in terms of how efficacious the system is and in how far it is accepted. Meanwhile, constituted sovereignty is *not* a matter of degree, because an internal view of the legal system is required to talk of constituted sovereignty.

In the following, these conclusions are explained and applied to the concept of external constitutive sovereignty (ECVS). However, first we will look at the distinction between internal and external dimension and the reasons for making this distinction. Thereafter, the meaning of external constitutive sovereignty will be analysed, and it will be determined who is sovereign in this sense. Lastly, potential limitations of the external constitutive sovereign will be discussed.

2.3.1. Why distinguish between external and internal sovereignty?

The traditional view on international law is that it is both addressed to and created by states. Historically, it allowed for the coexistence and later

[163] Note again that acceptance is a matter of social attitudes and should not be understood as very demanding. Acquiescence or convention consent are alternative terms for it.

also cooperation between states.[164] As such, it is distinct and has developed separately from national law. Greenwood summarises the distinction between an internal and external concept of sovereignty as follows:

> "There follows another important feature of the internal concept of sovereignty. That concept is primarily concerned with the relations between the different organs of the State and those who are subject to their authority and with the relations of those subjects *inter se*.
>
> The international concept of sovereignty is quite different. For the international lawyer, sovereignty means the sovereignty of the State itself and the principal concern of international law is not with the allocation of power between the institutions or territorial units within that State but the relations between that State and other States, each of which is also sovereign."[165]

Raphael similarly employs this distinction of perspective when he defines the purpose of a state:

> "What, then, are the functions, in practice, of the modern State? Its primary function is to settle and prevent conflict, or to put it in another way, the keeping of order and the maintenance of security. Two kinds of security are involved, security within the community and security against injury from external sources."[166]

In other words, the distinction between external and internal is first and foremost necessitated by different perspectives. However, these different

[164] Besson, 'Sovereignty', at 42 ff.
[165] Christopher Greenwood, 'Sovereignty: A View from the International Bench', in Richard Rawlings et al (eds.), *Sovereignty and the Law* (Oxford University Press, 2013) at 253.
[166] Raphael, *Problems of Political Philosophy*, at 46.

perspectives have led to different concepts as well, and external conceptions of sovereignty are different from internal ones.

2.3.2. What does "external constitutive sovereignty" mean?

States are not isolated units without any contact between them. Therefore, it is possible to reason analogously from the rationale for having laws between people to the rationale for having laws between states. Here, too, law is a tool for the maintenance of order.[167] A further analogy to be made is that between individuals and states—of course, states are not persons in the same way that individuals are, but legal personality is ascribed to them—the actions of state officials are attributed to the state. The Montevideo Convention calls states "person[s] of international law".[168] Within the world of law, states are (legal) persons. This does not mean that they can automatically be considered persons outside the world of law as well. However, there is an entire field of study dedicated to the behaviour of states as self-interested actors in the international arena, capable of making prudent choices and therefore of being motivated by reason.[169] It is therefore possible to consider states also as having and exercising powers and to consider the behaviour of states from a sociological perspective. States can follow the law or reject it; state officials can use different types of rhetoric regarding their international legal obligations, disregard them, or sign new treaties, justify or make demands in international conferences—in other words, state behaviour cannot be reduced to rule-based automatisms. For states,

[167] Ibid.
[168] Anonymous, 'Convention on the Rights and Duties of States', *165 LNTS 19* (1933).
[169] Cf. W. Julian Korab-Karpowicz, 'Political Realism in International Relations', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (URL = <http://plato.stanford.edu/archives/sum2013/entries/realism-intl-relations/>, 2013), Summer 2013 Edition.; International relations is defined as "An academic discipline originally concerned with the political relations between states but now embracing non-state political actors at the global scale and drawing on the full range of social sciences." Castree, Kitchin, and Rogers, 'International Relations', in *A Dictionary of Human Geography* (Oxford University Press, Oxford Reference, 2013).

as for individuals, to say that they should follow legal rules is a statement of a very different kind than to say that they do in fact follow legal rules.

One power that states can exercise is external constitutive sovereignty (ECVS): the power of states and state actors to constitute, maintain, and deconstruct the international legal system. This power, just as internal constitutive sovereignty, is exercised through the creation and maintenance or deconstruction of a constitutive social convention, i.e. the governing convention of the international legal system. What, however, does this mean? To reiterate, Hampton has formulated a number of conditions against which the existence of convention consent can be tested, which is the minimum requirement of political authority. These conditions are:

1. There exists a convention to regard the norms created by the governing institution(s) as pre-emptive and final.
2. There are means to enforce the norms created by the governing institution(s), and the willingness to use them; in other words, enforcement is possible and actual.
3. Individuals consider the norms created by the governing institution(s) as a reason to act accordingly; in other words, individuals recognise the authority of the governing institution(s).[170]

The third condition is not a necessary one, making Hampton's formulation very similar to Hart's understanding of the rule of recognition, which is limited to two conditions, namely efficacy and a social attitude of acceptance. While phrased differently, the condition of regarding the norms created by the governing institution(s) as pre-emptive and final corresponds to the social attitude of acceptance that Hart requires. One can also equate the requirement of enforcement with the requirement of efficacy—actually, efficacy may be more accurate a

[170] Hampton, *Political Philosophy*, at 97 f.

requirement for the existence of a social convention in this case, because while enforcement is certainly a very important reason when it comes to motivating either individuals or state actors to obey the law, it is not the only possible reason. Efficacy also leaves room for other reasons, while still requiring the same result: that the law is actually obeyed.

Regardless of specific phrasing, it is immediately clear that these conditions are not *obviously* met when it comes to the international community. An explanation for this is the distinction between political authority and a legal system. Hampton's theory concerns the establishment of political authority. That there is no political authority—in the sense of a world government—on the international plane should be obvious. Furthermore, there is very little in terms of enforcement mechanisms and, even where such mechanisms exist, the political will to use them is often lacking. In other words, enforcement is rarely possible and even more rarely actual. Focusing on efficacy instead of enforcement does not clearly resolve this issue, either, as there are many instances in which international law is not followed. It is not obviously clear that international law is efficacious, therefore.

The first and third condition, however, are no less problematic. Does a convention to regard norms created by the governing institution(s) as pre-emptive and final exist and, if so, which entity or entities should be identified as the governing institution(s)? If we consider that there is a distinction between the set of states taken collectively and individual states and that we are concerned not with the constitution of a world government but the international legal system, the question of governing institutions becomes less relevant than the question whether there are legal rules which are recognised. What we must ask, then, is whether states consider international laws as a reason to act accordingly? The issue of compliance has been a topic for both international law and

international relations.[171] Rephrasing the question, let us ask whether states consider the norms created by states as pre-emptive and final or what is the social attitude of states towards international legal norms? Any definite answer to this question must be left to sociologists and, since this author is not a sociologist, a definite answer cannot be provided here. However, there are some indicators that states adopt an attitude of acceptance towards international legal norms, if not always necessarily for themselves then for other states. Furthermore, states argue about the content of international law, sometimes before international courts or arbitration panels and couch their rhetoric in terms of international rights and duties. There are, of course, also instances where this is not the case and in which international legal norms are disregarded. Taking an external viewpoint to international law, we can ask whether these instances are too many to speak of the existence of a governing convention that is both accepted and efficacious, or whether there are sufficient instantiations of the governing convention by state actors to speak of a social attitude of acceptance. Furthermore, the question whether the international legal order is efficacious comes into play again here: how are instances handled in which states—irrespective of their own social attitude towards international law—disregard it? Enforcement of the norms, for example in the form of imposing a penalty for the non-performance of an obligation, would be an instantiation of the governing convention and work towards fulfilling the second criterion Hart formulated. It would furthermore be a sign that states consider international legal rules reasons for actions not only for themselves but for other states as well.

One might consider that the enforcement of (some) international legal norms is at least possible. Looking at Chapter VII of the Charter of the United Nations, the Security Council has the competence to

[171] Cf. Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlnaes, Thomas Risse, and Beth Simmons (eds.), *The Handbook of International Relations* (Sage Publications, 2002).

> "[…] determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[172]

Articles 41 and 42 respectively hold

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

and

> "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

There are instances in which these enforcement mechanisms have been used, but the arguments that political will is lacking or that states might not comply with Security Council resolutions to this effect are not without sway. That it is states who must do so and enforce the law against other states does not logically prevent the enforcement of norms: to argue that Security Council actions under Chapter VII cannot be considered an (effective) enforcement mechanism because it relies on

[172] 'Charter of the United Nations', *892 UNTS 119* (1945) at Article 39.

action by states would be analogous to saying that a state's enforcement cadre cannot be considered effective because it relies on action by individuals such as police officers. More relevant, then, is the question whether or not states actually do comply with these resolutions and whether they actually enforce the norms of international law. The potential (and often actual) lack of political will to make use of the enforcement mechanisms that do exist touches on the governing convention of international law, in that a use of existing mechanisms to enforce the obligations, duties, et cetera that make up international law would be an instantiation of the governing convention. Conversely, while not making use of enforcement mechanisms in individual cases does not negate the existence of the governing convention, a continued disregard for them would mean that the governing convention fades due to a lack of instantiations.

At this stage, it is important to recall that constitutive sovereignty—as opposed to constituted sovereignty—is a matter of degree, in the sense that the governing convention can be weaker or stronger, depending on how well-instantiated it is, that is in what way constitutive sovereignty is exercised. To assess the relative strength of the governing convention requires taking an external view to it, which explains the criticism levelled against international law at times.[173] It would thus appear that, studied from this external viewpoint, the governing convention for international law is comparatively weak.[174] However, it must be asked whether the convention model accurately captures the nature of international law. In the following, this question will be briefly considered.

[173] Cf. J. L. Goldsmith and E. Posner, *The Limits of International Law* (Oxford University Press, 2005).
[174] Hart himself considered it to be so weak that he thought international law was not law at all. Hart, *The Concept of Law,* at 236 f.

2.3.2.1. Convention or contract?

With regard to internal constitutive sovereignty, we have followed Hampton's argument that the national legal system is based not on a social contract but rather on a social convention such as, for example, the rule of recognition as developed by Hart.

Hampton introduces the conditions for convention consent with the following words:

> "According to the traditional social contract analysis, which assumes that each individual possesses the authority to rule himself that he then confers on the ruler, a political regime has authority only over those who have, in effect, given it to them. […] [t]his is a very unsatisfactory model of political authority, not least because it fails to capture the commonsense idea that political authority extends over a territory rather than only over those who happen to have given authority through their explicit consent (an event that, in any case, rarely seems to have occurred in the history of real states). Albeit a kind of consent model, the convention model works much differently and represents the conceptual topology of political authority as far more complicated than the (overly simple) social contract model represents it.
>
> In order to see that topology, imagine, first, that we are anthropologists seeking to determine whether a political authority exists in a territory. We would look for two conditions that are jointly necessary and sufficient for the existence of such an authority in this territory."[175]

These conditions are, as we know, the following:

1. There exists a convention to regard the norms created by the governing institution(s) as pre-emptive and final.

[175] Hampton, *Political Philosophy*, at 97.

2. There are means to enforce the norms created by the governing institution(s) and the willingness to use them; in other words, enforcement is possible and actual.

The link between the first and the second condition is instantiation. It is apparent that neither condition is met to the fullest degree, but both are met at least to some degree when it comes to the international legal order. The potential conclusion to be drawn from this is that there is a governing convention of international law and that the international legal order therefore exists as a legal order, but that the governing convention is less strong than that of a given national legal order.[176] This conclusion is specific to the convention model of authority. The convention model is, however, not the only possible model of the source of a legal order. It is possible that external constitutive sovereignty is better captured by a social contract model than by Hampton's convention model. Arguments in favour of this position would be that the external dimension is less concerned with a particular territory, unless one counts "the entirety of the world" as such and that states, far more than individual human beings, are held not to be subject to laws unless they have agreed to them. The traditional view on international law certainly coheres very well with a social contract model. However, the existence of, in particular, *ius cogens*, for which it is irrelevant whether individual states consent or object, is indicative at the very least of a move towards a convention model and away from the social contract model. The convention model explains how a state can be considered subject to legal rules it has not itself consented to, while this very consent would be the basis for an obligation under the contract model. *Ius cogens* is considered by states as a motivating reason not just for themselves but for other states as well. The convention model is better suited, therefore, to capturing and explaining the constitution of the international legal system, including *ius cogens*, than the contract model is. It furthermore

[176] This of course depends also on the state.

bears mentioning that the existence of a contract already presumes a legal system.

In light of all these considerations, it is not a far-fetched conclusion that states have the power to constitute the authority of international law and that indeed they are motivated to do so by self-interest[177] but also that the governing convention of international law is weaker, largely due to unwillingness to introduce effective enforcement mechanisms. This view coheres, again, with much criticism that is directed at international law.[178]

To conclude, external constitutive sovereignty, much like internal constitutive sovereignty, is the *power*, on the one hand, to constitute, both initially and by ways of maintenance, a legal system—in this case the system of international law rather than a national legal system—and it is equally, on the other hand, the power to deconstruct that system. While, on the national level, in many states the positive side of constitutive sovereignty is exercised more than the negative (deconstructive) side and, while situations of mastery on the national level can inhibit the exercise of constitutive sovereignty, we see with regard to the external dimension that enforcement and instantiation of the governing convention are both practiced to a lesser degree than on the national plane.[179] Even though, under the convention model of political authority, this leads to the conclusion that political authority in the external dimension is weaker than in many a nation state, the convention model has strong explanatory force with regard to both the source of international law and much of the criticism directed at it.

[177] Cf. Goldsmith and Posner, *The Limits of International Law*.
[178] Cf. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn.: Cambridge University Press, 2005).
[179] Again, this of course depends on the individual states chosen as comparators, but overall this appears to be the case. As an aside, it is furthermore the case that international enforcement might grow stronger over time.

In the following, we will explore who is sovereign in the external constitutive sense and which limitations the external constitutive sovereign is subject to, if any.

2.3.3. Who is sovereign in this sense?

Just as sets of individuals—called "a people"—are sovereign in the internal constitutive sense, the set of states is sovereign in the external constitutive sense. That the sovereign entity in this case is the set of states rather than of other actors can be explained by the fact that states are still the main actors on the international plane. However, the considerable rise in intergovernmental organisations and the growing importance of non-governmental organisations, as well as multi-national corporations on the international level, means that these entities might also need to be included in the set: their actions, too, can strengthen or weaken the governing convention/rule of recognition of international law. Accordingly, in the long run, the set of international actors constituting international law may well include entities other than states.

When it comes to the external dimension, states are very much analogous to people in the internal dimension. They constitute the international legal system; they can dissent and direct reform measures towards changes in the content of international law; they can even revolt against international law, usually in the form of war.

It is clear that it cannot be organisations such as the United Nations which are sovereign in this sense, because these institutions rely on international legal acts from which they derive their competences and in accordance to which they act. In other words, they are constituted rather than constituting themselves. It is states which constitute them.

However, even though analogous to them in the comparison between internal and external dimension, states are not individuals. This is

particularly relevant in that there are usually constitutional rules concerning the question of which entity, body or office-holder(s) has or have the competence to act on the international level. One could argue that this limits states because they act through state officials and these state officials might pursue their own interests or make mistakes. One could also argue that, because a state is composed of different bureaucratic entities, there can be no argument for the state acting as such; these different bureaucracies might also pursue different goals.[180] However, this would be akin to arguing that an individual is inherently limited because his stomach might crave sugar, but his brain might suggest that losing weight would be the better path to take. It is true that states are legal persons and, as such, act through state officials or the acts of representatives attributed to the state. This is not, however, a limitation.

2.3.4. Why this concept?

One might ask, with respect to external constitutive sovereignty, why it should be called "sovereignty". Indeed, both internal constitutive and internal constituted sovereignty and, as we will see also external constituted sovereignty, are based on, correspond with, and refine traditional views on sovereignty: political or popular sovereignty, internal sovereignty, and state sovereignty respectively. With regard to external constitutive sovereignty, there is no immediate correspondence to a common usage of the term sovereignty. Given that the concept of ECVS does not reflect historical or political usage, why is it nevertheless included in this book and why is it called "sovereignty" here?

An answer to this question necessitates a link back to the method and aim of this book. The purpose of this book is not to give an overview how

[180] John Baylis, Steve Smith, and Patricia Owens, *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press, 2013) at 4.

"sovereignty" has been used historically or how it is used in political and legal discourse at the moment but to provide the conceptual tools to clarify those discourses. This means that, for reasons of consistency and clarity, the proposed usage in this book may diverge from existing usage. The inclusion of ECVS as one of the "sovereignties" of this book is consistent with internal constitutive sovereignty, and has great explanatory value with regard to the constitution of the international legal system.[181] This does not take away from the fact that an argument could still be made that another name for it might be less confusing. However, it also bears mentioning that this same argument can also be made for any of the other concepts of sovereignty. The section "Is sovereignty necessary?" deals with the issue of nomenclature in more detail.[182]

The introduction of this concept into the sovereignty discourse allows, for example, for the transposition of insights made within constitutional theory about internal constitutive sovereignty and its relationship with internal constituted sovereignty. Because of its similarity to internal constitutive sovereignty, which indubitably corresponds to a well-established understanding of sovereignty, external constitutive sovereignty, too, is denoted by the term "sovereignty" despite the lack of a corresponding established concept.

2.3.5. Concluding Remarks

To summarise, constitutive sovereignty, whether internal or external, comprises the power to constitute a legal system, on the one hand, and to deconstruct it, on the other. External constitutive sovereignty means that these powers are geared towards the external rather than the internal dimension, constituting international law. Where people are the holders of internal constitutive sovereignty, the external governing convention is

[181] See Section 2.3.2.1. of this book.
[182] See Section 2.6. of this book.

instantiated by actions of state officials attributed to the state as a whole, meaning that the holder of external constitutive sovereignty is the set of states that form the international community. While an argument could be made that states are limited in what they can do on the international level by bureaucracy, internal divisions or internal rules, we have seen that this does not constitute a real limitation to external constitutive sovereignty.

While the existence of enforcement mechanisms and the political will to use them are debatable on the international level and, as such, the governing convention is comparatively weaker than on the national level of many states, the convention model nevertheless manages to capture and explain the reality of international relations and law better than the consent model does. This is the reason—next to consistency—that external constitutive sovereignty is considered to be one concept of sovereignty here, despite the fact that it does not correspond to existing usage.

2.4. External Constituted Sovereignty

External constituted sovereignty (ECDS) is similar to internal constituted sovereignty, in that both internal and external constituted sovereignty are forms of *constituted* sovereignty and they are both concepts situated in the world of law rather than outside of it, as constitutive sovereignty is. However, ECDS and ICDS differ with regard to their content. As a concept situated within the world of international law, the meaning and content of external constituted sovereignty are determined (read: constituted) by international law and legal limitations might apply. In the following section, the nature of external constituted sovereignty will be analysed. Thereafter, the question of who is sovereign in this sense is discussed and finally potential limitations of external constituted sovereignty are considered.

2.4.1. Sovereignty as a legal status

We have addressed sovereignty as a legal status already in the context of internal constituted sovereignty. Also, with regard to international law, the term "sovereignty" describes a legal status which is attached to certain entities by virtue of a characteristic that they have. With regard to legal statuses, we have mentioned that there are different aspects to consider: first, we can describe how one gains the status in question, what consequences are attached to having that status, and how one loses the status. These aspects are defined by entrance rules, consequential rules, and exit rules respectively.[183] Consequentially, we find the answers to the question of how to gain the status, what consequences it has, and how to lose it by studying these rules, although we cannot derive from these rules what it means, precisely, to have the status in question. In the following, we consider the meaning of "sovereignty" and subsequently study also (some of) the entrance, consequential, and exit rules relating to it. It remains noteworthy that individual entrance, consequential, and exit

[183] Hage, 'The Meaning of Legal Status Words', at 61 f.

rules can be changed without the status losing its meaning. We discussed this in greater detail in Part 2.2.4. of this book. It is difficult, if not impossible, however, to say much about sovereignty without talking about the consequences attached to it, instead of only addressing the status itself. Let us begin with the entrance rules or the question when the status "sovereignty" attaches to an entity. This will immediately also answer the question who is sovereign.

2.4.2. Who is sovereign in this sense?

Current international law does not contain (a) clear entrance rule(s) for sovereignty. Nowhere does it say "an entity is sovereign if…" and list criteria. However, we see that international law attributes sovereignty to states: states are the entities claiming sovereignty in the case law considered and these claims are accepted. It is the "sovereign equality of all its Members" that is invoked by the Charter of the United Nations and its members happen to be states.[184] Looking at the external dimension, "sovereignty" and "state sovereignty" are synonyms. The following statement by Besson, in her introduction to an encyclopaedic article on "sovereignty", exemplifies how indisputable this is: "Most […] if not all institutions and principles of international law rely, directly or indirectly, on State sovereignty."[185] There is no attempt to justify that sovereignty means state sovereignty, because this is presumed. This means that the status "sovereignty" and the institutional fact of sovereignty are attached to entities which fulfil the characteristic of a state or which have statehood.[186] What this means is again another question; the beginning of an answer can be found in the Montevideo Convention: "The state as a person of international law should possess the following qualifications: a)

[184] 'Charter of the United Nations', at Art. 2(1).
[185] Besson, 'Sovereignty', at 2.
[186] Cf. James Crawford, 'Statehood and Recognition', in *The Creation of States in International Law* (2 edn.; Oxford University Press, 2007) at 33.

a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."

Two seemingly obvious conclusions can*not* be inferred from the above: that an entity no longer fulfilling the criteria of statehood (a "failed state" for example) is no longer sovereign or that only states can be sovereign. The first conclusion conflates entrance rules with exit rules. However, international law does not contain a clear exit clause regarding the status of sovereignty, nor is one clearly implied by practice or legal wording. The second conclusion currently holds, in that only states *are* sovereign, but this does not mean that a further entrance rule conferring the status of sovereignty onto some other entity—perhaps a multinational organisation—could not be created. It is thus currently true, but it is not logically necessary that only states are sovereign.

2.4.3. What consequences are attached to the status of sovereignty?

While the terms "sovereignty" or "sovereign" appear in international legal documents, such as the United Nations Charter, it is not usually defined in those documents, nor are the legal consequences attached to the term always clearly spelled out.[187] However, international adjudication is more forthcoming on the matter. For this reason, it makes sense to turn to case law and to analyse authoritative cases to begin sketching the consequential rules that exist with regard to sovereignty. The cases addressed in the following section are the *Wimbledon* and the *Lotus* case, the *Island of Palma* case, and lastly *Military and Paramilitary Action in and against Nicaragua*.

[187] 'Charter of the United Nations'.

2.4.3.1. Wimbledon

This case, decided by the Permanent Court of International Justice in 1923, concerned the legality of Germany denying the steamship "Wimbledon" access to the Kiel Canal.[188] Germany argued that the relevant provisions of the Treaty of Versailles should be interpreted restrictively, since they constituted a limitation upon the exercise of sovereignty.[189]

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[190]

Translating the "right of entering into international engagements" into Hohfeldian terminology, we find that the Court here refers to the *legal power* (and the *permission* this entails) to enter into international engagements of a sovereign entity.

2.4.3.2. Lotus

In 1927, the Permanent Court of International Justice was asked to determine whether Turkey had violated a principle of international law by instituting criminal proceedings against a French national who was officer of the watch on board the French steamer *Lotus* at the time of its collision on high seas with the Turkish steamer *Boz-Kourt* when both ships arrived in Turkey.

---

[188] 'Case of the S.S. "Wimbledon" (UK, Japan)', (Permanent Court of International Justice, 1923) at Under II.
[189] Ibid., at 34.
[190] Ibid., at 35.

In this case, the PCIJ considered that

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*"[191] (emphasis added)

The Court went on to say that international law imposed, first and foremost, the restriction that States may not exercise their power in any form in the territory of another State, save for the existence of a permissive rule to the contrary.[192] This describes the doctrine of non-intervention, which can be summarised as the *prohibition* of exercising power on the territory of another state, in the absence of a more permissive rule.[193] Such permissive rules could be created via custom or treaties.

It is noteworthy that

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application

[191] S.S. "Lotus" (France, Turkey)', (Permanent Court of International Justice, 1927) 1 at 18.
[192] Ibid.
[193] This prohibition can be rephrased as a duty not to. This becomes obvious if one considers whether it is possible to violate the doctrine of non-intervention; cases such as that of Eichmann's capture in Argentina clearly demonstrate this (see UNSC, 'Resolution 138', S/4349 (1960)).

> of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. (…) In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[194]

Therefore, while there is a general *prohibition* regarding the exercise of power by one state on the territory of another state, international law contains no *prohibition* regarding the creation of rules on one's own territory, even where these rules extend in their application beyond the territory of the state.

2.4.3.3. The Island of Palmas Case

In the *Island of Palmas* case, decided a year later, the subject of the dispute was the sovereignty over the Palmas Island, also called Island of Miangas, with the Netherlands claiming that it was part of the Netherlands East Indies and the United States claiming that Spain had held title to the land based on discovery and transferred this title via treaty to the US after the Spanish-American war in 1898. Max Huber, sitting as sole arbitrator, held that

[194] 'Lotus', at 19.

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. […] Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries."[195]

In other words, sovereignty means independence, which in turn means the exclusive *permission* and *competence* to exercise, on a particular territory "the functions of a State". The functions of a State are not immediately defined, but, importantly, the notions of independence and exclusivity are essential for the notion of sovereignty used. However, sovereignty is not limited to these two qualities:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial

[195] 'Island of Palmas Case (Netherlands, USA)', at 838.

> sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."[196]

Hence, the following consequences attach to the status of sovereignty:

(1) The *permission* to exercise the functions of a State on a particular territory, which is exclusive in the sense that all other entities are *prohibited* from doing so (in the absence of more permissive rules, see above).
(2) The *competence*, where the exercise of functions of a State rests on juridical acts, to do so, which is again exclusive, meaning that there is a *disability* of all other entities to do so (in the absence of more permissive rules).

The case furthermore emphasises the importance of a continuous and peaceful exercise of state functions as being a constituent element of territorial sovereignty:

> "The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State."[197]

This is specified in the following way:

[196] Ibid., at 839.
[197] Ibid., at 840.

> "Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory."[198]

These sections relate the exercise of functions of a state to the constitution of territorial sovereignty. The relationship between these is easily explained by recalling that statehood is currently a prerequisite for sovereignty in the sense discussed here. While the outcome of the *Palmas Island* case is that the Netherlands has sovereignty over the territory in question, because of their inchoate title deriving from the continuous and peaceful display of state authority, which trumps the inchoate title derived from discovery, this should not be taken to mean external constituted sovereignty is a matter of fact and the exercise of it a factual action.[199] What is decisive is rather that there is a *title*, derived here from the factual exercise of state authority. However, such a title could equally be derived from something else. In other words, there are various ways in which it can result in an application of sovereignty, but territorial sovereignty cannot be reduced to a mere question of fact, such as whether or not the state exercises continuous and peaceful authority on the territory. This places territorial sovereignty firmly in the world of

[198] Ibid.
[199] Ibid., at 870.

law. Given that the consequences of sovereignty are a *permission*, a *prohibition*, a *disability*, and a *competence*, all of which are determined and constituted by law rather than by factual actualities, this provides a coherent picture of state sovereignty as a legal status.

2.4.3.4. Military and Paramilitary Activities in and against Nicaragua

This case before the International Court of Justice (hereafter: ICJ or 'the Court') concerned the issue whether the United States of America had, *inter alia* in supporting military and paramilitary actions in and against Nicaragua by rebels and in using force and the threat of force, violated a number of provisions of international law, customary international law and Nicaragua's sovereignty. In the judgment, the Court held that

> "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."[200]

While not phrased precisely as such, the inference that all sovereign entities are prohibited under customary international law from interfering in the affairs of other sovereign entities or, phrased differently, that all sovereign entities have the exclusive *claim*, under customary international law, to conduct their affairs without outside interference is certainly supportable. This *claim* to conduct state affairs without interference includes the *permission* to choose the political, economic, social, and cultural system of the state, as well as formulate a foreign policy.[201] This attaches to the status of sovereignty the principle of non-intervention as well as the principle of the prohibition of the use of

[200] 'Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua, United States of America)', (International Court of Justice, 1986) at 202.
[201] Ibid., at 205.

force.[202] As such, every sovereign entity is *prohibited* from interfering in the affairs of other states, except for the existence of more permissive rules.[203] The *claim* of a sovereign entity to conduct its affairs without interference also comprises the right to opt for a political and ideological system which could be described as a totalitarian dictatorship.[204] The Court quite clearly states that, as a matter of law, there is no rule granting a right of intervention on the grounds of particular ideological or political systems. It falls outside the scope of this book to evaluate this position taken by the Court on ideological grounds, but it bears mentioning here that the doctrine of non-intervention may no longer be as encompassing as it was at the time of this judgment. It has been called into question by the idea of Responsibility to Protect (R2P) and of humanitarian intervention, although these ideas remain controversial. The precise relationship of R2P and humanitarian intervention with external constituted sovereignty will be discussed in a later part of this book.[205] Suffice it to say here that the doctrine of non-intervention is part of the conventional doctrine of international law; it is a legal concept and any dispute surrounding it takes place firmly within the world of law.

On a less politically charged note, the principle of respect for *territorial sovereignty,* which the Court appears to use as largely synonymous with state sovereignty, is "directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State"[206] and inevitably overlaps with the aforementioned principles of non-intervention and the prohibition of the use of force.[207]

---

[202] Ibid., at 212.
[203] Ibid., at 213.
[204] Ibid., at 263.
[205] See Section 4.2. of this book.
[206] 'Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua, United States of America)', at 251.
[207] Ibid.

The Court furthermore holds that a state "which is free to decide upon the principles and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty […]".[208] The Court refers here to a limitation of sovereignty, suggesting that sovereignty comes in degrees. However, a more accurate statement would be to refer to a limitation of sovereign permissions, duties, or competences. There can be fewer or more consequential rules attached to the sovereignty status, without the status itself changing (i.e. becoming "more or less sovereign"). We will consider this point in greater detail in the section 2.4.4. of this book, in which we will address "limitations" and why considering them as such is a mistake.

2.4.3.5. Summary

Summarising and synthesising the above analyses of the case law, we find that at least the following consequential rules are typically attached to sovereignty: Firstly, it includes the *permission* and *competence* to enter into international agreements and engagements by means of treaties and conventions. Secondly, there is a *prohibition*, save for the existence of a more permissive rule, regarding the exercise of powers on the territory of another state. Thirdly, there is exclusive *permission* to exercise, on a particular territory, the functions of a state—and the *competence* to do so, where this exercise relies on international juridical acts. Fourthly, there is a *claim* to conduct its affairs without outside interference, including the *permission* to choose the political, economic, social, and cultural system of the state, even a system of totalitarian dictatorship, and to formulate a foreign policy. Fifthly, there is a *prohibition* of the use of force, in the absence of more permissive rules. These are by no means the only consequential rules attached to the status of sovereignty, nor are they unchangeable. The emphasis on independence and non-intervention underlying these consequential rules has often been considered an

[208] Ibid., at 259.

important aspect of sovereignty and explains how the statement that internal and external sovereignty are two sides of the same coin has come into being: these rules of international law appear to be based on a mutual recognition of internal constituted sovereignty, with the purpose of protecting it.

2.4.4. Limitations

Analysing the nature of external constituted sovereignty and understanding external constituted sovereignty as *constituted* gives a clear understanding of the apparent limitations to which the external constituted sovereign is subject. In *Lotus*, the PCIJ held that

> "All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[209]

In the same case, it is held that restrictions cannot be presumed.[210] However, in *Wimbledon* it was already considered that states can limit (the exercise of) their sovereignty.[211] What is meant by this is for example that states can enter into agreements which impose certain duties on them. In this way, states can limit their set of permissions or competences, or the set of prohibitions applicable to them. This does not change the fact that they are sovereign, nor does it make them more or less sovereign than they were before or in comparison to another sovereign state. ECDS as a status explains how international law can speak of "sovereign equality" when they so clearly differ in terms of powers, permissions, duties, and prohibitions.[212] To coin a general formulation of the consequential rules attached to this status, let us say that states have, on the one hand, the exclusive *claim* to exercise state

[209] 'Lotus', at 19.
[210] Ibid., at 18.
[211] 'Case of the S.S. "Wimbledon" (UK, Japan)', at 35.
[212] 'Charter of the United Nations', at Article 2(1).

functions on a given territory, in the absence of more restrictive rules, and the *prohibition* from exercising power on the territory of another state, in the absence of more permissive rules, and the *competence* to make more permissive and restrictive rules.

To identify the consequential rules of sovereignty in this way means that what is oftentimes considered a limitation of sovereignty is in fact not part of sovereignty at all, but rather something attached to it which can change without impacting sovereignty. This is the same separation of the status of sovereignty from its consequences (sovereign powers, etc.) that we have already argued for in Part 2.2.4. of this book. We see, then, that also for ECDS, it results in conceptual confusion to speak of limitations of sovereignty.

2.4.5. Concluding Remarks

Much like internal constituted sovereignty, external constituted sovereignty is situated in the world of law. Its holders are states, and to say that a state is sovereign in this sense implies that the state has the exclusive *claim*, in the absence of a more restrictive rule, to exercise state functions on its territory without outside interference, and that it is *prohibited*, in the absence of a more permissive rule, from interfering in the exercise of state functions on the territory of any other state. Furthermore, states have the *competence* to make more restrictive or more permissive rules. This permission, prohibition and competence are not the meaning of "sovereignty", however, instead, they are attached (consequential rules) to the status of sovereignty, which is given by international law to those entities fulfilling the criteria for statehood (entrance rule). It is not clear how a sovereign entity loses its sovereign status (i.e. there is no clear exit rule).

States can have comparatively few or many permissions, prohibitions, competences, and disabilities. If we were to assume that this type of

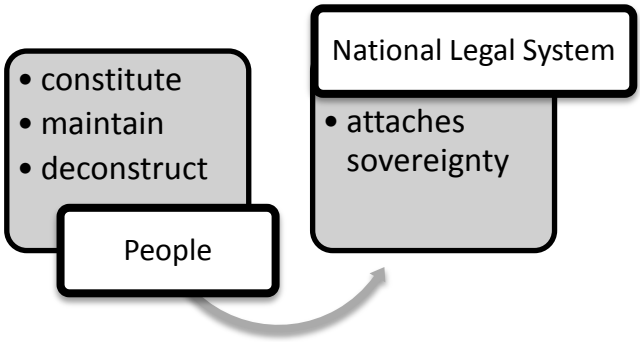
sovereignty is equated with the permissions, prohibitions, competences, and disabilities a state possesses, rather than the underlying assumptions of initial attribution of the aforementioned, external constituted sovereignty would be something that comes in degrees. However, a more likely interpretation is that external constituted sovereignty is a status attached by international law to entities fulfilling the criteria of statehood, thus explaining how we can talk of states that are all equally sovereign or of sovereign equality.

2.5. Relationship between Sovereignties

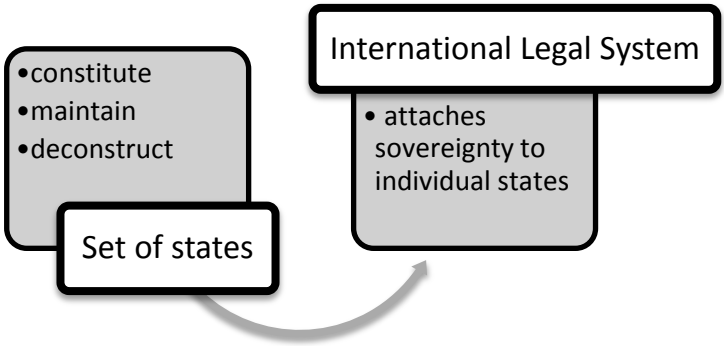
Up until this point, the individual concepts of sovereignty have been discussed largely independently of one another. This is possible because they are indeed four distinct concepts—but this does not mean that there are no connections between the concepts. These connections will be the subject of analysis in the following. Some connections have already been mentioned in the text so far, but they have not been the focus of discussion; in this section, they will be.

2.5.1. Constituted and Constitutive

First and foremost, the link between constitutive and constituted sovereignty has been mentioned. The distinction and the importance of making this distinction lies in their different natures and provides the answer to the "chicken-and-egg" problem of sovereignty. However, the very fact that the "chicken-and-egg" problem is a problem at all already offers insight into the connection between the two: there needs to be one which constitutes and one which is constituted. Where that distinction is not made, or both constitutive and constituted are held to be one and the same, sovereignty appears paradoxical. On the internal level, the people hold the power to *constitute*, to *maintain*, and to *deconstruct* the legal system, on which internal constituted sovereignty is dependent. In other words, internal constituted sovereignty is (initially) contingent on internal constitutive sovereignty. Internal constitutive sovereignty can create, change, and destroy the legal system and thus the internal constituted sovereignty which is dependent on it.



External constitutive sovereignty and external constituted sovereignty share the same kind of relationship analogously.



The relationship between constitutive and constituted is already implied in the terminology. The relationship between internal constituted sovereignty and external constitutive sovereignty, or the relationship between external constituted sovereignty and internal constitutive sovereignty is less obvious.

2.5.2. Internal Constituted and External Constitutive

External constitutive sovereignty is the power to constitute a system of norms to regulate relations between entities on the external level.

Initially, these entities were only states.[213] States constituted the system of international law; international law now assigns permissions, duties, rights, and competences to various entities, including states. It also determines what it considers acts of states and when acts by individuals such as state officials are attributed to the state as acts of that state.[214] For this reason, it is now the case that some instantiations of the governing convention of international law rely on competences given to state officials on the internal level. However, while a state official can act only within the limits of the competences given to him or her on the internal level, i.e. under the ultimate control of the internal constituted sovereign, this is mitigated by the assumption of legality on the international plane. The assumption of legality, as the name already suggests, means that it is assumed that the actions by a state official are legal in the sense of not being *ultra vires*, i.e. not exceeding his or her given competences. This assumption allows for the attribution of the juridical acts of state officials on the international level to the state and can therefore, on a very different level and outside the world of law, influence instantiations of the governing convention. However, one can ask the following: if external constitutive sovereignty constitutes external constituted sovereignty, how can external constituted sovereignty have an impact on external constitutive sovereignty? This question neglects the fact that, while there is an initial point of constitution before which external constituted sovereignty necessarily could not have existed, this point of constitution is long past and we are now in an on-going process of

[213] To a degree, this still holds true, but non-state actors are gaining influence on the external plane.

[214] The Draft Articles on the Responsibility of States for Internationally Wrongful Acts GA Res. 56/83, Report of the ILC, 53rd session, A/56/10, while non-binding, provide an example thereof in Chapter II, such as Article 4: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

constitution (the maintenance of it being constituted), whereby external constituted sovereignty and the international legal system both exist and thus can have an impact on the continued exercise of external constitutive sovereignty. At this point it is appropriate to recall Hampton's words that people are born into legal systems they did not themselves create and they nevertheless can instantiate the governing convention.[215] Historically speaking, therefore, the attribution of actions by certain individuals to the state has occurred for different reasons and via different rationales, but, today, international law specifies when acts of state officials—or sometimes even of private parties—are attributable to the state. Even in cases of *ultra vires* acts, the act can be attributable to the state:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[216]

Hence, an argument using the assumption of legality under international law to mitigate the limitation of a requirement of internally-granted competences for both acts within the world of (international) law and for acts which are outside of it but which instantiate its governing convention is not a confusion of the various levels. Rather, it is a further example of how they impact one another.

This covers the relationship between internal constituted sovereignty and external constitutive sovereignty, with some influence also being evident between external constituted and external constitutive sovereignty. In the

[215] Hampton, *Political Philosophy*, at 71.

[216] International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Chapter IV, Art. 7. Admittedly, the articles are mainly concerned with the responsibility for internationally wrongful acts, rather than with acts to states in general; nevertheless the section from which the quoted article is taken addresses the attribution of acts to states in more general terms and is titled "Attribution of Conduct to a State", Chapter II.

next section, the relationship between external constituted sovereignty and internal constitutive sovereignty is analysed.

2.5.3. External constituted sovereignty and internal constitutive sovereignty

In the advisory opinion of the International Court of Justice on the unilateral declaration of independence of Kosovo, the question was raised whether the unilateral declaration was in accordance with international law. The Court stated that it must determine whether international law contains a prohibition of such a unilateral declaration of independence.[217] Considering that a declaration of independence by the representatives of a people can be considered an exercise of internal constitutive sovereignty, this advisory opinion in essence asks whether there is a prohibition under international law against this particular form of internal constitutive sovereignty.[218]

One consideration in the case is the question whether the principle of territorial integrity—which appears to be an important element of state sovereignty, read external constituted sovereignty—implicitly prohibits a unilateral declaration of independence.[219] The Court held that no general prohibition of unilateral declarations of independence can be inferred from the practice of the Security Council.[220] Indeed, the Court concluded that general international law contains no such prohibition. While the Court then continued by examining specific documents—namely

[217] 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion', *I.C.J. Report* (International Court of Justice, 2010), 403 at 56.
[218] It bears mentioning, here, that the question is whether international law prohibits such an exercise, not whether external constituted sovereignty prohibits it. Nevertheless, we will see that external constituted sovereignty forms part of the argument which was taken into account in answering the question.
[219] 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion', at 80.
[220] Ibid., at 81.

Security Council resolution 1244 (1999) and the Constitutional Framework[221]—which also form part of international law and must be taken into account in answering the question posed,[222] what is more interesting for the study of the concept of sovereignty is the statement by the Court that

> "The court arrives at the conclusion that […] the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside of the framework of their interim administration."[223]

These persons—representatives of the people of Kosovo—were not prohibited by international law from unilaterally declaring the independence of Kosovo and thus from declaring Kosovo to be an independent and sovereign state.[224] While the Court did not consider the question whether international law contains an express *permission* to do this, it at least does not contain a *prohibition*. The court further identifies that they were acting in an extra-legal fashion. The unilateral declaration is an example of the exercise of internal constitutive sovereignty, not in its continuing and on-going function, but rather in the original, constituting function. It clearly demonstrates how the moment of constitution necessarily departs from an existing legal framework and is not based on a *competence*, i.e. not based on existing law and taking place outside the world of law. Rather, it is the people exercising—through its democratically elected representatives, in this case—the *power* to constitute a new legal order.

---

[221] The Constitutional Framework was enacted on 15 May 2001 via the United Nations Interim Administration Mission in Kosovo's (UNMIK) Resolution 2001/9. Its full title is "Constitutional Framework for Provisional Self-Government in Kosovo".
[222] 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion', at 93.
[223] Ibid., at 109.
[224] Ibid., at 123, also 75.

The conclusion thus appears to be that international law does not contain a prohibition of this kind of exercise of internal constitutive sovereignty and, equally, that external constituted sovereignty does not imply such a prohibition despite the element of territorial integrity. Particularly the latter is interesting, as the Court holds that "the scope of the principle of territorial integrity is confined to the sphere of relations between States".[225] The principles of territorial integrity do not address peoples within states; it addresses states vis-à-vis other states.

2.5.4. The Impact of Mastery

Lastly, the relationship between internal constituted sovereignty and internal constitutive sovereignty (rather than the reverse) as well as the role of external constituted sovereignty in this context must be discussed with regard to a question raised earlier in this book: what is the impact of mastery on the internal constituted sovereign?

2.5.4.1. Its Impact on the Internal Constituted System

If it is internal constitutive sovereignty which constitutes, via the governing convention, the state and states, or rather the set of states, is the holder of external constitutive sovereignty and if an individual state is the holder of external constituted sovereignty, how can there be external sovereignty if internal constitutive sovereignty is absent? In other words, are internal constituted sovereignty, external constitutive, and external constituted sovereignty not all contingent on internal constitutive sovereignty?

At the heart of internal constitutive sovereignty lies the governing convention, which is the source of authority of the legal system thus constituted. For its existence, the governing convention requires at least

[225] Ibid., at 80.

convention consent. Repeating Hampton's criteria for convention consent, what is needed is that:

1. There exists a convention to regard the norms created by the governing institution(s) as pre-emptive and final.
2. There are means to enforce the norms created by the governing institution(s), and the willingness to use them; in other words, enforcement is possible and actual.
3. Individuals consider the norms created by the governing institution(s) as a reason to act accordingly; in other words, individuals recognise the authority of the governing institution(s).[226]

In situations where there is a relationship of mastery, rather than political authority, between the governing and the governed, the mastered individuals are unlikely to fulfil the third condition. The only reason they might have to act in accordance with the norms created by the governing institution(s) would be fear of the enforcement cadre. This does not, however, imply that the normative system collapses when not all three conditions are met. Those individuals who do not accept the third condition

> "[…] understand that by virtue of the empowerment convention, a political authority exists in their society, but they do not support it and seek to oppose it. The traditional social contract analysis says that by virtue of their refusal to give convention consent to the regime, the regime is not authoritative over them, but the convention model represents the plight of such people rather differently. It maintains that they are indeed subject to the power of an authoritative regime in their territory—a regime that is authoritative because it has been made so by the actions of others

[226] Hampton, *Political Philosophy*, at 97 f.

> rather than themselves, but it also recognizes that they will not believe they are politically obligated to the regime."[227]

This is what Hampton means when she explains that "Hume is right to say we are all, in a sense, born into a political system whose authority over us is not of our own making".[228] It shows that it is not individuals but a collective of individuals—people—holding constitutive sovereignty. Provided that the first two conditions are fulfilled, there is political authority over a territory. Hampton also specifies that in situations of mastery, there is no governing convention between the governing and the mastered, but there *is* one between the governing and the members of the enforcement cadre which enable the governing to continue the situation of mastery. As such, the first condition for the existence of convention consent remains fulfilled, even if it is not fulfilled by the majority of individuals subject to this authority.

The existence of the governing convention between governing and members of the enforcement cadre makes the deconstruction of the legal system, i.e. the negative side of constitutive sovereignty, more difficult for mastered individuals in states where mastery is present to a great degree. The deconstruction of the legal system, too, takes a collective effort, but this collective effort is made difficult and exceedingly dangerous, if not impossible, by tactics of censure or the involvement of the enforcement cadre in the form of state police or military or both. As such, the convention theory of political authority accepts that

> "[…] the state is a dangerous institution that can operate in ways that make it morally indefensible in particular cases. It therefore refuses to offer a justification of all states qua states but rather offers justifications of particular states dependent upon how good

[227] Ibid., at 98.
[228] Ibid., at 95.

> their overall moral performance is—a test that some states may well fail."[229]

It falls outside the scope of this book to assess the moral defensibility of individual states. What this argument suggests, however, is that the existence of mastery, even of widespread mastery, does not necessarily and automatically imply that internal constituted, external constitutive and external constituted sovereignty are not present.

This is, one the one hand, due to the fact that the exercise of internal constitutive sovereignty is not momentary but rather an on-going process: the political system—i.e. the state, the legal order—is constituted initially from a legal vacuum and, thereafter, exercising internal constitutive sovereignty is a matter of maintenance and acquiescence, rather than creation, until such a point that the internal constitutive sovereign exercises the negative side of internal constitutive sovereignty. On the other hand, the fact that the set of states rather than any one individual state holds external constitutive sovereignty means that the deconstruction of one state would not lead to a collapse of external constitutive sovereignty. A complete deconstruction of an individual state would mean, however, that international law can no longer attach the status of sovereign to this entity (ECDS), as such a status cannot be attached to something that does not exist.

Irrespective of this answer to the question, we have seen that convention consent is rather undemanding and that convention consent and mastery—or even endorsement consent and mastery—can be present at the same time in the same legal system with regard to different individuals or even different peoples in one state. As long as a governing convention exists between the governing and a sufficient number of governed to keep the system functioning, e.g. via the enforcement of commands of the governing and the suppression of dissenting voices, the

[229] Ibid., at 99.

legal system remains constituted.[230] In other words, as long as the system remains efficacious, it continues to exist. It remains rather unspecific what is needed to "keep the system functioning", but, as this is a matter outside the world of law, precise legal specifications cannot be found or stipulated for it. The conclusion therefore appears to be that, once constituted, internal constituted sovereignty continues until the negative function of internal constitutive sovereignty is exercised and deconstruction follows with the internal constituted sovereignty being replaced by something else.

2.5.4.2. Impact on and Implications for International Law

In the previous section, it was argued that, once constituted, it takes an act of revolution to deconstruct the legal system.[231] What, if any, is the impact of such an act of revolution on external sovereignties? Even where the internal legal system undergoes a drastic change in the sense of the governing convention being deconstructed and a new one being constituted, external constituted sovereignty usually remains intact. The internal governing convention changes, but only in few cases does this have an effect on the external legal personality of the state. In cases of secession and in cases where one state splits into several, the internal changes have an immediate impact on the external personality and, as such, on the holder of external constituted sovereignty. If the internal

[230] With regard to the phrasing of keeping the system functioning, think of Hart's requirement that a legal system must be effective, (Hart, *The Concept of Law* at 103 f.) and of Raphael's statement that no sovereign can hold a gun to the heads of all their (mastered) citizen at all times, as well as Hampton's considerations regarding the enforcement cadre necessary to keep up a system of mastery, and the fact that between those of the enforcement cadre and the sovereign, there *is* a political relationship. Hampton, *Political Philosophy,* at 90 f, Raphael, *Problems of Political Philosophy*, at 61.

[231] Naturally, in some states, the possibility of reform rather than revolution exists. However, we are concerned here with situations of widespread mastery which make the possibility of reform rather than revolution rather unlikely. Furthermore, reform does not deconstruct the governing convention so much as change it.

deconstruction of the system is so far-reaching that the previously sovereign (in the sense of ECDS) state no longer exists, international law can no longer attach the status of sovereignty to this entity. Generally speaking, however, internal constituted sovereignty and, to a considerably greater degree, also external constitutive and constituted sovereignty do not cease to exist when internal constitutive sovereignty ceases. Although the historical development of external constitutive sovereignty and external constituted sovereignty could not have occurred the way it did without the internal constitutive sovereignty of a number of states, ECVS and ECDS are not contingent on it.

It is this independence of external constituted sovereignty from internal sovereignty that explains how a state, the internal structure, governing convention and government of which have changed completely, remains subject to international law in much the same way that a new human being born into an existing legal system is subject to the rules of the existing system. Thus, while initially it took internal constitutive sovereignty in a number of states to constitute legal systems, which were ascribed legal personality as states and became the external constitutive sovereigns constituting the international legal system, now that this system is in existence, it would indeed take an act of revolution on the international level to deconstruct that legal system.

In short, the two dimensions—internal and external—do not rely on one another. This does not mean, however, that they cannot influence each other. Secession is a clear example of how internal changes can affect the external dimension, but, equally, the external might affect the internal. There is, for example, some evidence that situations of mastery, characterised by coercion and widespread human rights violations against the mastered people, has implications for both external and even internal constituted sovereignty. In 1984, for example, the Security Council declared the newly-introduced racist constitution of South Africa null and

void.[232] According to the international community, that constitution was not a valid legal instrument due to the situation of mastery it derived from and would perpetuate.[233] Equally, the notions of the Responsibility to Protect and of humanitarian interventions indicate a move from limited potential for the impact of the international legal order on the national towards the potential for a greater impact. What this means is that, while external constituted sovereignty contains the doctrine of non-intervention as a core assumption, an element that is based on mutual recognition and the respect of internal constituted sovereignty and the internal legal order, there is a move towards recognition and respect of the internal constitutive sovereign instead. This is captured in the following statement by Besson:

> "Seen differently, the sovereigns behind international law are peoples within States, and no longer States only."[234]

Some argue that the notion of Responsibility to Protect and that of humanitarian interventions violate the (external constituted) sovereignty of the state in question.[235] However, both notions are part of the world of law—controversial and debated though they may be, they rely largely on the competences of the United Nation's Security Council and are couched in legal terms by those invoking them or arguing against them. Equally, Security Council Resolution 554 was the result of an exercise of competences by the Security Council. We will consider the case of the notion of Responsibility to Protect in greater detail in Part 4 of this book. For now, the following point should be made: the conclusion that,

[232] UNSC, 'Resolution 554', S/RES/554 (1984).
[233] However, departing from the specific case of South Africa, it should be specified that, generally, due to the fact that international law and the national law are separate bodies (or separate worlds) of law—subject, of course, to one's understanding of law—any such international declaration of invalidity does not have legal consequences within the national system.
[234] Besson, 'Sovereignty', at 49.
[235] Wim Muller, 'China's Sovereignty in International Law: From Historical Grievance to Pragmatic Tool', *China-EU Law Journal*, 1/3-4 (2013), 35-59 at 51-55.

because the construction of political authority is ultimately done by the people and that because internal constitutive sovereignty appears to be the initial foundation of legal systems, constituted forms of sovereignty necessarily need to include safeguards to protect peoples from mastery is as wrong as the conclusion that internal constitutive sovereignty necessarily implies democracy. As such, "popular sovereignty", i.e. the fact that it is peoples which are sovereign, in the internal constitutive sense, does not necessarily require democracy or safeguards on the international level. It must furthermore be noted that where such safeguards exist, this may be incidental to the fact that the peoples protected are the internal constitutive sovereign, rather than because of it. In other words, there are various reasons—political, moral—to introduce safeguards for the protection of peoples, and that peoples are the internal constitutive sovereign may be one of them, but internal constitutive sovereignty does not necessitate or demand the introduction of safeguards.

Even though the introduction of safeguards for the protection of the internal constitutive sovereign, be they incidental or contingent to this characteristic, is not a necessary component of any concept of sovereignty, an increasing number of such safeguards exists: human rights are receiving more attention, international courts and tribunals prosecute crimes against humanity, and actions supporting mastery, from censure to systematic oppression of (parts of) the population receive international attention, both in the media and from international bodies and other states. The debate around the notion of an international Responsibility to Protect and around humanitarian interventions are further indicators of a value climate that increasingly gives weight to safeguarding peoples and individuals and granting them rights over the independence of states and state governments to do as they will on their territory.

While external constituted sovereignty remains an argument which is invoked against outside interference, this need not be the case: it is not and would not be conceptually inconsistent for the international legal system to include rules that prohibit certain acts, such as genocide, regardless of the fact that the states prohibited from performing this act are sovereign. Equally, it would not be conceptually inconsistent for international law to introduce entry rules for the status of sovereignty that assign this status only to those entities who have an impeccable human rights record.[236] The idea to constrain external sovereignty or to make it contingent on something, irrespective of what, only appears to be a contradiction to the absoluteness of sovereignty if one fails to keep constitutive and constituted sovereignty conceptually separate.

2.5.5. Concluding Remarks

To conclude, it must be said that the four concepts of sovereignty are distinct from one another, although this does not deny the potential for one level having an impact on another level. The possibility of happenings, such as the act of constitution, revolution, secession, or humanitarian interventions shows that this is the case and what form such an influence could take. Their relationship is not simply one of starting at internal constitutive sovereignty and moving through the steps to external constituted sovereignty, but rather more complex and nuanced. As such, the four concepts can also be a useful tool in the analysis of situations of, for example, secession or revolution, in order to differentiate on which levels various actions take place.

Considering the relationship between these concepts of sovereignty, it is clear that there is no progression in a straight line from ICVS to ICDS to ECVS to ECDS. To assume this form of progression would not capture

[236] This is, of course, rather unrealistic in current times and any such introduction would fail for a lack of political will. Nevertheless, it would be *conceptually* possible.

their relationship accurately. ICVS constitutes the internal legal system within which ICDS is situated—be it attributed to an organ or the state as a whole. After the initial moment of constitution from a legal vacuum, ICVS largely plays a maintaining or acquiescing role, in that acting in accordance with the rules of the internal constituted sovereign (again, be it a particular organ or the state as a whole) instantiates the governing convention. In this sense, the two mutually influence each other and an act taking place within the world of law can, at the same time, instantiate the governing convention on which that very same world of law is based. Much the same holds true for the relationship between ECVS and ECDS, i.e. constitutive and constituted sovereignty on the external level. Furthermore, we have seen that while the external level is not logically or temporally prior to the internal level and historically could not have been constituted without the existence of ICDS, this does not mean that it is currently contingent or dependent upon it. Internal and external sovereignty can exist independently from one another and are conceptually distinct levels.

2.6. Is the concept of sovereignty necessary?

The term "sovereignty" is used in various ways and stands for at least four different concepts. So far, this book has been focused on developing a coherent theory of sovereignty—or perhaps more accurately a theory of sovereignties. While this is sufficient to answer the research questions posed at the beginning, it is perhaps necessary or at least valuable to briefly consider one further question, namely whether it is necessary to have a coherent theory of sovereignty at all.

Eleftheriadis (2010) holds that sovereignty, if taken seriously, is and "always has been incompatible with the rule of law and with constitutional law itself"[237] and indeed that "sovereignty and law are […] mutually exclusive".[238] Neil MacCormick holds that "sovereignty is neither necessary to the existence of law and state nor even desirable".[239] While this author would disagree with Eleftheriadis, because, as the previous chapters have hopefully shown, it is possible to contrive a theory of sovereignties which is not mutually exclusive with law or incompatible with constitutional law, the question raised here remains. Is it necessary or useful to have a concept of sovereignty or several concepts of sovereignty at all?

This question will not be considered in great depth, because the fact remains that the concept of sovereignty exists and is used and the scope of the present research does not extend to ideological considerations of whether this is desirable or if the concepts should be taken to mean something they are not currently taken to mean. Nevertheless, there are a few points the mentioning of which is of value here and follows, in the author's opinion, from the argumentation so far.

---

[237] Eleftheriadis, 'Law and Sovereignty', at 539.
[238] Ibid., at 569.
[239] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 222 at 129.

First and foremost, it is certainly the case that each of the uses of the term "sovereignty"—internal constitutive, internal constituted, external constitutive, external constituted—could be replaced by another term without any loss of meaning. Instead of internal constitutive sovereignty, one might simply talk about the sources of political authority—as Hampton does—or about the foundation of a legal system or the basis of normativity of law or some other expression. Instead of internal constituted sovereignty, one could talk about the highest legislative authority or about constitutional amendment competences. Instead of external constituted sovereignty, one could talk about the rights, duties, competences, etc. that a state has under international law, about the doctrine of non-intervention and of the equality of states. That the term "sovereignty" has been used to refer to all of these things has certainly led to some confusion, especially—but not only—as regards the distinction between constitutive and constituted sovereignty that leads to the figurative "chicken-and-egg" scenario, conceptually speaking, and the question how absolute power can be compatible with the rule of law.[240] That it is possible to untangle these conceptual confusions and create a coherent theory of sovereignties does not necessarily mean that this is the most desirable path. Perhaps it would indeed, as for example MacCormick argues, be better if we did away with the use of sovereignty entirely or if, instead of calling the different meanings of sovereignty constitutive, or constituted, either internally or externally, we came up with new words for them that do not all contain the term "sovereignty" somehow.

Alternatively, one could do what Hohfeld, quoting Justice Franklin quoting Hobbes, suggests, namely to consider that

> "Instead of rejecting convenient terms because they are ambiguous or not comprehensive, it is better to explain their

[240] Cf. again Eleftheriadis, 'Law and Sovereignty'.

> meanings, or, in the language of old Hobbes, 'to snuff them with distinctions and definitions,' so as to give a better light."[241]

An attempt has been made, here, to untangle the meanings of sovereignty and to define them in a theory of sovereignties. Would it be more convenient to coin four wholly new terms rather than to simply stipulate that the existing term "sovereignty" should be used with an addendum so as to specify which meaning of the term is employed? The latter would require a complete departure from existing discourse and is, for this reason, considered rather unlikely to be pursued by the present author. However, the reader might disagree and there is no reason why, in the future, such a departure should not take place. For now, it suffices to remember that the term "sovereignty" is the one used and to have untangled the ways in which it is used and what it is understood to mean respectively, depending on the context of its usage.

To answer the question whether the concept of sovereignty is necessary: it is not, but it is perhaps still more convenient than the alternative, without negative consequences provided that its meanings are not confused and are clearly denoted.

[241] Hohfeld, 'Fundamental Legal Conceptions 1917', at 714.

Part 3: Other Accounts

In the previous part of the book, the meanings of "sovereignty" were analysed and a coherent framework of different kinds of sovereignty was developed. In this part of the book, various accounts of sovereignty are described and analysed, using both Hohfeldian terminology and the framework developed in the previous section to elucidate and clarify the existing discourse on sovereignty.

The accounts of sovereignty analysed in this part of the book are grouped together by the type of sovereignty they describe and the entity which they hold to be sovereign: monarchs, parliaments, peoples, and states. In this manner, historical concepts of sovereignty (e.g. Bodin, Dicey), constitutional (e.g. Goldsworthy's), and international legal discourse are all represented. These accounts are primarily meant to be illustrative of the need for a rational reconstruction of sovereignty. This section does not aim to provide a comprehensive overview of the existing sovereignty discourses.

3.1. Monarchical Sovereignty

Jean Bodin is generally credited with the introduction of the modern concept of sovereignty.[242] His idea of sovereignty concerned the sovereignty of princes or kings—monarchs. The starting point of this section will thus be the sovereignty of monarchs, as sovereignty in its modern form was first ascribed to them. In addition to Bodin, also the Hobbesian *Leviathan* will be considered as a sovereign in this sense. It bears mentioning, at this stage, that Bodin and Hobbes had similar aims in writing their understandings of sovereignty, namely to enable the functioning and stability of government, for which they each considered that a great deal of power and competences were necessary.

3.1.1. Jean Bodin's Theory of Sovereignty

Jean Bodin (1530 – 1596) was not the first to use the word "sovereignty".[243] He held, however, that

> "The term needs careful definition, because although it is the distinguishing mark of a commonwealth, and an understanding of its nature fundamental to any treatment of politics, no jurist or political philosopher has in fact attempted to define it."[244]

Given that Bodin was a proponent of the French monarchy, it should come as no surprise that his treatise on sovereignty considers the prince of the commonwealth the holder of sovereignty. However, he equally mentions the possibilities of popular reign, aristocracy, and the full

[242] Cf. Jacques Maritain, 'The Concept of Sovereignty', *The American Political Science Review*, 44/2 (1950), 343-57 at 344.

[243] Consider Marsilius of Padua, Bartolus of Saxoferrato and potentially also Cicero or Plato, who might not have employed the word itself, but possibly a concept (roughly) equivalent to the one Bodin referred to. For a more detailed consideration of particularly the first two writers, see Francesco Maiolo, *Medieval Sovereignty* (Eburon Academic Publishers, 2007).

[244] Jean Bodin, *Les Six Livres Du République*, trans. M. J. Tooley (Blackwell, 1955) at I, VIII.

transfer of sovereign power from the prince to another entity.[245] As such, it is not a necessary element of sovereignty that the prince be its holder.

The prince—or another entity—can become sovereign in a number of ways: the people can renounce and alienate its sovereign power and vest the prince with it, making the prince the sole sovereign. It must be, according to Bodin, full investiture and not merely consent, because, when the prince relies on the consent of the people, he only exercises authority by the sufferance of the people, making them rather than the prince sovereign. Another option to gain sovereignty is by conquest.[246] The traditional view on how a people can alienate its inherent sovereign power and invest an entity with sovereignty is the social contract, but Hampton's convention model offers a more convincing alternative.[247] Within the convention model, Hampton holds that different possibilities exist for the creation of the governing convention: one is a democratic process, the other is acquiescence to conquest.[248] What Bodin's statement, that cases where the prince has power only by the sufferance of the people means he is not sovereign at all, shows is that Bodin does not make the distinction between internal constitutive and internal constituted sovereignty.

Sovereignty, as such, is not dividable, although sovereign powers and competences can be delegated.

> "The true sovereign remains always seized of his power. Just as a feudal lord who grants lands to another retains his eminent domain over them, so the ruler who delegates authority to judge and command, whether it be for a short period, or during pleasure, remains seized of those rights of jurisdiction actually exercised by

[245] Ibid.
[246] Ibid.
[247] One example of the social contract model will be discussed in the following, namely Hobbes' theory.
[248] Hampton, *Political Philosophy*, at 83.

> another in the form of a revocable grant, or precarious tenancy. For this reason the law requires the governor of a province, or the prince's lieutenant, to make a formal surrender of the authority committed to him, at the expiration of his term of office. In this respect there is no difference between the highest officer of state and his humblest subordinate. If it were otherwise, and the absolute authority delegated by the prince to a lieutenant was regarded as itself sovereign power, the latter could use it against his prince who would thereby forfeit his eminence, and the subject could command his lord, the servant his master. This is a manifest absurdity, considering that the sovereign is always excepted personally, as a matter of right, in all delegations of authority, however extensive. However much he gives there always remains a reserve of right in his own person, whereby he may command, or intervene by way of prevention, confirmation, evocation, or any other way he thinks fit, in all matters delegated to a subject, whether in virtue of an office or a commission. Any authority exercised in virtue of an office or a commission can be revoked, or made tenable for as long or short a period as the sovereign wills."[249]

In other words, it is only in the moment that a sovereign loses his absolute authority that he loses his sovereignty and transfers it to whoever has gained absolute authority in last instance. A more limited transfer of competences does not equate to a transfer of sovereignty. We see this understanding of sovereignty also reflected in more modern understandings of sovereignty: it is possible to delegate competences or transfer them to another entity (such as the European Union) without a loss of sovereignty, provided the transfer is not irrevocable.

[249] Bodin, *Les Six Livres Du République,* at I, VIII.

Sovereignty—held by the prince or possibly another entity and being undividable—is defined by Bodin as

> "Supreme power over citizens and subjects, unrestrained by laws."[250]

However, while the prince can, in principle, amend and annul any law, this is only provided that the law "does not involve a principle of natural justice" and that "with the alteration of the law the profit of some does not do damage to others without just cause."[251] In addition to this, the prince is bound by the law of nations only in as far as it corresponds to the laws of nature or divine law. Furthermore, Bodin states that it is in the sovereign's best interest to uphold even those laws he is not bound by. This, and his assertion that sovereignty acquired by conquest is, despite its initial illegality, true sovereignty, seems to imply that sovereignty is a matter which can be acquired not (only) through changes in the legal world, but rather through changes in the factual world. This, too, supports the fact that Bodin did not make a distinction between internal constitutive and internal constituted sovereignty. This distinction, however, could be particularly elucidating as regards the issue of investiture or acquisition of sovereignty and furthermore explains *why* it is beneficial for the (internal constituted) sovereign to uphold even those laws he is not bound by. Here, Bodin indirectly seems to acknowledge the power of the people to revolt, without actually elaborating on the role of the people in a state. That he did not do this follows from the aim he wished to achieve: a theory designed to strengthen the government and allow for stability would not do well to mention the impact a revolution by the people could have and how it fits within the system.

---

[250] James Brown Scott, 'Jean Bodin the Transition from Medieval to Modern Thought: Chapter Xxiii', in *Law, the State, and the International Community*, 1 (1939), 324-52 at 332.

[251] Bodin, *Les Six Livres Du République* at I, VIII.

While Bodin's definition of sovereignty as supreme power, unrestrained by law, appears to exclude any kind of limitation, this is not entirely correct:

> "For Bodin a sovereign is "not bound" (*absolutus*) by the civil or positive laws which he or his predecessors had promulgated. Nevertheless a sovereign is always bound to natural and divine law. Sovereignty, according to Bodin, is as supreme as one wishes, but is also limited by natural and divine law. The Kings of France were glorious because their sovereignty was limited by divine and natural law."[252]

This raises the questions whether there is a right of the people to resist or overthrow a sovereign who does not obey the commands of natural law.

JB Scott picks up on this when he describes that

> "[…] the ultimate purpose of government is 'the benefit of the commonwealth.' Bodin states a general principle which applies to this entire subject: 'But by whatever right a prince obtains his authority, whether by law, testament, popular election, or lot, it is just to fulfil those obligations which were undertaken for the good of the state.' This should be a limitation upon the king of the utmost important—a check flowing directly from natural law itself, which requires the fulfilment of obligations as an act of justice; for, as Bodin declares, to act 'otherwise' for selfish purposes would be 'contrary to the laws of nature.' But here a question arises to which he offers no answer: Who is to determine 'the good of the people'? Should the decision be that of the prince, or of the people? In view of the care with which Bodin has safeguarded his prince's sovereignty, it may be assumed that he

[252] Mario Turchetti, 'Jean Bodin', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2012 edn.; URL = <http://plato.stanford.edu/archives/win2012/entries/bodin/>, 2012) at 4.

> would have been unwilling to limit that sovereignty by leaving so important a question to the people's decision."[253]

Bodin considers that

> "It is however never proper for the subject to disobey the laws of the prince under the pretext that honour and justice require it."[254]

One could thus deduce that Bodin considered that the subjects of the sovereign did not have the authority to proclaim a violation of natural or divine law by their prince, meaning that, while the prince was bound by natural and divine law, any violation on his part was not actionable.

Regarding the limitations imposed on the sovereign prince under Bodin's theory, an emphasis can be placed on the applicability of natural and divine law which imposes on the prince a certain code of conduct and morality,[255] or alternatively on the lack of actionability and enforceability of this limitation.[256] Depending on one's viewpoint, one can classify Bodin's sovereign as subject to limitations or as essentially unbound under a thin veneer of respectability and legitimacy granted by the allusion to natural and divine law. Even in the latter case, the reason for this veneer of legitimacy and respectability and the rhetoric of natural and divine law were necessary because of the internal constitutive sovereignty of the people—because of their power, in particular, to revolt, to overthrow the system. That Bodin did not (want to) acknowledge this power does not mean he did not take it into account.

In short,

> "Bodin's plan for ridding his country of the political ills from which it was then suffering consisted in setting up a strong central

[253] Scott, 'Jean Bodin the Transition from Medieval to Modern Thought: Chapter Xxiii', at 338.
[254] Bodin, *Les Six Livres Du République*, at I, VIII.
[255] Cf. Turchetti, 'Jean Bodin'.
[256] Cf. Maritain, 'The Concept of Sovereignty', at 354.

> government, with a monarch subject to so-called fundamental laws, but himself the source of the laws of the realm and not subject to those laws. This plan required that the rights of the people be limited in order that the power of the sovereign might be expanded. Peace and order were to be brought about through emphasis on the supremacy of the personal ruler. To be sure, Bodin's sovereign was limited, as has been shown, by certain categories of law: what we may term the divine law and the law of nature, containing those universal precepts which could not be denied by a ruler without placing himself beyond the pale of enlightened society."[257]

Following this understanding of the purpose of Bodin's theory of sovereignty, his *telos* is comparable to that of later political philosophers, particularly perhaps Thomas Hobbes whose main concern was to argue that effective government—whatever its form—must have absolute authority.[258]

Hobbes' understanding of sovereignty is considered in the following.

3.1.2. Thomas Hobbes' Theory of Sovereignty

Thomas Hobbes' political philosophy sets out a theory of sovereignty that, much like Bodin's, considers sovereignty to be absolute—and much like in the case of Bodin, absolute here does not, in fact, mean absolute in a sense of unlimited.

According to Hobbes, there are essentially two ways of acquiring sovereignty—one is by acquisition, the other by institution. Sovereignty

[257] Scott, 'Jean Bodin the Transition from Medieval to Modern Thought: Chapter Xxiii', at 341.
[258] Sharon A. Lloyd and Susanne Sreedhar, 'Hobbes's Moral and Political Philosophy', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2013 edn.; URL = <http://plato.stanford.edu/archives/sum2013/entries/hobbes-moral/>, 2013) at 8.

by institution is present where individuals agree to give up their rights and to transfer them to a sovereign who will protect them and regulate their behaviour in a society so as to avoid the state of nature in which life is "solitary, poore, nasty, brutish, and short", to cite Hobbes' perhaps most famous phrasing.[259] Sovereignty by acquisition describes the case in which a people promises obedience to an aggressor in exchange for protection. Either case—institution or acquisition—represents a social contract, and in either case the motivation of the people is fear, either of the conqueror or of one another.[260] These are, in essence, the scenarios in which Hampton holds that a social convention—rather than a social contract—is created.

Similar to Bodin, Hobbes is a proponent of monarchy, and, again similar to Bodin, Hobbes also identifies different forms of government in each of which a different entity is the holder of sovereignty: in a monarchy, it is the monarch who is sovereign, in an aristocracy it is an assembly representing only a part of the people, and in a democracy it is an assembly representing all of the people. These three are, according to Hobbes, the only types of government—oligarchy or tyranny or even anarchy are simply variations on the above.[261] For each of the three forms of government,

> "[…] the power of Soveraignty is the same in whomsoever it be placed."[262]

In other words, Hobbes holds that the content of sovereignty is independent from the holder of sovereignty, meaning that the holder is all but interchangeable. Nevertheless, he makes an argument for monarchy. He states that placing sovereign power in the hands of several persons rather than just one person has a number of disadvantages, such as the

[259] Hobbes, 'Leviathan', at 57.
[260] Lloyd and Sreedhar, 'Hobbes's Moral and Political Philosophy', at 7.
[261] Hobbes, 'Leviathan', at 94 f.
[262] Ibid., at 88. The spelling has been taken over from the cited text.

likelihood of inconsistencies arising from numbers, favouritism of more people than a monarch would favour, a larger divide between public and private interests of the representatives, with private winning out over the public due to the nature of man, and the possibility of disagreement within the sovereign assembly, which might lead to civil war in the worst case.[263]

To avoid this kind of scenario or a return to the state of nature, a government needs to be effective and, in order to be effective, Hobbes considers that it must have "the essential rights of sovereignty" and then, namely, all of them in absolute measure.[264] These "essential rights" are at the very least "the power of legislation, adjudication, enforcement, taxation, war-making" and the right of control of normative doctrine.[265]

One very important aspect of Hobbes' theory of sovereignty, and something that can also be found in Bodin's theory, is that the sovereign is not subject to the civil (i.e. positive) law. Hobbes explains this with the following reasoning, relating to the above-mentioned *competence* of the sovereign to legislate:

> "The Soveraign of a Common-wealth, be it an Assembly, or one Man, is not subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himself onely, is not bound."[266]

[263] Ibid., at 96.
[264] Lloyd and Sreedhar, 'Hobbes's Moral and Political Philosophy'.
[265] Ibid.
[266] Hobbes, 'Leviathan', at 128.

This is a similar argument to Bodin's: auto-limitation is not possible and hence the sovereign—who can amend or repeal laws—cannot be bound.

When it comes to the issue of divided or unitary sovereignty, Hobbes holds that sovereignty is "incommunicable, and inseparable".[267] Lloyd offers an explanation and elaboration on this simple statement:

> "The powers of legislation, adjudication, enforcement, taxation, war-making (and the less familiar right of control of normative doctrine) are connected in such a way that a loss of one may thwart effective exercise of the rest; for example, legislation without interpretation and enforcement will not serve to regulate conduct. Only a government that possesses all of what Hobbes terms the 'essential rights of sovereignty' can be reliably effective, since where partial sets of these rights are held by different bodies that disagree in their judgements as to what is to be done, paralysis of effective government, or degeneration into a civil war to settle their dispute, may occur.
>
> Similarly, to impose limitation on the authority of the government is to invite irresoluble disputes over whether it has overstepped those limits. If each person is to decide for herself whether the government should be obeyed, factional disagreement—and war to settle the issue, or at least paralysis of effective government—are quite possible. To refer resolution of the question to some further authority, itself also limited and so open to challenge for overstepping its bounds, would be to initiate an infinite regress of non-authoritative 'authorities' (where the buck never stops). To refer it to a further authority itself unlimited, would be just to relocate the seat of absolute sovereignty."[268]

[267] Ibid., at 87.
[268] Lloyd and Sreedhar, 'Hobbes's Moral and Political Philosophy', at 8.

Nevertheless, the power of the people to revolt and to overthrow a government—in other words, the negative side of internal constitutive sovereignty—is taken into consideration and has impacted the development of the theory. However, Hobbes' understanding of sovereignty showcases one of the points also contained in the framework developed in this book, namely that constitutional or international human rights constraints are not a necessary element of the concept of sovereignty, as such, and illustrates how this relates to situations of mastery.

It appears a matter of interpretation whether Hobbes' sovereignty is unlimited in theory, in application, or not at all. The text itself seems to point in various directions and scholars are equally divided on the matter. What is certainly the case is that the Hobbesian sovereign is *no more* limited than the sovereign of Bodin's theory.

3.1.3. Conclusions: Monarchical Sovereignty

Taking Bodin's and Hobbes' understandings of sovereignty as exemplifying historical understandings of the sovereignty of monarchs, some conclusions can be drawn. First of all, understandings of monarchical sovereignty fall under the concept of what is in this book termed internal constituted sovereignty. However, the boundaries of what takes place within the world of law and what takes place outside of it are not clearly drawn here, nor is the distinction between constitutive and constituted sovereignty made. While some sections of their work strongly suggest that they were aware of the role which people (can) play in creating and overthrowing the sovereignty of the monarch, both Hobbes and Bodin neglect to explore the full extent of internal constitutive sovereignty.

Bodin's and Hobbes' understandings of sovereignty have a few elements in common. While they are both proponents of the monarchy and their

theories focus on the sovereignty of monarchs, neither considers it a necessary element of sovereignty that it is the monarch who is the holder of sovereignty. Both acknowledge that it could be another entity, such as an assembly representing part or the whole of the population. The meaning of sovereignty is not, according to either of them, dependent on who is the holder of sovereignty. Equally, both Bodin and Hobbes call sovereignty "absolute", but it is a qualified absoluteness—which appears a contradiction in terms. What is meant here is that, while the sovereign can essentially do as he pleases because he is not bound by the positive law of the state, given that he can change it, natural or divine law limits what he can do legitimately. Nevertheless, any violation of natural or divine law is not actionable and no positive legal remedies are available for citizens against a sovereign violating natural law. This is where the internal constitutive sovereignty Bodin and Hobbes describe leaves off and where internal constitutive sovereignty picks up.

3.2. Parliamentary Sovereignty

In the United Kingdom, in particular, the doctrine of parliamentary sovereignty is one of the fundamental doctrines of constitutional law. The primary historical account of the doctrine of parliamentary sovereignty is Albert Venn Dicey's formulation of it; a more recent account is found in the works of Jeffrey Goldsworthy. Theories of parliamentary sovereignty fall under the concept of internal constituted sovereignty.

3.2.1. Dicey's Theory of Parliamentary Sovereignty

Albert Venn Dicey's *Introduction to the study of the law of the constitution* exemplifies the move of British constitutional doctrine from the Hobbesian *Leviathan* and Austin's habitually obeyed sovereign to parliamentary sovereignty. More than Blackstone or Blake, then, Dicey is credited with the theory of parliamentary sovereignty. According to him, Parliament is defined as the King or Queen, the House of Lords, and the House of Commons acting together.[269] As such, they may be

> "[…] aptly described as the 'King in Parliament,' and constitute Parliament."[270]

The holder of sovereignty is thus an entity composed of more than one body. Dicey, having seen the Parliament Act of 1911 being passed and having considered its implications, considers whether it makes sense to consider the entire composite entity sovereign when one of the bodies has less of a role to play in the process by which the entity acts. On the one hand, he holds:

> "The simple truth is that the Parliament Act has given to the House of Commons, or, in plain language, to the majority thereof, the power of passing any Bill whatever, provided always that the conditions of the Parliament Act, section 2, are complied with.

[269] Dicey, *Introduction to the Study of the Law of the Constitution*, at xxxvi.
[270] Ibid., at 3.

> But these provisions do leave to the House of Lords a suspensive veto which may prevent a Bill from becoming an Act of Parliament."[271]

He continues that

> "In these circumstances it is arguable that the Parliament Act has transformed the sovereignty of Parliament into the sovereignty of the King and the House of Commons."[272]

On the other hand, he argues that

> "[…] the better opinion on the whole is that sovereignty still resides in the King and the two Houses of Parliament. The grounds for this opinion are, firstly, that the King and the two Houses acting together can most certainly enact or repeal any law whatever without in any way contravening the Parliament Act; and, secondly, that the House of Lords, while it cannot prevent the House of Commons from, in effect, passing under the Parliament Act any change of the constitution, provided always that the requirements of the Parliament Act are complied with, nevertheless can, as long as that Act remains in force, prohibit the passing of any Act the effectiveness of which depends upon its being passed without delay."[273]

Despite the distribution of competences within the composite entity and of roles within the procedure according to which the composite entity acts, the composite entity counts as the holder of sovereignty. According to Dicey, this is parliament in the British system, although he makes reference to other sovereign entities as well.[274] In short, in the United Kingdom it is Westminster Parliament which is sovereign, but it may be

[271] Ibid., at xli.
[272] Ibid., at xlii.
[273] Ibid.
[274] E.g. Ibid., at 35.

another entity in another legal system. What, however, does it mean to be sovereign according to Dicey?

He summarises the doctrine as follows:

> "The principle, therefore, of parliamentary sovereignty means neither more nor less than this, namely that 'Parliament' has 'the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'"[275]

Given that the *competence* to make or unmake any law whatever is fundamental to this definition, it bears mentioning that

> "A law may, for our present purpose, be defined as 'any rule which will be enforced by the Courts.'"[276]

Elaborating on the definition of parliamentary sovereignty, Dicey distinguishes a positive and a negative side of parliamentary sovereignty:

> "The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament."[277]

[275] Ibid., at 3 f.
[276] Ibid., at 4.
[277] Ibid.

This distinction between the positive and negative side of parliamentary sovereignty translates into Hohfeldian terminology by means of *competence* and *disability,* whereby the competences of Parliament to legislate, to amend laws, and to repeal them, and to exercise all these competences is accompanied by the disability on the side of all other entities to make rules overriding or derogating from an Act of Parliament. It is noteworthy here that this disability does not touch upon interpretation of Acts of Parliament by the courts. Especially given that the courts combine their interpretations with a rhetoric suggesting that they are not creating new rules but rather clarifying or interpreting the will of Parliament, the supremacy that is necessary for parliamentary sovereignty is not touched upon by the interpretation of courts.

Aside from the sovereignty of parliament, which is internal constituted sovereignty, Dicey also considers the role of the people and whether it is not the electorate which is sovereign, rather than the parliament:

> "The electors can in the long run always enforce their will. But the Courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word "sovereignty" is, it is true, fully as important as the legal sense or more so."[278]

While not using the same terminology, this is in essence a description of the distinction between the world of law, wherein internal constituted sovereignty is situated, and what is outside of it. It acknowledges the importance of the sovereignty of the people, their internal constitutive sovereignty, without confusing it with parliamentary sovereignty, which

[278] Ibid., at 28.

is constituted. Dicey also makes this distinction with regard to the limitation of parliamentary sovereignty, stating that

> "The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."[279]

However, he also states that

> "the actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations. Of these one is an external, the other is an internal limitation. The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws. This limitation exists even under the most despotic monarchies. A Roman Emperor, or a French King during the middle of the eighteenth century, was (as is the Russian Czar at the present day) in strictness a "sovereign" in the legal sense of that term. He had absolute legislative authority. Any law made by him was binding, and there was no power in the empire or kingdom which could annul such law. It may also be true, -- though here we are passing from the legal to the political sense of sovereignty, --that the will of an absolute monarch is in general obeyed by the bulk of his subjects. But it would be an error to suppose that the most absolute ruler who ever existed could in reality make or change every law at his pleasure."[280]

[279] Ibid., at 4. citing Edwardo Coke, *The Fourth Part of the Institutes of the Laws of England; Concerning the Jurisdiction of Courts* (W. Clarke and Sons, 1817) at 36: "Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."

[280] Dicey, *Introduction to the Study of the Law of the Constitution*, at 30.

In other words, a sovereign may have the *competence* to pass or amend any law whatever, such as a law that all blue-eyed babies must be killed five days after birth, but this competence is situated within the world of law; outside of it, internal constitutive sovereignty of the people means that they might disobey or even deconstruct the entire legal system if they are outraged enough (and situations of mastery do not prevent them from exercising their sovereignty). As such,

> "The exact point at which the external limitation begins to operate, that is, the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision."[281]

The external limitation identified by Dicey corresponds to internal constitutive sovereignty. What, however, about the internal limitation? Dicey considers that

> "The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs."[282]

In other words, the holder of sovereignty is a product of time and circumstances when it comes to the opinions and beliefs held and, as such, there is a sociological limitation shaping, for example, the policies of Parliament. This is not a limitation that need concern us here, but it again underlines the distinction between the world of law and the outside world: within the world of law, the holder of sovereignty—in this case Westminster Parliament—is considered one entity acting in accordance with a certain procedure. Outside the world of law, we can consider the

[281] Ibid., at 33.
[282] Ibid., at 32.

individual Members of Parliament and their background to analyse their voting behaviour and understand, at least potentially, the policy choices they make. These things have a direct impact on the world of law, but the world of law is indifferent to the *why* of, for example, voting patterns.

While the external and internal limits always apply to the exercise of sovereign powers and, as such, always delineate, more or less precisely, the boundaries of what a sovereign can, in fact, achieve for all of his power, this does not mean that all sovereigns will necessarily be faced with these constraints in equal measure. Given their nature, the sovereign is unlikely to be entirely aware of the internal limit and, under certain circumstances, unlikely to be faced with the external limit:

> "Where a Parliament truly represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises, must soon disappear. Speaking roughly, the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of the English people usually desire."[283]

Dicey's theory of parliamentary sovereignty offers a clear example of internal constituted sovereignty which does not neglect the relationship with internal constitutive sovereignty. Built on Dicey's understanding of parliamentary sovereignty is Goldsworthy's theory, a theory which develops Dicey's theory in the light of more modern insights and questions.

[283] Ibid., at 34.

3.2.2. Goldsworthy's Theory of Parliamentary Sovereignty

Jeffrey Goldsworthy makes the same distinction Dicey makes regarding legislative sovereignty and political sovereignty, with the focus of his work equally being the former rather than the latter. His theory of parliamentary sovereignty builds upon Dicey's and develops it further, taking into account more recent developments in analytical jurisprudence and applying it to questions of our time.

Goldsworthy states that he considers Parliament "as a whole, including the Crown as well as both Houses" rather than the two Houses or just the House of Commons.[284] He considers parliament as a composite entity. This composite entity finds its constitution in fundamental laws:

> "[…] rather than being a transcendent creator of all laws, a sovereign law-maker is itself created by fundamental laws. These identify the law-maker, and if it is not a natural person, may determine its 'constitution', in the sense of its composition. 'Parliament', for example, is not a natural person, but a complex artificial institution that is defined and structured by law. Fundamental laws may also prescribe the procedure that the law-maker must follow, and the form in which it must express itself, if it is to exercise its law-making authority successfully. Laws of these kinds provide criteria that determine whether or not its deliberations have resulted in laws."[285]

"Fundamental laws", here, could be considered a reference to the rule of recognition or the governing convention of the British legal system. Goldsworthy considers, however, that these fundamental laws are consistent with the sovereignty of parliament only in so far as they do not "unduly impair its ability to change […] the law".[286] Where internal or external restraints—for example, requirements of unanimity or even

[284] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, at 9.
[285] Ibid., at 14.
[286] Ibid.

qualified majorities such as two-thirds—make it difficult or impossible for a legislature to act, the conclusion that parliament remains sovereign because it is theoretically free to amend the law whenever it so chooses becomes debatable, for it may be theoretically free, but it is practically limited.[287] This suggests that parliament needs to have not only the relevant legal competences but also the practical ability to exercise those competences. Goldsworthy also holds that the acceptance by senior officials of the British legal system of parliamentary sovereignty as the prevailing doctrine of constitutional law is more decisive. The empirical test for the existence of parliamentary sovereignty is whether senior officials of all three branches of government accept the parliament as sovereign.

Does it need to be the parliament, however, which is sovereign? Goldsworthy holds that

> "It is not a logical or practical necessity that Parliament should have ultimate legal authority to decide what the law is. But it is a practical necessity that *some* institution have ultimate authority to decide any legal question that may arise, even if it is a different institution with respect to different types of question."[288]

Goldsworthy's theory of parliamentary sovereignty is one that situates sovereignty at the level of an organ of the state, or an individual state institution, as opposed to the state as a whole. This raises two questions—one is whether it really is a practical necessity that one institution has the ultimate authority to decide any legal question, the other is whether it can still be called sovereignty if, for different types of questions, different institutions have the ultimate authority to decide.

Goldsworthy makes the argument that the chain of legal authority must necessarily end somewhere—there can be no infinite regress of appeals

[287] Ibid.
[288] Ibid., at 261.

and overruling—and "whichever institution has ultimate authority to decide a question must be trusted to exercise it responsibly", because the possibility of abuse cannot be eradicated entirely. It is then a political choice to trust parliament rather than another institution, e.g. a small elite of constitutional judges. "Political choice" here should be taken to mean an extra-legal choice by senior officials to accept one rule of recognition over another. There are, according to Goldsworthy, good reasons for choosing parliamentary sovereignty rather than assigning sovereignty to another entity.[289] However, this does not take away from the possibility that, theoretically, this could be done. What would be required is that senior officials are convinced to accept such a rule of recognition.[290]

Yet, none of this answers the question whether there can be one or several sovereigns. Goldsworthy makes it clear that there can only be one per legal issue, shifting the focus to the question whether there can be more than one legal question for which an ultimate decision maker is required. Goldsworthy does not provide us with an answer to this question, likely because the focus of his theory is legislative sovereignty. Accordingly, the conclusion is that there can only be one entity to decide in cases of legislative debate. While his writing seems to suggest that he considers legislative sovereignty synonymous with sovereignty, he does hold that

> "The legislative sovereignty of the Crown in Parliament is compatible with the Crown having unquestioned authority to reject Bills passed by both Houses, and *to exercise prerogative powers regardless of their approval*."[291] (emphasis added)

While one could argue that this is an argument in favour of the assumption that there can be several sovereign entities in a state, it is the case that under British law, parliament can legislate to limit the royal

[289] Ibid., at 262.
[290] Ibid., at 279.
[291] Ibid., at 9.

prerogatives exercised by the government, meaning that parliament remains the ultimate decision maker also in this case. With law as the main focal point of his enquiry, sovereignty is indivisible, because any legal issue is or can be decided by law and parliament is the ultimate legislator.

Parliament is currently sovereign, therefore, but Goldsworthy holds that this might change in the future:

> "It does not follow that the doctrine of parliamentary sovereignty cannot be changed. There are many examples of fundamental legal rules changing as a result of official consensus changing. In the Australia Act 1986 (UK), the United Kingdom Parliament relinquished its authority to alter Australian law. If it attempted to resume that authority by repealing the Act, Australian courts would almost certainly refuse to accept the validity of the repeal, even if this meant repudiating the doctrine of parliamentary sovereignty that they themselves accepted many years ago. But this change in the allegiance of Australian courts is part of a change in the allegiance of all senior legal officials, and citizens, in Australia, and would therefore be universally accepted there as legitimate. Indeed, a refusal by Australian courts to subscribe to that general change in allegiance would provoke political conflict between them and the other branches of government.
>
> Another example, involving essentially the same process in reverse, is the way in which a nation can surrender its independence by merging with a larger political entity. This may be the future in store for Britain, if it ever comes to be generally accepted by British legal officials that Parliament has lost its authority to withdraw from the European Community. That point has not yet been reached, because if Parliament were tomorrow to legislate to terminate Britain's membership of the Community, British courts would almost certainly acquiesce. It follows that

> Parliament still retains ultimate legal sovereignty, even though the rules governing its exercise of that sovereignty have changed."[292]

An interesting point[293] concerning the relationship between the United Kingdom and the European Union with regard to a potential shift of sovereignty from Westminster Parliament to the EU or an institution of the EU is the following: what the doctrine of parliamentary sovereignty, as it is currently understood and contained in the rule of recognition of the system, "does not permit Parliament to do is limit its own sovereign power."[294] What would thus be required for parliament to cease being the holder of sovereignty is not an Act of Parliament, but rather a change in the rule of recognition, that is, acceptance not only by Parliament, but also by senior officials of the other branches of government, not as a matter of law, but as a matter of fact.

So far, we have focused on the holder on sovereignty and what factual requirements are necessary for it to attach to that holder. This does not tell us what sovereignty means according to Goldsworthy. In terms of content, Dicey identified two criteria for parliamentary sovereignty, namely the positive "right to make or unmake any law whatever" and the negative criterion that "no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[295] Goldsworthy considers that "if the negative criterion is satisfied then the positive one is too."[296] This is so because

> "If no person or body, including the courts, can override or set aside legislation, then Parliament's legislative authority is not restricted by any rule that the courts can enforce—and that is to

[292] Ibid., at 244.
[293] This may be a point of theoretical rather than practical interest, but it is nevertheless a point of interest.
[294] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, at 14.
[295] Ibid., at 9. citing Dicey, *Introduction to the Study of the Law of the Constitution*, at 40.
[296] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, at 10.

> say that it is not restricted by any law, which amounts to saying that Parliament has the legal right to make or unmake any law whatever."[297]

Goldsworthy suggests further that Dicey's definition of sovereignty should be qualified: "law-making authority is sovereign if it is unrestricted by norms that either are judicially enforceable"[298] or which satisfy the following criteria, namely that they are

> "[…] indistinguishable in form and function from other rules that are unquestionably laws. That condition is satisfied if they are expressed in written, canonical form, in formally enacted legal instruments, such as constitutions; are expected to be obeyed by legal institutions other than courts; are in fact generally obeyed by those institutions; and, despite borderline problems of vagueness and ambiguity, are sufficiently clear that some possible actions of those institutions would plainly be inconsistent with them."[299]

A parliament can be limited or restricted, however, by rules imposed on it, for example, by a written constitution which is supported by the rule of recognition, where those rules determine the form and procedure of the legislative process without which an Act of Parliament is not recognised as law, provided that those rules do not limit parliament in such a way that it can no longer change those rules itself:

> "Fundamental laws governing these matters of composition, procedure, and form are consistent with an institution possessing sovereign law-making authority, as long as they do not unduly impair its ability to change the substance of the law in any respect and at any time it chooses."[300]

---

[297] Ibid.
[298] Ibid., at 12.
[299] Ibid.
[300] Ibid., at 14.

As already elaborated upon above, the condition that it does not unduly impair the ability of parliament to change the law refers not only to theoretical limitations, but also very much to factual ones. As mentioned above, Goldsworthy admits that this understanding of a sovereign parliament being limited in this way means that

> "Sovereignty is a matter of degree."[301]

According to Goldsworthy's theory, therefore, parliament can be more or less sovereign, depending on the degree of limitation upon it. A parliament which can limit the power of future parliaments is more sovereign than a parliament which cannot do so, just as a parliament with no restrictions regarding composition, procedure and form is more sovereign than one under such restrictions. Such procedural requirements thus constitute limitations on parliament restricting its sovereignty without, however, taking sovereignty from parliament. Parliament remains sovereign, but less sovereign.

Another question that features strongly in the debate surrounding the doctrine of parliamentary sovereignty, and therefore also in Goldsworthy's treatise of it, concerns the issue of whether Parliament truly is unrestricted in its law-making power in terms of content. In other words, can parliament make any law whatever, provided that it is made in the correct form and in accordance with the right procedure? Opponents claim that such an unlimited power would be wholly nonsensical, for it would allow Parliament to make laws requiring that all blue-eyed babies be killed, laws which deprive Jews of their citizenship or prevent Christians from marrying outside their own denomination, or laws confiscating the property of redheads or only red-headed women. The list of possible examples could go on; the question remains whether such laws, if passed by Parliament in accordance with the proper procedures and in the correct form, would have to be considered a law by

[301] Ibid.

other officials of the system (the judiciary, the executive) and bind subjects. Goldsworthy states quite clearly that

> "Although it [this argument] may show that it is unreasonable for officials to believe that Parliament has unlimited law-making authority, it does not overcome the fact that they do so. That fact is sufficient to establish that, as a matter of law, Parliament has unlimited authority, even if in this respect the law is unreasonable."[302]

It is noteworthy here that Goldsworthy specifies that this unlimited law-making authority exists *as a matter of law*, i.e. in the world of law. This does not take away, in other words, that parliament would risk a revolution if they were to make a wholly unreasonable and discriminatory law. Dicey captured this when he wrote that the exercise of authority "by any sovereign whatever, and notably by Parliament" remains subject to limitations, particularly to the limitation provided for by the possibility of popular resistance.[303]

Is it still true, then, that parliament's unlimited law-making authority exists as a matter of law? Despite membership of the European Union, it is certainly true that parliament still has the competence (in the Hohfeldian sense) to legislate on any matter whatsoever, but what is no longer true is that there is no legal recourse against such legislation. If parliament were to legislate in a manner inconsistent with EU law, such an Act of Parliament would not automatically be void (as it would be if they did not have the competence to legislate on the matter), but courts now have the competence to set aside such an Act of Parliament, meaning that, in the hierarchy of norms, the Act of Parliament is no longer highest. Does this mean Westminster Parliament is not sovereign? Goldsworthy considers two options.

---

[302] Ibid., at 260.
[303] Ibid., at 19. citing Dicey, *Introduction to the Study of the Law of the Constitution*, at 76-7, 79.

> "The practical consequence of the decision [the *Factortame* judgment] is that British legislation inconsistent with applicable EC laws will be 'disapplied' unless Parliament either: (a) makes it quite clear, by express words or necessary implication, that it specifically intends the legislation to be applied notwithstanding the inconsistency; or if this is held to be insufficient to make the legislation applicable, (b) enacts legislation formally withdrawing Britain from the European Community."[304]

It is unclear whether (a) would be sufficient, or whether only (b) would suffice to prevent courts from disapplying an Act of Parliament inconsistent with applicable EU law.[305] Goldsworthy holds that if (a) is sufficient, this is consistent with parliamentary sovereignty, but if only (b) suffices, Westminster Parliament has in fact "abdicated part of its sovereignty, even if it retains the power to recover it."[306] Goldsworthy discusses a number of possibilities for the European Communities Act of 1972 and all that follows from it to be reconciled with the notion of parliamentary sovereignty, such as statutory interpretation, or the notion that the EC Act gives limitations only in form rather than substance.[307] Another option would be that the EC Act is a 'constitutional statute'.[308] If this is the case, and if (a) does not suffice, two conclusions are possible—one is that, as Goldsworthy states, Westminster is no longer (as) sovereign, the other is that Goldsworthy's account of sovereignty no longer holds. If indeed there are constitutional and ordinary statutes in the United Kingdom, this would mean that nowadays—and contrary to what Dicey said[309]—there is a distinction between Westminster Parliament acting as an ordinary legislator and Westminster Parliament

[304] Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, at 287.
[305] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, at 287.
[306] Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, at 288.
[307] Ibid., at 287-98.
[308] Cf. *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin at 62: "We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes."
[309] Dicey, *Introduction to the Study of the Law of the Constitution*, at 37.

acting as a constitutional legislator.[310] Only Westminster Parliament acting as a constitutional legislator can repeal the European Communities Act of 1972, and only Westminster Parliament acting as a constitutional legislator is sovereign in that it has the competence to 'recover' the competences previously abdicated. These competences themselves, then, do not form part of parliamentary sovereignty. This admittedly unorthodox understanding (and reduction) of parliamentary sovereignty (which most closely corresponds to ICDS on the organ level) is the necessary conclusion of thinking the current legal reality of the United Kingdom through. As such, Goldsworthy's notion of parliamentary sovereignty shows how difficult it is to reconcile a traditional understanding of parliamentary sovereignty with the current legal reality of European Union membership of the UK.

[310] The argument can be made that this distinction is purely theoretical, as there is no difference in e.g. voting procedures. However, if implied repeal is not possible for the European Communities Act and any inconsistency with European Union law will be disapplied by courts unless *at least* explicitly noted as intentional, this is in itself a procedural requirement, if a minor one.

3.3. Popular Sovereignty

In the Chapter on Parliamentary Sovereignty, a distinction was made between legal and political sovereignty, with the latter belonging to the people but not being actionable. While Dicey mentions it only to contrast it with parliamentary sovereignty, conceptions of popular sovereignty deserve consideration in their own right as well. This chapter thus deals with various conceptions of popular sovereignty, most of which are examples of internal constitutive sovereignty (ICVS). Having just discussed parliamentary sovereignty, this chapter will start with a theory which deliberately departs from parliamentary sovereignty and juxtaposes it to a conception of popular sovereignty.

3.3.1. The Indian Conception of Popular Sovereignty

The formation of the Constituent Assembly of India, the move to independence from Britain, as well as the drafting of the Indian Constitution of 1949[311] have led to a break from British constitutional tradition. Instead of parliamentary sovereignty, it is the people of India which is considered sovereign. The founding of the constitution is considered an expression of popular will.[312] The break from British constitutional doctrine can be found particularly in the limitation of government by the Constitution, the introduction of judicial review of the constitutionality of legislation and decisions by the executive, and the rigidity of the Constitution, i.e. the fact that it cannot be amended via the ordinary legislative procedure.[313]

Sarbani Sen has developed a theory of constitutionalism and popular sovereignty that will be taken, here, to exemplify a country's conception of popular sovereignty deriving from an anti-colonial struggle, as

[311] Entered into force 1950.
[312] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*, at 111.
[313] Cf. Ibid., at 112 f.

institutionalising those experiences are part of the author's intention.[314] Sen holds that

> "The framers recognized that though the revolutionary movement stood for the idea of sovereignty in the hands of the people to resist arbitrary exercise of authority, such irregular and revolutionary periods of direct popular participation would inevitably be shortlived."[315]

It was only at the time of the framing of the Constitution that sovereignty was exercised directly by the people and even then it might be called into question how direct this exercise truly was, given that the Constitution was drafted by the Constituent Assembly. Nevertheless, supremacy is assigned to this act and it is assigned to the people:

> "Since the founders decided to frame a written constitution to secure the supremacy of popular will at the moment of the founding, the text had to be preserved from factional and self-interested politics which threatened to derogate from the superior constitutional text."[316]

Assigning supremacy to the popular will at the moment of founding was not done lightly, with debate regarding the legitimacy of the Constituent Assembly vis-à-vis future legislative assemblies elected by the people. Nevertheless, the Constituent Assembly chose to assign supremacy to the constitutional text and to safeguard it by means of judicial review, on the one hand, and a special legislative procedure for constitutional amendments, on the other hand. The rationale for these choices can be found in the belief that

[314] Ibid. holding that "The text is a conscious effort to institutionalize the country's revolutionary experience during its anti-colonial struggle."
[315] Ibid., at 115.
[316] Ibid., at 142.

"An electoral mandate did not vest sovereignty in parliament."[317]

Rather, Sen's conception of sovereignty seems to limit the exercise thereof by the people to the moment of constitution, i.e. to the original writing of the Indian Constitution by the Constituent Assembly. Under "conditions of normal politics, popular sovereignty could only exist in a 'proceduralized' sense", influencing channels of legitimate law-making.[318] While sovereignty did not cease to rest with the people after the establishment of the Constitution, the will of the people was only truly expressed in periods of "constitutional politics"—even elected institutions cannot, under Sen's conception, truly represent the people.[319] Rather, only the founding was an expression of popular will. Representative institutions symbolise electoral victories, but these electoral victories cannot be considered an actual expression of popular will—they are only a metaphor.[320]

On the one hand, therefore, there is the expression of the popular will which took place only at the moment of revolution and constitution positing. On the other hand, there is limited power in the hands of the government. It is limited because the people have imposed, at the time of constitution positing, limits on the exercise thereof. Several such limits can be identified. A first limit exists in the *competence* of judicial review in the hands of the judiciary.[321] A second limit is imposed by the rigidity of the Constitution, safeguarded by the procedure laid down in Article 368 of the Indian Constitution.[322] The relationship between these limits is explained in the following. The existence of judicial review does not suppose

[317] Ibid., at 116.
[318] Ibid., at 112.
[319] Ibid.
[320] Ibid.
[321] Ibid., at 113.
[322] Ibid., at 138.

> "[…] a superiority of the judicial to the legislative branch. It only supposed that the power of the people was superior to both, and when the legislative will, as expressed in its statutes, stood in opposition to that of the people, declared in the constitution, the latter had to prevail. Fundamental constitutional change could occur not by the ordinary acts of representatives, but through the special higher law-making track prescribed by the founders, that enabled future proponents of change to claim genuinely that they had overwhelming popular support for their initiatives only after they had cleared its obstacles."[323]

Indeed, only

> "The founding was a direct act of popular sovereign authority, and any future change in the constitutional text could only occur through other such extraordinary efforts that could claim to speak in the voice of the people."[324]

The rationale for the introduction of judicial review is a clear break from British constitutional doctrine and can be found in the following argument, partly quoted already above:

> "Since the founders decided to frame a written constitution to secure the supremacy of popular will at the moment of the founding, the text had to be preserved from factional and self-interested politics which threatened to derogate from the superior constitutional text. Recognizing the superiority of exercises of sovereign power by the people also implied that when legislative assemblies or the government acted under pressures of expediency, these acts needed to be reviewed by an institution that stood aside from the clash of interests and could support and

[323] Ibid., at 113.
[324] Ibid., at 138.

> preserve enduring constitutional principles validated by the people themselves."[325]

This argument also emphasises that under Sen's conception of popular sovereignty, it is through the people that the constitutional text at the basis of the legal system is validated.

The people have constituted the *competences* of the government; this also means that the government only has those *competences* as conferred on them in the Constitution. While Sen distinguishes between the people and the government and ascribes *power* to the people and *competences*—legislative both in ordinary procedure and in the constitutional amendment procedure, judicial—to the government, it is only the people which is held to be sovereign according to Sen.

> "The legislatures could never be sovereign; no set of men, representatives or not, could set themselves up against the general voice of the people."[326]

A noteworthy feature of Sen's conception of popular sovereignty is that

> "Conceptually, sovereign power, by its very definition, cannot be subjected to a constitution."[327]

The sovereignty of the people is thus necessarily extra-legal and outside of the constitutional framework, constituting it but not part of it. This is in line with Sen's determination that the expression of popular will could only occur in extraordinary moments, not in times of normal politics regulated by the Constitution. As such, Sen has penned a convincing theory of internal constitutive sovereignty (ICVS) and how it constructs and shapes the limits of internal constituted sovereignty (ICDS). While Sen argues that, under the Indian conception, there is no sovereignty for

[325] Ibid., at 142.
[326] Ibid., at 159.
[327] Ibid., at 160.

parliament, which would mean that there is no internal constituted sovereignty (ICDS), this may be due to Sen's understanding of sovereignty, which does not make a distinction between the different types. Understanding sovereignty of the people and sovereignty of parliament to be mutually exclusive, Sen holds the people to be sovereign and denies parliamentary sovereignty. Seen as a departure from the constitutional doctrine of the UK in a post-colonial India, this insistence on popular sovereignty to the exclusion of other forms of sovereignty is very comprehensible.

3.3.2. The Australian Conception of Popular Sovereignty

Another jurisdiction in which a move from parliamentary to popular sovereignty has been the subject of debate is Australia.

In the 1990s, Australia seemed to experience what has been described as constitutional turmoil, a glorious revolution, and a shift in the fundamental paradigm of constitutional doctrine.[328] Case law led commentators to believe that the Australian constitutional doctrine was shifting from parliamentary sovereignty to popular sovereignty. In the following, this shift and the conception of popular sovereignty that crystallised will be considered as an example of the theory of sovereignty developed by George Winterton. Winterton distinguishes between two senses of sovereignty. On the one hand, "sovereignty" can be used to refer to the source of authority of the Australian Constitution; on the other hand, it refers to the "location of the power to amend the Constitution",[329] i.e. the *competence* to do so. It is not necessary that one entity is sovereign in both senses; rather, it is entirely possible—and even likely—that different entities are sovereign in the different senses.[330]

[328] Winterton, 'Popular Sovereignty and Constitutional Continuity', at 1.
[329] Ibid., at 4.
[330] Ibid., at 5.

In the Australian context, one source of authority of the Constitution clearly used to be the Parliament of the United Kingdom, until such time that the UK Parliament passed the Australia Act 1986, renouncing its competence to legislate for Australia.[331] However, as the draft Constitution of 1899 and 1900 was approved by the Australian electors (usually equated with the people), an argument could—and has—been made that the authority of the Constitution derives from the people and their approval of the Constitution. Here, Winterton rightly points out two possible views: Either it derives its authority from the moment of constitution, i.e. from the one specific moment in time in which Australian electors—no longer living now—accepted it in a referendum, or it derives its authority from the continued acquiescence with the Constitution by the current Australian people. This view on sovereignty is acknowledged by the judges of the Australian High Court. Justice Deane held that a

> "[…] compact between the Australian people, rather than the past authority of the United Kingdom Parliament under the common law **…** [offers] a more acceptable contemporary explanation of the authority of the basic law of the Constitution."[332]

The distinction between deriving the authority of the Constitution from the original moment of adoption and from the continued acceptance by the people is acknowledged, although authority is held to derive not from one or the other, but rather from both taken together:

[331] For a detailed consideration of whether, and if so in which way, the UK parliament can limit its own legislative power in this way and what this means for the sovereignty of the UK parliament, c.f. Colin Tomkins Adam Turpin, *British Government and the Constitution: Text and Materials* (Cambridge; New York: Cambridge University Press, 2007) at 66-71.

[332] Winterton, 'Popular Sovereignty and Constitutional Continuity', at 7. citing *Breavington* (1988) 169 CLR 41 at 123.

> "The present legitimacy of the Constitution ... lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people."[333]

This view on the source of authority of the Australian Constitution, and with it the entire legal system, corresponds closely with Hampton's theory of convention consent. Equating the two also explains how the legitimacy of the Australian Constitution can be taken to lie in both the original moment of adoption and in the continuous and on-going acquiescence of the Australian people to it.

The other view on sovereignty is that the sovereign is the entity that has the competence to amend the Constitution. Winterton holds that, here, it is far clearer that it is the people who are sovereign in this sense, because Section 128 of the Australian Constitution requires that proposals for constitutional amendments are put before the electors in a referendum. According to Winterton,

> "Ironically, the Australian Constitution, which claims neither to be based upon popular sovereignty nor adoption by "We the People", can justifiably claim a basis in popular sovereignty since the Australian people directly approved its adoption and have controlled its content since 1901."[334]

He considers that this is ironic mainly because the constitutions of the United States, India, Germany, Portugal, and Greece, which claim to be based upon popular sovereignty or the adoption by the people, do not give the same extent of control regarding the content of their constitutions to their respective people. Winterton here combines the two views on sovereignty—on the one hand, Australia can justifiably claim popular sovereignty because the Australian people approved the Constitution; on the other hand, the claim is justified because the people

[333] Ibid., at 4. citing *Theophanous* (1994) 182 CLR 104 at 171.
[334] Ibid., at 7 f.

are directly involved in the constitutional amendment process. However, the people do not have the competence to amend the Constitution on their own. Instead, the amendment procedure prescribes that the Australian parliament must pass a bill containing the proposal for a constitutional amendment, which is then submitted to the people (equated, again, with the electors) in a referendum. This places sovereignty in the second sense, not in the people acting alone but rather in the "Commonwealth Parliament acting with the approval of the people expressed at referenda by the majorities specified" in the Constitution.[335] In other words, the people are not sovereign in the second sense identified by Winterton, betraying some conceptual confusion in his theory. Rather, a composite entity involving the people and acting in accordance with a certain procedure is sovereign in the internal constituted sense (ICDS). The main sense in which a people can—and indeed must be—sovereign is extra-legal:[336] this is internal constitutive sovereignty (ICVS).

3.3.3. The German Conception of Popular Sovereignty

Popular sovereignty does not always mark a departure from parliamentary sovereignty, and not all systems have British constitutional doctrine as their point of departure. Germany is one such system. Article 20 (2) of the German Basic Law (i.e. the German Constitution) provides that

> "*Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.*"

[335] Ibid., at 8. citing G Sawer, "Government and Law", in J D B Miller (ed), *Australians & British: Social and Political Connections* (1987) 45 at 75.
[336] Winterton acknowledges this: ibid., at 7.

The first sentence of this provision translates to "all state power emanates from the people" and is generally considered to be the expression of popular sovereignty, despite the term *popular sovereignty* (Volkssouveränität) not actually making an appearance in the provision itself. Commentaries to this provision explain the German concept of popular sovereignty as state power being the object of democratic legitimation with the people being the subject which legitimates. Popular sovereignty requires that all exercise of state power can be traced back to the will of the people.[337] However, while this codification of popular sovereignty requires that the people can, in effect, have an influence on the exercise of state power, it is not a provision which confers a competence. Rather, popular sovereignty is a principle of legitimation and responsibility.[338]

This raises a number of questions, such as what state power is and how the people can have an influence on it. Regarding the exercise of state power, that expression—and thus what needs to be legitimised—contains all kinds of exercises of state power: action by the legislative, executive, and judiciary. State power in the sense of this provision can be exercised not just by organs on the federal level, of the Länder—the federal states—and the municipalities, but by juridical persons of public law. Any official action by these organs with *Entscheidungscharakter*—with decisional character—constitutes an exercise of state power.[339] This specifies the object of legitimation, leaving open the question of how the people can influence the exercise of state power. Popular sovereignty under Article 20 (2) refers to other concepts such as representative democracy and legitimacy, and the second sentence of this provision gives some indication of how the people exercise their sovereignty, i.e. in which way they are capable of influencing the exercise of state power:

[337] Bernd Grzeszick, 'Maunz/Dürig, Grundgesetz-Kommentar 69, Ergänzungslieferung 2013', *Grundsatz der Volkssouveränität, GG Art. 20 Rn. 60-77* (2013a).
[338] Ibid.
[339] Bernd Grzeszick, 'Maunz/Dürig, Grundgesetz-Kommentar 69, Ergänzungslieferung 2013', *Staatsgewalt, Rn 89-106* (2013b).

elections and referenda as well as via special organs of the legislative, the executive, and the judiciary. This does not account for the extra-legal ways in which people can exercise their *power* to constitute a legal system, but it gives some further guidance and offers clarification of the ways in which individuals can, in Germany, give their convention or even their endorsement consent. In other words, constitutive sovereignty in Germany—something extra-legal by nature—can be exercised through legal means. In cases such as elections, voting is a juridical act, but it is also a means to exercise internal constitutive sovereignty.[340]

3.3.4. Concluding Remarks

Interestingly, theories of internal constituted sovereignty, such as parliamentary sovereignty, do not claim that there are no other concepts of sovereignty in addition to them. Rather, they (sometimes explicitly) leave room for other forms of sovereignty, whether they be called political sovereignty, popular sovereignty, or internal constitutive sovereignty. Meanwhile, conceptions of popular sovereignty or internal constitutive sovereignty claim for themselves to a far greater degree that it is people that are sovereign, to the exclusion of any other (constituted) body. From a standpoint internal to the concept, this makes sense, but it neglects to look beyond the borders of one concept to see that there are other concepts equally called "sovereignty".

One potential explanation for the insistence on exclusivity found in theories, such as the one by Sen[341] and also others,[342] is the idea that if it is peoples that are recognised as the sole sovereign, further rights might be granted to them or they might have a greater role to play in decision

[340] See Section 2.2.5. for further analysis of this point.
[341] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*.
[342] Cf. Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power'.

making on both national and international levels.[343] This would coincide—and might have contributed—to the conceptual change which Besson notes: that more often now it is argued that the sovereign behind international law is people within states, instead of states themselves.[344] However welcome such shifts might be, and however valid the sentiment and theory behind these shifts, technically speaking it is not necessary to insist on it for the sake of attributing importance to peoples: internal constitutive sovereignty is necessarily a sovereignty of the people and is necessarily present in every legal system. Indeed, without internal constitutive sovereignty, no legal system would exist. Thus, while internal constitutive sovereignty is relatively undemanding, in the sense of not requiring democracy or even awareness of it by the peoples exercising it, its importance cannot be understated and should not be overlooked.

[343] This assertion is made both without having looked into the mentioned authors' heads and without having consulted with them, so in no way should it be taken as an insinuation that the mentioned authors hold this belief.
[344] Besson, 'Sovereignty', at 49.

3.4. State Sovereignty

The previous chapters of this part of the book have considered theories of monarchical, parliamentary, and popular sovereignty—theories which fall into the category of internal sovereignty. In this chapter, we turn to the external plane and consider state sovereignty, i.e. external sovereignty of the state vis-à-vis other states or supranational organisations. As before, the notion of sovereignty in a variety of sources will be considered, ranging from a focus on the relationship between the European Union and its Member States to China's understanding of sovereignty, as well as general academic theories on state sovereignty. There is, of course, a great wealth of literature on the topic of state sovereignty and not all of it—or even a large part of it—can be considered here.

3.4.1. Hans Kelsen

In 1960, Hans Kelsen published the article *Sovereignty and International Law* in the Georgetown Law Journal, summarising the thoughts more extensively developed in *Das Problem der Souveränität und die Theorie des Völkerrechts*. Kelsen himself is not a proponent of state sovereignty, but, as the doctrine of state sovereignty is the object he considers in the aforementioned article, his work is treated here under the heading of state sovereignty. He considers that the etymological origin of the term sovereignty derives from the Latin *superanus* and refers to "the quality of being a supreme power or supreme order of human behavior", a special quality of the state.[345] He notes further that

> "There are, however, authors who, in spite of their assertion that sovereignty is an essential quality of the state, admit that even the "sovereign" states are bound by the norms of morals in general, or

[345] Hans Kelsen, 'Sovereignty and International Law', *Geo. L. J.*, 48 (1959), 627-40 at 627.

> the Christian moral order in particular, and hence that they are subjected to this order. To be sovereign seems to be incompatible with being subject to a normative order; thus to maintain the idea of the state as a supreme authority this term is understood to mean only that the state is not subject to a legal order superior to its own legal order, i.e. the national law."[346]

However, this becomes problematic when taking into account the unity of normative systems. Kelsen's argument, briefly summarised, goes as follows. It is not logically possible that a normative system contains norms which are both assumed to be valid by the system but contradict each other. The international legal order delegates to the national legal order the determination of both actors and subjects of international law, as well as its content, therefore international law and national law cannot be separated in the manner assumed by theories of dualism. Rather, monism must be assumed. As regards monism, there are two possibilities: Either international law is considered to have primacy and to constitute the various national legal orders, or primacy of the national legal order is assumed, in which case only one state can be considered to be sovereign, namely that from whence the considerations of primacy depart.[347] The meaning of sovereignty differs depending on which of these constructions is assumed. If it is national law which is presumed to have primacy, then "it is this primacy of national law which in the traditional theory is presented as sovereignty of the state."[348] If the primacy of international law is assumed, the term sovereignty expresses that "the national legal order is subject only to the international and to no other legal order", i.e. that the state is legally independent of other states.[349] Sovereignty according to Kelsen is either "supreme legislative power" or "freedom of action of the state", that is "unlimited competence

[346] Ibid.
[347] Ibid., at 629 ff.
[348] Ibid., at 631.
[349] Ibid., at 632.

of the national order".[350] Which of the two it is depends on whether one assumes the primacy of national law or of international law, meaning that, even though Kelsen gives two possible definitions, there can only be sovereignty in one sense according to him. If he is correct about this, it would mean that the theory of sovereignties—in the plural—developed in this book cannot hold.

To understand Kelsen's argument as to why it can only be the one or the other, it is necessary to be aware of Kelsen's understanding of what constitutes a legal order. Notably, two of the main features of Kelsen's Pure Theory of Law are relevant here. Firstly, Kelsen holds that every norm in a given legal system ultimately derives its validity from a *Grundnorm*, one basic norm. Secondly, the validity of this basic norm must be assumed; it cannot be found in either political ideology or ideas of morality, or derived from the natural or social sciences on the other.[351] With regard to sovereignty—on the assumption of the primacy of national law— this means that it is

> "Not an apperceptible or otherwise objectively recognizable quality of a real thing; it is a *presupposition*, viz., the presupposed assumption of a system of norms as a supreme normative order whose validity is not to be derived from a superior order. Whether the state is sovereign cannot be answered through an inquiry into its natural or social reality. The sovereignty of the state, as seen from the viewpoint of a theory of law, is not a certain amount or degree of real power. Even states which in comparison with the so-called "Great powers" do not have any significant power are regarded as equally sovereign as these great powers. The question whether a state is sovereign is only the question of whether one *presupposes* a national legal order as a supreme order."[352]

[350] Ibid., at 636.
[351] Marmor, 'The Pure Theory of Law'.
[352] Kelsen, 'Sovereignty and International Law', at 631.

If one assumes the primacy of national law, however, Kelsen points out that it is only possible to assume the primacy of the law of one state, rather than sovereign equality:

> "This construction of the relation between national and international law, it is true, may start from *any* state, but always only from *one* state; and only the state which is the starting point of the construction can be presupposed as sovereign. The relation of this state to the other states is established by international law which, as a consequence of the primacy of national law, is to be conceived of as part of this national law of the state that is the starting point. According to international law, other communities are "states" in their relation to this state only if recognized as such by the state which is the starting point, i.e. only if in the opinion of the competent organ of this state they fulfill the conditions prescribed by international law. If international law is part of the national law of the recognizing state, the reason of the legal existence of the other states, i.e. the reason of the validity of the other national legal orders, lies in the law of the recognizing state, i.e. in the national legal order on the basis of which the recognition takes place. As a consequence of the primacy of national law the other states must be regarded as subordinated to this national legal order which includes international law as part of it. Hence, they cannot be presupposed as sovereign."[353]

This argument still rests on Kelsen's claim that all legal norms ultimately derive their validity from a *Grundnorm* and that all legal norms deriving their validity from the same *Grundnorm* belong to the same legal system. Kelsen's theory of law has contributed greatly to the legal philosophy of the 20th century and so his understanding of sovereignty will be considered in greater detail. However, already at this stage, it can and must be said that Kelsen's *Grundnorm* differs from the Hartian *rule of*

[353] Ibid., at 633.

recognition, in that the rule of recognition is based on social attitude and efficacy, both of which belong to the realm of social science, whereas the *Grundnorm* is assumed.[354] The theory of sovereignties developed in this book finds its basis in Hart's and, following Hart, also in Hampton's understanding of the basis of a normative system. This does not mean, however, that Kelsen's conception of sovereignty cannot be considered. Instead, Kelsen's theory will require careful situating within the framework developed here: the link between internal constitutive and internal constituted sovereignty, as well as the link between external constitutive and external constituted sovereignty is severed when a *Grundnorm* is presumed rather than based in social practise and attitude. In other words, Kelsen's theory is not and cannot be about constitutive sovereignty. Hence, we will consider how Kelsen's insights compare to constituted sovereignty only.

Kelsen distinguishes between two possible understandings of the term "sovereignty": on the one hand, it can mean supreme legal authority and that the state is not subject to any legal order but its own; on the other hand, it can mean legal authority which is supreme *except* for its subjugation to international law, i.e. that the state is not subject to any legal order but the international legal order.

However, even where the primacy of national law is assumed, Kelsen points out that international law is superior to national law in the narrow sense—the difference is that international law is now considered part of national law in the wider sense.

> "The national law in the narrower sense is subordinated to the international law which is part of the national law in the wider sense, and hence the national law in the narrower sense is not sovereign; just as the national law of the other, the recognized,

[354] In other words, the *Grundnorm* is an assumed *ought* whereas the *rule of recognition* is an *ought* based on an *is*, namely the power possessed by the people.

> states is not sovereign because subordinated to the international law that is part of the national law of the recognizing state."[355]

While Kelsen specifically states that both views on primacy—and thus sovereignty—are possible, it is unlikely that the view that only the national legal system of one state is sovereign is acceptable to the proponents of national sovereignty—and, furthermore, it does not coincide with the assumption of sovereign equality that forms such a fundamental part of international law.[356] If the implications Kelsen attaches to the primacy of national law are not acceptable, two options remain: either the primacy of international law must be assumed or an option outside of Kelsen's argument must be sought. Kelsen's argument rests on the unity of norms: the assumption that all norms are part of one system, deriving from one *Grundnorm*. The assumption of the unity of norms can be called into question, however. It does not fit the traditional view on law which practitioners and scholars alike have and teach, namely that there are a variety of legal systems—some limited to a certain territory and some independent of territory, such as the law of the European Union, the *lex mercatoria*, or international law. Of course, merely because it is the traditional view on law does not mean that it is necessarily the correct view. An alternative would be to accept Kelsen's assumption of the unity of norms, but to contest his point that all norms of the system must derive from only one *Grundnorm*. Under this model, all legal norms would be part of the same legal system, although some norms may have different temporal and spatial applications and restrictions thereto. According to Kelsen, in this case all legal norms necessarily need to derive from one single *Grundnorm*, but it is not clear why this need be the case and why there could not be different *Grundnorms* for norms within the same legal system or norms belonging to different legal systems derived from the same *Grundnorm.*[357] Joseph

[355] Kelsen, 'Sovereignty and International Law', at 633 f.
[356] Ibid., at 632 f.
[357] Marmor, 'The Pure Theory of Law', at 1.

Raz argued these points in *The Authority of Law*. Regarding the latter issue, he gives the example of the peaceful secession of one state from another:

> "The first axiom asserts that all the laws belonging to one chain of validity are part of one and the same legal system. If this axiom were correct, certain ways of peacefully granting independence to new states would become impossible. Suppose that country A had a colony B, and that both countries were governed by the same legal system. Suppose further that A has granted independence to B by a law conferring exclusive and unlimited legislative powers over B to a representative assembly elected by the inhabitants of B. Finally, let it be assumed that this representative assembly has adopted a constitution which is generally recognized by the inhabitants of B, and according to which elections were held and further laws were made. The government, courts, and the population of B regard themselves as an independent state with an independent legal system. They are recognized by all other nations including A. The courts of A regard the constitution and laws of B as a separate legal system distinct from their own. Despite all these facts it follows from Kelsen's first axiom that the constitution and laws of B are part of the legal system of A. For B's constitution and consequently all the laws made on its basis were authorized by the independence-granting law of A and consequently belong to the same chain of validity and to the same system."[358]

Indeed, for Kelsen there is no inconsistency in holding that the constitution and laws of B are part of the legal system of A. However,

[358] Joseph Raz, 'Kelsen's Theory of the Basic Norm', *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 122-45 at 127 f.

> "Kelsen's mistake is in disregarding the facts and considering only the content of the laws. For his theory the only important feature is that the legal system of A has a law authorizing all the laws of B. That the courts and population of B do not consider this law as part of their own legal system is irrelevant. But the attitude of the population and the courts is of the utmost importance in deciding the identity and unity of a legal system in the sense in which this concept is commonly used."[359]

Regarding the issue that norms of the same legal system can derive from more than one *Grundnorm*, Raz argues that

> "Kelsen admits, at least by implication, that disregarding the basic norm, all the positive laws of a system may belong to more than one validity chain. Some may owe their validity to a customary constitution while others derive their validity from an enacted constitution. It is only the basic norm that unites them in such a case in one chain of validity by authorizing both constitutions."[360]

Assuming a legally minded observer from outside a legal system were to observe the legal system and note that there are norms of customary law and norms of positive (written) law, Kelsen's comment would be that it is the *Grundnorm* from which both derive their validity. However,

> "It seems that he [the observer] can only identify the legal system with the help of the basic norm whereas the basic norm can be identified only after the identity of the legal system has been established. Even if our diligent observer succeeds in establishing that at least two sets of norms are effective in the society, one, a set of customary norms, the other, of enacted norms, there will be nothing a Kelsenite can say to help him decide whether or not they form one system or two. There is nothing in the theory to

[359] Ibid., at 128.
[360] Ibid.

> prevent two legal systems from applying to the same territory. Everything depends on the ability to identify the basic norm, but it cannot be identified before the identity of the legal system is known. Therefore, the basic norm cannot solve the problem of identity and unity of legal systems, and Kelsen has no other solution."[361]

In other words, Kelsen's conclusions follow from an internally coherent argument, but they necessitate the assumption of disputable axioms. These axioms neither conform to the traditional view of the law, nor are they undisputed in legal philosophical circles, in part precisely due to the former reason.

What remains to be made explicit, therefore, is that the understanding of sovereignties developed in this book neither conforms to nor accepts Kelsen's most fundamental axiom. Instead, it takes a more Hartian approach, which accounts for constitutive as well as constituted sovereignty, and it therefore allows for conceptions of popular sovereignty to be incorporated and explained as theories of sovereignty as well as other types of theories. A Kelsenite approach cannot explain how conceptions of popular sovereignty are linked to the foundation and source of a legal system, whereas the Hart-inspired notion of constitutive sovereignty does.

Even though Kelsen's understanding of the legal order and the separation of law and social science in a pure legal theory is not accepted here, we see that the elements of *legislative authority* and *supremacy* which form cornerstones particularly of the notion of internal constituted sovereignty and which are recognised and protected in turn by external constituted sovereignty also return in Kelsen's theory of sovereignty. In the following, we will explore whether this also holds true for other theories of sovereignty.

[361] Ibid., at 129.

3.4.2. Chinese Sovereignty

Sovereignty is sometimes held to be an imperialist concept, imposed by Western states and used by them to justify or further colonialism.[362] While the origins of the concept are, historically speaking, undeniably Western, that does not mean that the concept today is not employed also by non-Western states, some of them former colonies. India's conception of popular sovereignty is one such example and the following section on the Chinese understanding of state sovereignty is another.

Wim Muller considers the Chinese conception of sovereignty in *China's sovereignty in international law: from historical grievance to pragmatic tool*.[363] As stated, the concept of sovereignty is Western in origin and therefore China did not come into contact with it upon its conception. It was not until after the Opium Wars (1839 – 1842) that China started "to make use of [the concept of sovereignty] to defend itself against foreign invasions and assert China's sovereign equality" and, even then, such use was infrequent.[364] China became more involved in the international community and in international organisations, first and foremost the United Nations, in the 1970s—rather recently— considering that Western states have been using the Westphalian notion of sovereignty since after the signing of the Treaties of Westphalia (1648).[365] In current times, China has embraced the concept of sovereignty as a means to promote and protect territorial integrity and non-intervention:

> "Chinese references to sovereignty usually entail protection of either China's own independence or its unwillingness to interfere in what its government considers the internal affairs of other states—for example, recent statements by China's representative

[362] Cf. David Strang, 'Contested Sovereignty: The Social Construction of Colonial Imperialism', *Cambridge Studies in International Relations*, 46 (1996), 22-49.
[363] Muller, 'China's Sovereignty in International Law: From Historical Grievance to Pragmatic Tool'.
[364] Ibid., at 43.
[365] Ibid., at 44 f.

> to the Security Council calling on UNSMIS to 'fully respect Syria's sovereignty and dignity' and on states to respect 'the sovereignty, independence and territorial integrity of Libya' and the 'sovereignty and territorial integrity of Serbia' regarding the Kosovo question. Even better known are the numerous statements in which the Chinese government has asserted that 'the issue of human rights falls by and large within the sovereignty of each country.'"[366]

Muller considers that "both the call for respect towards other states' sovereignty and the invocations of its own reflect unwillingness on the part of the Chinese government to meddle in other states' business, or let them meddle in its own."[367] In other words, the doctrine of non-intervention is the focal point of the Chinese conception of state sovereignty. Already in 1978, Kim suggested that China had embraced the Western system centred around state sovereignty, with the intention to "carry the logic of state sovereignty to an untenable extreme" likely born from a siege mentality arising from China's history of unequal treaties.[368] While Muller's inquiry indicates that this trend has continued, China's insistence on sovereignty has nevertheless not been absolute.[369] There are instances in which China did not insist on non-interference, provided that interfering action was authorised by the United Nations' Security Council and/or requested by the state itself.[370] Carlson (2004) holds that Chinese policy on this matter is one of biding its time and picking its fights.[371] Given that China is often seen as one of the main

[366] Ibid., at 36.
[367] Ibid.
[368] Samuel S. Kim, 'People's Republic of China and the Charter-Based International Legal Order, The', *Am. J. Int'l L.*, 72 (1978), 317-49 at 347.
[369] Muller, 'China's Sovereignty in International Law: From Historical Grievance to Pragmatic Tool', at 51.
[370] Ibid., at 55.
[371] Allen Carson, 'Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention', *Pacific Affairs*, 77/1 (2004), 9-27 at 14.

protectors of sovereignty,[372] it is noteworthy that its recent position towards sovereignty and particularly the issue of intervention in other states is not "much of an outlier when compared with other states within the international system."[373] China's position on sovereignty can thus be understood as exemplifying, at least to some degree, the position of developing countries, many of which have suffered injustices at the hand of Western imperialist nations throughout history and now use the concept of sovereignty to prevent further interventions in their internal affairs and to promote their own freedom and equality. In other words, despite not being free of a certain irony, China's insistence on state sovereignty and non-intervention can be classified as anti-imperialist, with a "need for the democratization of international relations, and the imperative of peaceful dialogue based on the principle of equality between all civilizations in the world", as is also the case for other developing countries.[374] China's permanent seat in the Security Council means simply that it has a voice and a vote and, equally, that it is—more often than other developing states—in a position where it is under pressure to explain its political choices.[375] That these are political—and pragmatic—choices does not detract from the fact that they influence the legal concept of state sovereignty as developed by both state practice, *opinio iuris*, and the case law of international courts with regard to the issue.

In short, territorial integrity, the doctrine of non-intervention and independence are key components of the Chinese conception of state sovereignty, meaning that China's position is largely orthodox, oriented

[372] Cf. Muller, 'China's Sovereignty in International Law: From Historical Grievance to Pragmatic Tool', at 35; Carson, 'Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention', at 9.
[373] Carson, 'Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention', at 25.
[374] Muller, 'China's Sovereignty in International Law: From Historical Grievance to Pragmatic Tool', at 55.
[375] Carson, 'Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention', at 25.

to the classical positivist model of sovereignty which was developed and elaborated on in the *Island of Palmas* and the *Lotus* cases respectively.[376] Nevertheless, it is not completely static but is subject to developments, particularly with regard to notions of humanitarian intervention. As such, China's understanding of sovereignty appears to fit neatly with the notion of external constituted sovereignty developed here.

[376] Muller, 'China's Sovereignty in International Law: From Historical Grievance to Pragmatic Tool', at 46.

Part 4: Application

A large amount of time and words has been spent, in this book, on a very theoretical account of sovereignty, or rather of sovereignties, on developing different concepts in an analytically coherent manner. In the following, these concepts and the theoretical account developed in this book are applied to questions of the current times involving the notion of sovereignty. We will see that the insights developed in the theoretical part of this book can also shed some light on the more practical issues of our time. The issues considered here are the relationship between the European Union and its Member States, the tension between state sovereignty and humanitarian intervention, the question whether there can be religious states, i.e. states which are constituted not by the people but by a religious entity and, lastly, what the relationship between sovereignty and secession is. These topics have been the subject of a considerable amount of academic debate and literature. The purpose of this chapter is not to cover that body of literature, but rather to provide a starting point for future debates and a visualisation of how the theory of different concepts of sovereignty developed in this book can be applied to current discourse. This also means that this chapter does not seek to provide definite answers or end the on-going discussions on these topics; instead, it seeks to rephrase the discussions in a conceptually clearer light. Nevertheless, conclusions will be drawn where possible.

4.1. Sovereignty and the European Union

One issue often raised with regard to the European Union is whether its Member States are still sovereign or whether there is a clash between the sovereignty of a Member State and that of the European Union. [377] In the

[377] For an in-depth analysis of the various conflicts that can be identified with regard to the sovereignty of the European Union vis-à-vis its Member States, cf. Bruno De Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition', *Maastricht Journal of European and Comparative Law*, (1995), 145-73.

following, we will explore how the European Union fits into the framework of sovereignty developed in this book.

A first step in determining whether the European Union is sovereign is to specify the type of sovereignty the EU could or could not have. Regarding external constituted sovereignty, we have seen that international law attaches the status of sovereignty to states. The notion that the EU is *sui generis* is widely accepted; the notion that it is a state is not. International law does not attach this status to the European Union, consequently. In this sense, the EU is no more sovereign than the United Nations. External constitutive sovereignty, meanwhile, is a power exercised by the set of states, instantiating the convention that norms of international law are pre-emptive and final. In this sense, the European Union is no more sovereign than one individual is in the sense of internal constitutive sovereignty or any individual state in the external constitutive sense. While a case can be made that the aforementioned convention is instantiated not only by states, but by all agents on the international level, sovereignty in this sense remains a collective power, not something individual actors have. This leaves us to consider internal forms of sovereignty.

It should be immediately obvious that the EU itself does not and cannot have internal constitutive sovereignty; this is a power exercised by people to constitute a legal system. The relevant question for our purposes in this chapter is then whether the European Union is sovereign in the sense of internal constituted sovereignty, not sovereign at all, or whether it possesses some other form of sovereignty. There are three possibilities with regard to the European Union and how it fits into the framework of this book; which one is the most accurate is a question of sociological fact or a matter for international relations. Let us consider the three in turn.

4.1.1. People(s)

A first option is that a European people or the people of the Member States constitute the legal system of the European Union.[378] Internal constitutive sovereignty is the power of peoples to constitute a legal system via a governing convention to regard the norms of that system as preemptive and final. For people(s) to have constituted the European legal system, this would mean that people(s) instantiate such a governing convention, either instead or in addition to the governing conventions of their national systems. To some extent, the people living in the EU do precisely this: they accept the application of European Union law, they vote in elections to the European Parliament (even though voter turnout for this institution is quite low), and thereby they instantiate a convention to regard the norms created by the European Union as pre-emptive and final. Does this mean that the European Union possesses internal constituted sovereignty in the same way that nation states currently do? There are three arguments why this is not the case and one reason why it is.

The first argument against is this is the following. Let us assume that the European Union possessed ICDS, but that the people were to revolt against it, that they wanted to deconstruct the legal system they have constituted via their constitutive sovereignty. In doing so, the people would have to revolt against their national legal systems; they would have to revolt against the courts that apply EU law to cases, the administration that executes EU law, and the legislature or the politicians that have made it possible for the European Union to come into existence in the first place. A revolution against the European Union would, at the same time, be a revolution against the Member States. This suggests that it is not—or not only—people(s) that constitute the legal system of the

[378] When it comes to the people that constitutes, it is always a set of individuals. The set of individuals that comprises all the peoples of the Member States of the European Union and the set of individuals that comprises the people of the European Union might be identical.

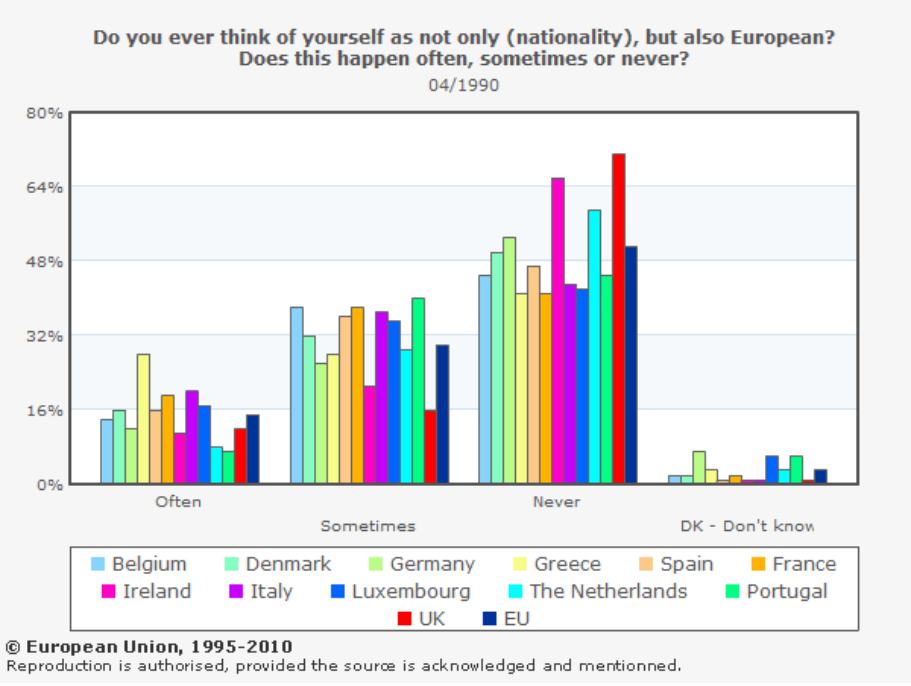
European Union. We will consider the possibility that it is states which constitute the European Union in the following; the scenario of revolution shows why this is a more likely option than arguing that the European Union is constituted solely by people(s).

A second argument rests on the fact that, even if the European Union is constituted by people(s), this does not mean that it is sovereign. The constitutive sovereign constitutes the legal system, but it is the legal system that attributes sovereignty to an entity, be it the state or another entity such as the European Union. That the step from ICVS to ICDS is not immediate does not take away that EU law could attach the status of sovereignty to the European Union, provided that the legal system of the European Union is indeed constituted by people(s). The question remains, however, whether it actually does so. In *Van Gend & Loos*, the institutions of the European Union (then: European Communities) were described as "endowed with sovereign rights". We have already seen, however, that there is a distinction to be made between sovereign rights, or sovereign competences, and the status of sovereignty itself.[379] The competences, duties, permissions, prohibitions, etc. of an entity are not to be equated with its sovereignty, although these competences or rights,[380] when traditionally exercised by a sovereign entity, are often referred to as "sovereign competences" or "sovereign rights". It is not obvious, then, that the European Union claims sovereignty or, rather, that sovereignty is attributed to it by EU law.

The last and weakest argument against the European Union possessing internal constitutive sovereignty is this: there are indications that the people(s) do not consider European Union law pre-emptive and final. It bears mentioning here that the following is at best indicative and not conclusive; for conclusive data, sociological studies will need to be carried out to evaluate whether people(s) do actually instantiate a

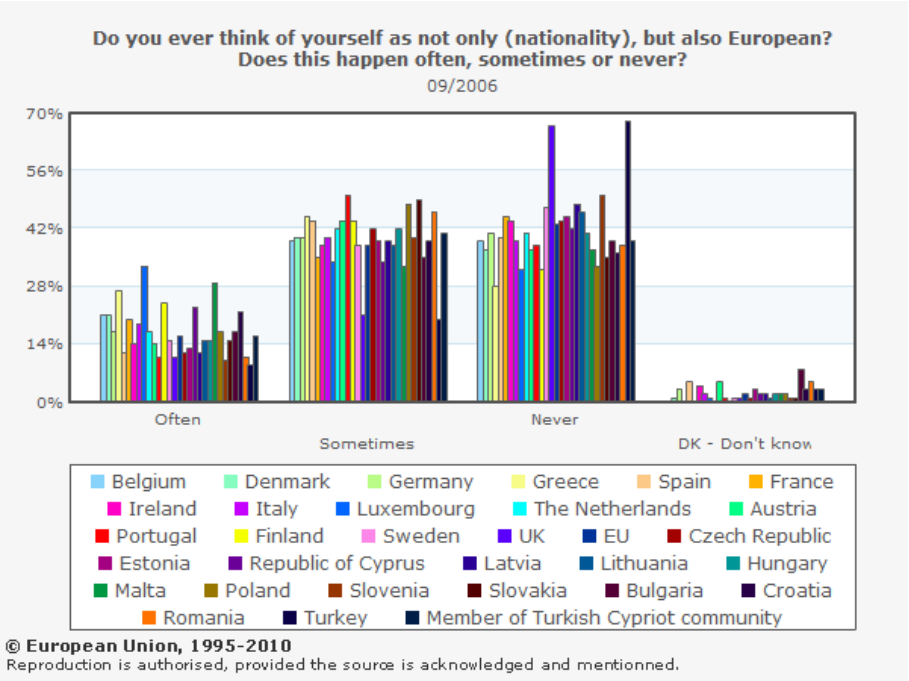
[379] Cf. Section 2.2, in particular 2.2.4.
[380] For the sake of brevity, the entire list will not be repeated each time.

separate governing convention for the European Union. The Euro Barometer of the European Commission does not offer this kind of data, but it might nevertheless offer some indication. The European Commission has been monitoring and evaluating public opinion on issues regarding the EU since 1972. These public opinion polls are captured in the so-called Euro Barometer.[381] One question asked is how often individuals think of themselves as European in addition to belonging to their own nationality.



Comparing the public opinion on this question from 1990 with the public opinion on the same question in 2006—now taking into account more states so as to reflect the developments since 1990—indicates that the majority of European peoples do not consider themselves as (a) European people.

[381] European Commission, 'Public Opinion: Eurobarometer Surveys', (updated 24/02/2015) <http://ec.europa.eu/public_opinion/index_en.htm>, accessed 02 March 2015.



The Euro Barometer suggests that individuals within the European Union do not consider themselves European so much as they consider themselves a national of their state. This can be taken as indicative that they do not deliberately instantiate a European governing convention over the governing convention of their state. However, to derive anything more from it would be to misunderstand constitutive sovereignty, which is part of why the last con-argument is the weakest and leads us immediately to the argument for a European Union constituted by people(s), possibly with its own internal constituted sovereignty. As we have seen in section 2.1. of this book, exercising constitutive sovereignty is done via collective instantiations of a governing convention or the deconstruction thereof. The individuals instantiating the convention do not need to do so deliberately; they do not even need to be aware that they are contributing to an exercise of constitutive sovereignty. This 'undemanding' nature of constitutive sovereignty means that, even if the people(s) might not mean to, they might nevertheless be constituting the European legal order.

In the absence of sociological studies as to whether the people(s) currently constitute the European legal order, the decisive argument is this: in a clash between the European Union and a Member State—e.g. the German Federal Constitutional Court and the Court of Justice of the European Union—it is unlikely that the constitutive sovereign (people(s)) would support the European legal system over the national one. This statement again uses the Euro Barometer as an indication; we cannot be certain that this is correct until it actually happens. Until a situation comes to pass—if ever—in which the people(s) are faced with a choice whether to instantiate the governing convention of their state over that of the EU, we are left with the argument that it is not solely the people(s) that constitute the European legal order.[382]

This brings us to the other two possibilities of how the European Union might fit into the framework of this work, namely with states constituting the European legal order, either as a sub-set of international law or as a *sui generis* legal order.

4.1.2. States and International Law

Looking at the coming into being of the European Union from a historical viewpoint, we see that it was created on the basis of treaties under international law and its competences and institutional set-up are still regulated by treaties. Under international law, it is an exercise of sovereign power to accept limitations to one's own set of competences: obligations of a state, for example on the basis of ratified treaties, do not impair or curtail sovereignty but rather are a consequence of its exercise.[383] This view is also echoed by actors on the European level.

[382] When choosing the European legal order above their national one, people(s) would deconstruct the national legal order and constitute/maintain the European one. Thereafter, the European legal order would be constituted solely by a European people, as there would be no more nation states in the European Union.

[383] See e.g. 'Case of the S.S. "Wimbledon" (UK, Japan)', at 35.; cf. also Martti Koskenniemi, 'Conclusions: Vocabularies of Sovereignty - Powers of a Paradox', in

Advocate General Kokott, for example, points out that "the principle stated in the first sentence of Article 5(1) TEU of conferred powers in order to define the competences of the Union is both an expression of that [the Member States'] sovereignty and a safeguard of it."[384] According to this view, the European Union is an international organisation. States (sovereign in the external and internal constituted sense) have transferred competences to this international organisation, allowing it to act within the limits of its conferred powers. This does not touch upon the internal constituted sovereignty of these states. It shows, however, that equating the status of sovereignty with (some of) its consequences leads to confusion, as has been the case with the question whether the European Union is sovereign. The fact that some powers usually exercised by sovereign entities have been transferred to it does not yet make it so.

Under this view, the European Union is *sui generis*, not in the sense that it is not an international organisation and not in the sense that it has its own kind of sovereignty, but rather in the sense that far more far-reaching powers have been transferred to it than to any other international organisation. This understanding of European Union law challenges many traditional views, such as the idea that international law does not address citizens of states, but states itself. What it does not challenge, however, is the sovereignty of its Member States as understood in this book.

Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010) at 225 ff. for a more elaborate view on this notion. Koskenniemi finds the limitation of this view in the "auto-limitation" and paradoxical nature it allegedly invokes; however, separating constitutive and constituted sovereignty avoids that charge.

[384] View of Advocate General Kokott, Case C-370/12, *Thomas Pringle v Government of Ireland*, [2012], ECLI:EU:C:2012:675, at 137. The Court in its judgment followed the conclusion proposed by AG Kokott, but it did not mention the word "sovereignty" in its judgment.

Is this view convincing, however? An argument could equally be made that the European legal order is not a subset of international law, but rather its own, entirely new—and properly *sui generis*—legal order. We will consider this possibility and what it would mean in the next section. Before that, let us briefly consider why seeing the European legal order as a subset of the international legal order might make sense. Firstly, as already mentioned, the history of the European Union and that it still finds its basis in treaties speak to this view. This is also supported by the fact that, if the people(s) were to revolt against the European Union, this would mean a revolution against their own states and the state apparatus that has created the European Union and applies and enforces its laws. This supports the view that the European Union—and with it the limitation of sovereign powers of the Member States—are an exercise of external constituted sovereignty. Moreover, we will see that the requirement of conceptual parsimony is a strong argument for this view—but of course, conceptual parsimony should not stand in the way of theory corresponding with states of affairs in the world. Therefore, let us consider the third option and evaluate it.

4.1.3. States and a *sui generis* Legal Order

If we do not consider the European Union a subset of international law, but rather a truly *sui generis* legal order, we must ask ourselves who constituted and continues to constitute this legal order. In section 4.1.1. we have seen that this is partially, but decidedly not solely, the people(s). The constitutive sovereign with regard to the European Union is its Member States collectively, just as the constitutive sovereign of international law is states collectively. If the European Union is a subset of international law, this is simply external constitutive sovereignty; if it is not, we have to add a third level to the analysis of sovereignty. Let us call this European constitutive sovereignty (EUCVS). In this scenario, there could easily be a corresponding European constituted sovereignty

(EUCDS) attributed to the European Union by European Union law, to which European Union law then gives further meaning. What this shows is that the distinction between constitutive and constituted sovereignty can and should be made consistently and not only with regard to the national legal system, where distinctions between *pouvoir constituant* and *pouvoir constitué*, or popular and state sovereignty are made already, but also with regard to other legal systems that do not coincide with the traditional nation state. Notably, public international law in general and European Union law are included here of course.

What speaks against this view, in addition to conceptual parsimony, is that the European Union claims sovereign rights for itself, but not sovereignty. However, it also claims to be a legal order of its own, rather than a subset of international law. Making a conceptually clear distinction between these last two options requires a theory of legal orders. While great thinkers such as Kelsen and Raz have written on this,[385] the European Union poses many challenges to such a theory and, consequently, future research is required on this matter.

4.1.4. Concluding Remarks

While it is not possible to give a conclusive answer as to the place of the European Union in the framework of this book without further research, both sociological research and research into the nature of legal systems, we can attempt, on the basis of our present knowledge and the arguments given, to choose the option that has the greatest explanatory value. However, it bears mentioning that the purpose of this book is not to provide answers to substantive questions, but rather to offer the analytical tools to debate these matters in a conceptually clear manner.

[385] Kelsen, *Pure Theory of Law*.; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn.; Clarendon Press, 1980).

That said, the arguments in favour of understanding the European Union as a subset of international law seem to outweigh the arguments in favour of seeing it as a *sui generis* legal order.

4.2. Humanitarian Intervention

The tension between the notion of humanitarian intervention and state sovereignty (ECDS) has been the topic of frequent discussion, in general,[386] with regard to the policies of individual states[387] or with regard to specific situations.[388] This tension derives from an understanding of sovereignty that relies heavily on the doctrine of non-intervention and the idea that, on its own territory, a state is permitted to do whatever it pleases. This understanding of sovereignty seems at odds with the idea that (some) human rights must be protected and that certain gross and wide-spread human rights violations are so significant as to trump the doctrine of non-intervention and call for action by states other than the one on whose territory these violations occur, *especially* when it is that state committing the violations in the first place.

The notion of humanitarian intervention is closely related to the concept of Responsibility to Protect (R2P). Either notion also includes an element of humanitarian assistance; the main focus here, however, will be on forcible, i.e. military, intervention by one or several states on the territory of another state on humanitarian grounds. As such, humanitarian intervention is used as "an autonomous justification for the use of armed force in another State distinct from other legal justifications" and defined

[386] Bruce Cronin, 'The Tension between Sovereignty and Intervention in the Prevention of Genocide', *Human Rights Review*, 8/4 (2007), 293-305.; Matthews Weinert, 'Bridging the Human Rights—Sovereignty Divide: Theoretical Foundations of a Democratic Sovereignty', *Human Rights Review*, 2 (2007), 5-32.
[387] Wu, 'Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises'.
[388] Christian Henderson, 'The Arab Spring and the Notion of External State Sovereignty in International Law', *Liverpool Law Review*, 35/2 (2014), 175-92.

as "the use of force to protect people in another State from gross and systematic human rights violations committed against them, or more generally to avert a humanitarian catastrophe, when the target State is unwilling or unable to act."[389] This definition is broad and

> "[…] could be applied to almost any instance of use of military force that has been claimed to have a humanitarian objective or to have been based on humanitarian considerations. The term is not one of art, however: it does not appear in any international treaties; and it cannot be said that its boundaries are yet clearly delineated."[390]

A frequent argument that humanitarian intervention is justified on moral grounds sometimes yields the reply that few, if any, actual interventions have been motivated solely by humanitarian considerations and that states usually follow their own interest as opposed to that of a foreign populace in deciding whether to intervene. Nardin (2013) responds to this objection that it might not be the motive that matters, but rather the consequences.[391] This consequentialist approach to the evaluation of whether an intervention is morally justified is interesting, especially because the argument from motive that it responds to is frequently made. It does, however, contradict the idea of *just cause*: that a state may enter a war only for the right reason, which is seen as (one of) the most fundamental rule(s) of *ius ad bellum*.[392] Regardless, it bears keeping in mind that it is an argument towards *moral* justification. Arguments toward moral justification and arguments toward legal justification are

[389] Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) at A.3.
[390] Ibid.
[391] Cf. Terry Nardin, 'From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention', *European Journal of International Law*, 24/1 (2013), 67-82 at 70 f.
[392] Brian Orend, 'War', in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (URL = <http://plato.stanford.edu/archives/fall2008/entries/war/#2>, 2008) at 2.1. It conflicts with the idea of "right intentions" to an even greater extent.

not the same. Hence, the question here is not whether humanitarian interventions are or can be morally justified, but rather whether there is a legal rule on the basis of which they are permitted or, more specifically, no legal rule on the basis of which they are prohibited.[393] With regard to general international law, the doctrine of non-intervention connected to the status of sovereignty appears to constitute a legal rule prohibiting intervention. The questions are therefore whether the doctrine of non-intervention prohibits intervention absolutely, i.e. without exception and in all cases, whether there is a permissive rule in certain cases, and what status this permissive rule has.

The first of these is a question which the International Commission on Intervention and State Sovereignty (ICISS) also considered when they developed the concept of Responsibility to Protect. They hold that there is considerable consent on six criteria for the justification of military intervention on humanitarian grounds: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.[394]

The question of right authority is particularly interesting to our inquiry into whether there exists a permissive rule regarding humanitarian intervention in the international legal system. In the Charter of the United Nations, the doctrine of non-intervention is found in Article 2.4 with regard to other states and in Article 2.7 with regard to the United Nations itself. Nevertheless, Article 24 gives the Security Council the mandate to take action for the maintenance of international peace and security. Chapter VII finally specifies that the Security Council may take action when it "determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression".[395] It also specifies what kind of action

[393] Whether a permissive rule or merely the lack of a prohibition is required depends on whether the system generally allows all things not expressly prohibited or whether it allows only those things expressly permitted.
[394] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', in International Development Research Centre (ed.), (Ottawa, 2001) at 4.16.
[395] 'Charter of the United Nations', at Article 39.

the Security Council may take, ranging from provisional measures[396] to the interruption of economic relations, or the means of communication, or the severing diplomatic relations[397] to "such action by air, sea or land forces as may be necessary to maintain or restore international peace and security".[398] Article 42, in short, grants the Security Council the power to resort to or permit the use of force.[399] While there are of course many other questions to answer and aspects to consider, such as clearly defining "international peace and security" or "necessary", as well as questions of political will, veto powers by the Permanent Five in the Security Council and many more, what this shows is that there is a possibility for (military) intervention on the territory of a state.

The analysis of external constituted sovereignty in this book has shown that, while the doctrine of non-intervention by other states and full power on a state's own territory come attached to this concept of sovereignty, they are not necessary to it. External constituted sovereignty is a status that international law applies to certain entities, namely states, and this status comes with consequential rules attached to it. Some of these rules are, for example, concerned with non-intervention, but these are not unchangeable. The consequential rules of sovereignty can change without sovereignty changing.[400] Understanding external constituted sovereignty in this manner means that the tension between humanitarian intervention and sovereignty is misplaced and does not actually exist, provided that that the rules which seem to conflict are both attached to the status of sovereignty. Instead of debating whether the notion of sovereignty and the notion of humanitarian intervention can co-exist, what should be debated is whether a "more restrictive rule" prohibiting states from

[396] Ibid., at Article 40.
[397] Ibid., at Article 41.
[398] Ibid., at Article 42.
[399] Cf. International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', at 6.3.
[400] For a more in-depth discussion of this point, please refer to the chapter on external constituted sovereignty in this book.

certain acts even on their own territory exists and, equally, whether a "more permissive rule" exists, giving other states the permission to intervene on the territory of the first state. This is not a debate or process that necessarily involves the concept of sovereignty, unless "sovereignty" is misunderstood to mean something that it does not.

This means that the often-perceived tension and incompatibility between state sovereignty on the one hand and humanitarian intervention on the other hand depends entirely on the state of positive international law. If a permissive rule to the effect of humanitarian intervention exists, there is no conflict between sovereignty and humanitarian intervention, unless the permissive rule does not attach to the status of sovereignty. If no such attached, permissive rule exists, however, the doctrine of non-intervention, which is attached to the notion of sovereignty, trumps the (in this case impermissible) humanitarian intervention. If a permissive rule exists, but is not attached to the status of sovereignty, again positive international law is decisive: a conflict rule will decide which trumps the other.

Concretely and currently, this means that, on the assumption that membership of the United Nations, with all this entails, is attached to the status of sovereignty, humanitarian interventions do not violate sovereignty, provided that they are authorised by the Security Council under Chapter VII. This is the case, because there are norms providing for the possibility that the Security Council can authorise action. In other words, the world of law of which external constituted sovereignty, and then namely the doctrine of non-intervention, is part, also contains the competences for the Security Council to do this. That means that there is no violation of a right of exclusive handling of internal affairs, but rather that any such right that may exist is contingent on the Security Council not exercising its competence to create the permission for other states to interfere in the internal affairs of a state. In short, while there is an obvious conflict, already visible in the nomenclature, between the

doctrine of non-intervention (which is attached to the concept of external constituted sovereignty) and humanitarian intervention, it is not necessarily true that there is a conflict between state sovereignty and humanitarian intervention. This is because sovereignty is not equivalent to non-intervention; instead, non-intervention is but one thing attached to the status of sovereignty. Instead of using sovereignty as a claim against intervention, the discourse in cases of potential humanitarian intervention should be focused on the question whether there is a permissive rule and whether this permissive rule is attached to the status of sovereignty or, if it is not, whether conflict rules of international law—e.g. *lex specialis*—allow for it to trump the more general doctrine of non-intervention. This is a question that can be answered in the abstract, after which any debate surrounding humanitarian intervention will no longer need to contend with the issue of sovereignty, but merely will have to test the criteria for humanitarian intervention in the specific case.[401]

4.3. Religious States

In 2014, the group previously known as "Islamic State in Iraq and Levant" (ISIL) or "Islamic State in Iraq and al-Sham" or "Islamic State in Iraq and Syria" (ISIS) declared that they are now called "Islamic State" (IS).[402] At the same time, they also declared a worldwide

[401] This is, of course, provided that the question is answered positively. If the doctrine of non-intervention trumps the permissive rule, humanitarian intervention is always impermissible.

[402] On the issue of names: Faisal Irshaid, 'Isis, Isil or Da'ish? What to Call Militants in Iraq', *BBC News* <http://www.bbc.com/news/world-middle-east-27994277>, accessed 23 February 2015.

caliphate.[403] This declaration involved declaring null all "emirates, groups, *states*, and organizations".[404]

Much can and has been said about the existence and legitimacy of IS,[405] as well as its human rights abuses, war crimes and crimes against humanity.[406] Many of the questions raised by its existence—such as how to act in response to it[407]—cannot be covered here, as they fall outside of the scope of this research. However, the question of whether IS can claim sovereignty and, if so, on what basis, is very much relevant here.

The IS claim to or declaration of a caliphate entails a declaration of a state ruled by a single political and religious leader, in this case Abu Bakr al-Baghdadi.[408] While we have seen that internal constituted sovereignty initially answered the question whether religious or political authority should reign supreme, this is nevertheless an unequivocal claim of sovereignty. The rhetoric involved in this claim is that al-Baghdadi has the authority because he is Mohammed's successor.[409] As such, his claim to political authority is based on religious grounds. This raises the question whether internal constituted sovereignty can have as its basis a theological entity or claim, or in other words whether internal constitutive sovereignty is necessarily sociological and of the people, or if it can be exercised by a deity or its proxy, constituting the legal system.

---

[403] Euronews, 'Isil Renames Itself 'Islamic State' and Declares Caliphate in Captured Territory', *Euronews* (2014).
[404] Anonymous, 'Isis Spokesman Declares Caliphate, Rebrands Group as "Islamic State"', *Jihadist News* (SITE Monitoring Service Jihadist Threat 2014). (emphasis added)
[405] Australian Government, 'Islamic State', in National Security (ed.).; BBC News, 'What Is Islamic State?', *BBC News Middle East* <http://www.bbc.com/news/world-middle-east-29052144>, accessed 23 February 2015.
[406] Amnesty International, 'Iraq: Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq', in Amnesty International (ed.), (London, 2014).
[407] UNSC, 'Resolution 2178', S/RES/2178 (2014).
[408] BBC News, 'What Is Islamic State?'.
[409] BBC News, 'Isis Rebels Declare 'Islamic State' in Iraq and Syria', *BBC News Middle East* <http://www.bbc.com/news/world-middle-east-28082962>, accessed 23 February 2015.

According to the theory developed in this book, and in contrast to the rhetoric used for example by IS, the answer must be negative: internal constitutive sovereignty is necessarily exercised by a people and it is the people, their adherence to the governing convention/rule of recognition, and their social attitude towards that same governing convention that constitutes and maintains the legal system. However, given that internal constitutive sovereignty is rather undemanding in nature, the reasons that people take a certain social attitude or effectively adhere to the norms of the system (thereby instantiating the governing convention) and their attitudes to any non-adherence can differ. In other words, it is very much possible that the people are convinced of religious rhetoric and claims and therefore take the required attitude (of convention or even endorsement consent) to the normative system, as well as adhere to the norms of the system. In other words, while the people constituting the system might believe that it is not them but a theological entity doing so, it nevertheless remains the people doing the actual constituting, no matter what reasons they might have for it or what their beliefs in this regard might be.

A further point of interest might be applying the distinction between convention consent, endorsement consent, and mastery to the people living on the territory currently controlled by IS. According to the BBC and its sources, IS controls a territory of about 40,000m² within Iraq and Syria, although some estimate the controlled territory to be as large as 90,000m². In this territory roughly eight million people live under full or partial IS control. The number of people actively fighting for IS is estimated to be around 31,000, of which 30% are believed to be convinced by the ideology, with "the remainder joining out of fear or coercion."[410] While not a lot of definite information is known, some conclusions can nevertheless be drawn: the fact that some of the fighters are believed to be involved only out of fear or coercion implies that they

[410] BBC News, 'What Is Islamic State?'.

do not give their endorsement consent and it is likely that they do not even give convention consent to the governing convention that underlies IS' claim to authority. Nevertheless, we have seen that a legal system requires social attitude and efficacy and, while the social attitude element here is one of acquiescence at best, the efficacy of the system is given. The great disparity between the number of fighters and the number of people living under the partial or full control of IS, often suffering from grave human rights violations, can be explained via the distinction between mastered people living under the control of a regime and the enforcement cadre of that regime. The individuals in the enforcement cadre give at least convention if not endorsement consent to the regime—in this case, the fighters convinced by the ideology can be classified as giving endorsement consent—while ensuring the efficacy of the legal system and making deconstruction of the system via the negative side of constitutive sovereignty more difficult, if not impossible, for the mastered individuals.

What the example of IS, and in particular the analysis of the situation in terms of convention and endorsement consent as well as mastery, also shows is that the existence of a legal system or a claim to authority is distinct from its legitimacy. In other words, we can use the theory developed in this book to determine whether a legal system exists and what form(s) of sovereignty are present or can be attributed to the system, but we cannot use the same theory to determine the legitimacy of the system, nor does sovereignty in itself indicate that the sovereign state is legitimate.

4.4. Sovereignty and Secession: Scotland, Catalonia, and Quebec

The example of self-determination and secession has been used earlier in this book to demonstrate how a change on the internal plane can also

mean a change on the external level. In this section, however, we will look at questions surrounding sovereignty and self-determination more generally, using in particular Scotland, Catalonia, and Quebec as examples. To begin with, it is useful to distinguish between several kinds of secession:

> "In what might be called secession in the classic sense, a group in a portion of the territory of a state attempt to create a new state there; secessionists attempt to exit, leaving behind the original state in reduced form. Second, there is irredentist secession, wherein the attempt is not to create a new state, but to merge the seceding territory with a neighboring state. This typically occurs when the majority in the seceding area are of the same ethno-national as that which is predominant in the neighboring state. A third case, exemplified by the dissolution of Czechoslovakia, occurs when there is agreement between the populations or at least the leaders of two regions (which together comprise the whole territory of the state), to split the state into two new states. A fourth case is that of externally-imposed partition of an existing state into two or more new states. In the past partition usually occurred when a deal was struck between two powerful neighboring states at the expense of the state that was partitioned, as with the partitioning of Poland between Nazi Germany and the Soviet Union."[411]

This section will focus on the first of these four types or cases of secession, as the examples in question—Scotland, Catalonia, and Quebec—all fall within this category. Nevertheless, let us briefly consider how internal constitutive sovereignty (ICVS) would interact with the other three types of secession. The irredentist secession requires

[411] Allen Buchanan, 'Secession', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (URL = <http://plato.stanford.edu/archives/sum2013/entries/secession/>, 2013) at 1.

that part of the population of one state ceases to recognise the governing convention of the state of which they are currently part and instead (wishes to) recognise the governing convention of another state. As long as the laws of the current state are still applied to them, this can be classified as a situation of mastery. The third case in which there is agreement to split means that, within an existing state, there are two groups wishing to and ultimately recognising two different governing conventions, thus constituting two separate states, while deconstructing the existing one by ceasing to maintain its governing convention/rule of recognition. The fourth case is perhaps more interesting, because, even though the partition is externally-imposed, this does not mean that ICVS cannot or does not play a role: the people on whom the partition is exposed still need to maintain (i.e. recognise and instantiate) the governing convention of the imposed state. This means that, while they did not constitute it initially, nevertheless they exercise their sovereignty with each act that instantiates the governing convention of the imposed state and, equally (but in the negative sense), with each act that disregards or actively counteracts it. A situation in which the people try to counteract the governing convention but it is nevertheless enforced would be one of mastery, again. An example of an externally-imposed partition and of a people at least partially mastered was the German Democratic Republic (GDR), where the negative side of internal constitutive sovereignty was exercised initially, not by opposing the regime but by leaving it[412] and in 1989 more explicitly.[413]

With regard to the first type of secession, or classic secession, a further distinction can be made. In a situation such as the Scottish one in which a compromise between the holder of internal constituted sovereignty, in this case the state of the United Kingdom, and the internal constitutive sovereign, here the Scottish people, can be reached, self-determination

[412] Mark R. Thompson, 'Why and How East Germans Rebelled', *Theory and Society*, 25/2 (1996), 263-99 at 275.
[413] Cf. Ibid.

does not appear to pose a threat to the legal order the people wish to leave. In situations such as that of Catalonia at the moment, it is quite different, as the Catalan people wish to leave the rest of Spain or at least wish to hold a referendum on the matter, while Spain's wishes are diametrically opposed to this wish of the Catalan people. This is not so much a distinction with regard to the type of secession but rather how it may come about: on a consensual basis or against the wishes of the state that is left in a reduced form. Despite the fact that no secession has actually taken place in any of the three examples, Scotland and Quebec can be understood as secessionist attempts with consent, whereas Catalonia is one without it. In the following, all three will be discussed, starting with the example of Catalonia.

To briefly recapitulate the most recent developments between Catalonia and Spain, in autumn of 2014, Artur Mas signed a decree regarding a referendum of the Catalan people on the questions whether they want Catalonia to be a state and whether they want it to be independent.[414] This call for a referendum has been labelled "illegal" by the Spanish government[415] and the referendum was suspended by the Spanish Constitutional Court.[416] On November 9, a symbolic independence referendum nevertheless took place in which 80.7% of voters opted for independence, with a voter turnout of about 2.3 million people, accounting for approximately 40% of those eligible to vote.[417] Notably, the Spanish deputy prime minster held that "No government, nobody, is above the law because nobody is above the sovereign will of all the

[414] BBC News, 'Catalonia President Signs Independence Referendum Decree', <http://www.bbc.com/news/world-europe-29390774>, accessed 22 February 2015.
[415] Ibid.
[416] Paul Mitchell, 'Spain's Constitutional Court Suspends Catalan Independence Referendum', <http://www.wsws.org/en/articles/2014/10/04/cata-o04.html>, accessed 22 February 2015.
[417] Zeit Online, 'Katalanen Stimmen Für Unabhängigkeit', <http://www.zeit.de/politik/ausland/2014-11/referendum-spanien-katalonien>, accessed 22 February 2015.

Spanish people."[418] In 2013 already, the Catalan parliament declared Catalonia to be a sovereign entity.[419] This places the conflict quite clearly within a discourse of sovereignty and legality.

Arguments for and against the referendum by the Catalan people can be couched in terms of popular sovereignty—either that of the Catalan people, that of the Spanish people all together—or in terms of the sovereignty of the Spanish Constitution or legal system. To untangle which understandings of sovereignty are involved can also bring clarity to the perspectives involved: where arguments are made surrounding the Catalan people or the Spanish people, internal constitutive sovereignty is at play. Arguments regarding the legality or constitutionality of the referendum come from a perspective of internal constituted sovereignty, placing the argument in the world of law of the Spanish national legal system, which again is constituted by the internal constitutive sovereignty of the Spanish people as a whole. We have seen with regard to internal sovereignty and the relationship between the governed and the governing that relationships of mastery, convention consent, and endorsement consent can all be present in the same state with regard to the same governing convention. Furthermore, the notion of a people is not one legally defined. The statute of autonomy for Catalonia calls it a "nation" or "nationality", although the Spanish Constitutional Court has ruled that there is no legal value behind the wording.[420]

[418] Elena Gyldenkerne, 'Catalonian Leader Orders Referendum on Independence from Spain', <http://www.reuters.com/article/2014/09/27/us-spain-catalonia-idUSKCN0HM09120140927>, accessed 22 February 2015.
[419] Vilaweb, 'Declaration of Sovereignty and of the Right to Decide of the Catalan Nation', <http://www.vilaweb.cat/noticia/4076896/20130124/declaration-of-sovereignty-and-of-the-right-to-decide-of-the-catalan-nation.html>, accessed 22 February 2015.
[420] Fiona Govan, 'Catalonia Can Call Itself a 'Nation', Rules Spain's Top Court', *World News* <http://www.telegraph.co.uk/news/worldnews/europe/spain/7861118/Catalonia-can-call-itself-a-nation-rules-Spains-top-court.html>, accessed 12 March 2015 (NB: For the sake of constitutive rather than constituted sovereignty, however, a court ruling is

With regard to the question of the legality of a referendum, the following can be said. It is up to Spanish law to determine the legality of such a referendum; an international right to self-determination might play a role here as well, if it can be argued that the Catalonian situation is one of (post-)colonialism, as this is the context to which it is usually applied. However, it is also worth remembering that constitutive sovereignty, in its function of original constitution (rather than its maintaining or deconstructing function), is extra-legal. In other words, an exercise of internal constitutive sovereignty by the Catalan people establishing an independent Catalan state might be illegal according to Spanish law, but that does not make it *impossible*. Internal constitutive sovereignty does not require a competence. This means that while, legally speaking, from an internal perspective of the Spanish legal system, Catalan secession would be illegal or alternatively—which is another thing entirely—impossible, because the relevant Catalan authorities lack the relevant competences, this would not impact the practical possibility of such a secession and the ability of the Catalan people to constitute, recognise, and maintain a new (Catalan) legal system. This Catalan legal system would be illegal by Spanish standards, but not by its own. A determination of the legality—or illegality—of secession depends, then, on the relative viewpoint taken: from the perspective of the Spanish legal system, it would be illegal, but from the perspective of the (future) Catalan legal system, it would be legal. However, there are further factors to be taken into account, such as the fact that most Catalan people, or at least their political leaders, seem to take an internal viewpoint of the Spanish legal system and offer at least convention consent to that governing convention. This is indicated, for example, by the request of regional president Mas to the world to help convince the Spanish government that Catalonia may hold a binding referendum, as well as by the fact that, after the ruling by the Spanish Constitutional

not authoritative, although it may have the same impact as if it were, depending on how it is perceived by the people in question.)

Court, a symbolic vote was held as opposed to a binding referendum.[421] Catalonia is not revolting or attempting to deconstruct the Spanish legal system on Catalan territory; rather, they are using legal and political means to effect change. This is very much an indicator of convention consent, although certainly not of endorsement consent. Psychologically speaking, this may make a complete break from the Spanish legal system via extra-legal means more unlikely.

The fact that Catalan authorities and people continue to give convention consent to the governing convention of the Spanish legal system is reminiscent of the situations in Canada with regard to Quebec and in the United Kingdom with regard to Scotland. In both cases, solutions were sought within the existing legal framework of the overarching constituted legal system, as opposed to the potential legal system constituted by the secessionist people. In the case of Canada, the Supreme Court dealt with the question of the legality of a unilateral secession of Quebec from Canada under Canadian and under international law. They held, inter alia, that "secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework."[422] However, "[a] clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize."[423] With regard to international law, the Court found that "[a]lthough there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession."[424] This judgment reflects the distinction,

[421] Zeit Online, 'Katalanen Stimmen Für Unabhängigkeit'.
[422] 'Reference Re Secession of Quebec', (Supreme Court, 1998) at 149.
[423] Ibid., at 150.
[424] Ibid., at 155.

although it is not explicitly made, between constituted and constitutive sovereignty and the fact that questions of sovereignty are also questions dependent on who is defined as the holder of sovereignty: considering the whole of the Canadian people(s) as constitutively sovereign and the Canadian Constitution and legal system as constituted sovereign, there is no right to secession, certainly not of unilateral secession. However, narrowing the focus to the Quebec people and their constitutive sovereignty, the Canadian Supreme Court correctly identifies that action on their part in, for example, the form of a referendum, would confer legitimacy on the secessionist movement. Equally, the fact that there is no right to secede under the current constituted legal framework does not take away the possibility of a *de facto* secession using extra-legal, and possibly illegal,[425] means.[426] The conclusion the Court draws from this is that any secession and any secessionist movement requires negotiations from both sides, [427] certainly if legal means are to be used to achieve a *de facto* secession. This introduces a legal duty on both sides of the movement, which is distinct from moral evaluations of a potential secession, as well as being distinct from any judgment on the factual possibility of secession.

In the Scottish case, political agreements resulted in the Scottish Independence Referendum Act 2013, on the basis of which a referendum about the question whether Scotland should be an independent country was asked and ultimately answered by the Scottish people in the negative.[428] The legal situation with regard to unilateral secession had been quite clear: Scotland did not even have the competence to legislate on a referendum before it was granted to it by Westminster Parliament in the Referendum Act 2013. Nevertheless, the same conclusions with

[425] From the perspective of the existing legal system.
[426] Cf. Hampton, *Political Philosophy*, at 249.
[427] 'Reference Re Secession of Quebec', at 88.
[428] BBC News, 'Scottish Referendum: Scotland Votes 'No' to Independence', *BBC News*, <http://m.bbc.com/news/uk-scotland-29270441>, accessed 12 March 2015.

regard to *de facto*, moral, and legal analyses holds true here: they are conceptually distinct and arguments about one or the other are situated in different realms of discourse and should not be conflated. While the above-mentioned legal obligation to negotiate is part of the Canadian legal system, and thus not an argument or a motivator in the Scottish case, nevertheless the Scottish referendum and the political process leading up to it is an example of what such a negotiation can look like. The time leading up to the Scottish referendum also showed the myriad of issues and factors to be considered in the case of a possible referendum, such as currency and membership of international organisations.

With regard to all three cases covered here, there already exists a people—Catalan, Scottish or Quebec—that identifies as such. However, it should be noted that an exercise of constitutive sovereignty can constitute not only a legal system but, at the same time, a people. The Constitution of the United States of America, for example, created not only the legal system but also constituted the US-American people. Nevertheless, historical developments can mean that a group of individuals already identifies as a people before the moment of the constitution of their legal system. This may go hand-in-hand with the existence of devolution or federalism, but it does not need to. We also see that, particularly in the cases of Scotland and Quebec, the original state worked with the potentially secessionist movement to some extent: granting the legal means for a secession through a referendum or implementing a duty to negotiate. This is by no means always the case. In situations of mastery, the exercise of constitutive sovereignty is suppressed for example by means of military, propaganda, or the curtailing of rights such as free speech allowing for coordination. As such, it is doubtful whether most individuals in North Korea can exercise constitutive sovereignty, be it in its maintaining or in its deconstructive sense. This also means that, because it sometimes takes constitutive

sovereignty to constitute a people, there may not be a North Korean people. However, ascertaining this falls outside the scope of this book and would require sociological research. Even within the scope of this book, some questions remain open, particularly the discussion as to whether Scotland would be an automatic member of the European Union or would need to go through the application process itself 'again'—when it formerly did so as part of the United Kingdom—raises questions regarding the division between the internal and external level. These questions will be considered in the next part.

What the above analysis shows is that sovereignty is a relative concept—not in the sense to which "absolute" is the antonym, but rather in the sense of being relative *to something*. What is meant here is that sovereignty, especially in the internal sense, is relative to its holder. The concept of sovereignty does not change, but whether we talk about the sovereignty of the Catalan people or that of the Spanish people as a whole makes a difference with regard to which conclusions must be drawn from involving the concept of sovereignty in the debate. This makes sovereignty a poor trump card to pull into arguments where different perspectives or differing claims to sovereignty are involved.

4.5. The Role of Recognition

In the case of Kosovo, representatives of the people issued a unilateral declaration of independence, the legality of which was considered by the International Court of Justice in an Advisory Opinion. The Advisory Opinion has been discussed elsewhere in this book,[429] but leaving aside the Court's Advisory Opinion as such for a moment, we can use the case of Kosovo as an example to consider in more detail the role of recognition on the external/international plane.

[429] Cf. Section 2.5.

The unilateral declaration of independence was simultaneously an exercise of internal constitutive sovereignty and claimed external constituted sovereignty for the thus constituted internal legal order. The claim for external constituted sovereignty follows from the claim of statehood for Kosovo on the international level, since the entrance rule of ECDS relates to statehood. However, recognition has not been unequivocally granted to Kosovo, with its statehood still disputed by a number of states. Is recognition necessary for statehood and therefore for the existence of external constituted sovereignty, or is an exercise of internal constitutive sovereignty sufficient for the constitution of the internal legal system *and* the claim to external constituted sovereignty at the same time?

There are two diverging theories on whether recognition is necessary for statehood, namely the constitutive and the declaratory theory. The constitutive theory claims that recognition is constitutive of statehood, i.e. that a certain (but not clearly defined) level of recognition is necessary for an entity to be considered a state. The declaratory theory, meanwhile, holds that recognition is merely indicative of statehood and that the determination of statehood is independent of recognition.[430]

Already in 1846, Wheaton considered that

> "Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent. This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed … between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its

[430] Crawford, 'Statehood and Recognition', at 4 f., 19 ff.

> internal sovereignty … The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete."[431]

Internal constitutive sovereignty is, first and foremost, *internal*, meaning that it is directed at the constitution, maintenance or deconstruction of the internal legal system. A successful exercise of internal constitutive sovereignty, for example with the intent to split from an existing legal system to create a new one, has, in first instance, implications for the internal level only: firstly, for the internal level of the state that is being left, because its governing convention ceases to apply (i.e. is deconstructed) on part of its territory; secondly, for the internal level of the newly created state, because its governing convention is created, accepted and maintained through the exercise of internal constitutive sovereignty. This exercise of ICVS by the people of the newly created state is directed internally, although it often comes with claims directed externally as well—for recognition by the state left and for recognition on the external plane in general. This means that recognition is certainly not necessary for the constitution and existence of the internal legal system—something which makes sense, also conceptually speaking, given that the internal legal system is constituted by the internal constitutive sovereign, that is, the people.

However, while internal constituted sovereignty relies on internal constitutive sovereignty for its existence, at least initially, the link to external constituted sovereignty is not so immediate. In other words, a successful secession means that, as a matter of fact (and as a matter of law of the newly created state), internal constitutive sovereignty has been exercised and a new (internal) legal system constituted. A successful secession does not mean, necessarily, that the newly created legal order is also recognised by other legal orders, i.e. as a state by other states on the external plane. The division between the internal and external plane and

[431] Ibid., at 8 f. citing Wheaton's *Elements of International Law* (3rd edn, 1846).

the fact that external constitutive sovereignty is situated—the same as its internal counterpart—outside of the world of law means that the people(s) that have recognised and thereby constituted the new legal order are not the same entities as those that need to recognise the state on the external plane.

This leads from questions of, for example, secession—an internal matter—to the question of state recognition. If there are norms on the international level to determine when a newly created *internal* legal order counts as a state for the application of external constituted sovereignty, i.e. when it counts as a subject of international law, recognition of a newly created legal order fulfilling those criteria is declaratory instead of constitutive, unless one of the criteria is sufficient recognition by other entities. Accepting the declaratory role of state recognition means that any non-acceptance or non-recognition of a legal order fulfilling the criteria by an existing state is at the same time a non-instantiation of the external governing convention and thus an exercise of external constitutive sovereignty. It means both at the same time "we do not recognise you as a state" and "we do not recognise the rules that determine that you are a state, which are part of international law, meaning we take an external viewpoint to international law (on this matter)"[432] The alternative view to the declaratory theory of recognition is that it is constitutive: without the recognition of other states, a state is not a state, even though it might appear to be one from the outside. On this view, it is the recognition of other states in itself rather than criteria such as population, territory, or the existence of internal constituted

[432] A state might claim that it is "on this matter only" and that they otherwise accept international law, but taking an internal or an external standpoint to international law or indeed any kind of legal system is not a matter of picking and choosing which rules to take an internal standpoint to, but rather an all-or-nothing matter. If the standpoint is internal, one must move within the legal system to amend or repeal rules with which one does not agree, if the legal system provides for such procedures; taking an external point of view means not accepting the system as a whole.

sovereignty that confers statehood—and with it external constituted sovereignty and all that it contains—upon an internal legal order.

Crawford (2007) argues that recognition is generally meant "as an act, if not of political approval" then "at least of political accommodation",[433] that state practice does not generally support the constitutive theory[434] and that the constitutive theory faces both practical and logical problems.[435] Crawford's argument suggests that the declaratory theory is more likely to be correct, but he also recognises that, for it to work, there must be precise and workable criteria on the basis of which it can be determined when an entity counts as a state and thus possesses external constituted sovereignty. "If there are no such criteria," he holds, "or if they are so imprecise as to be practically useless, then the constitutive position will have returned, as it were, by the back door."[436]

Keeping in mind the distinction between the world of law and social/factual world, there are essentially four possibilities regarding the role of recognition. First, recognition could be situated entirely outside the world of law, recognition of the newly emerged internal order as an equal and a subject of the existing international legal order. Second, recognition could be a factual act which has legal consequences within the world of law. This requires, in contrast to the first, that there are rules within the world of law regulating what consequences should be attached to recognition. Third, there are rules within the world of law as to which criteria need to be fulfilled for an entity to count as a state. Statehood is then a characteristic or a status of all entities which fulfil these criteria, and the recognition by other states of that state's statehood is unnecessary, unless required by the rules. Fourth, either sufficient recognition or the fulfilment of certain requirements contained in legal

[433] Crawford, 'Statehood and Recognition', at 26.
[434] Ibid.
[435] Ibid., at 22 f.
[436] Ibid., at 28.

rules are decisive for statehood, perhaps depending on the situation.[437] The first option coincides with the constitutive theory of recognition, the last with the declaratory one. The second is an unlikely hybrid between the two—unlikely, because there are no rules that determine how much recognition is sufficient for the legal consequences to take effect, unless one considers voting procedures for membership to the United Nations as such. A fifth possibility would be that recognition is not necessary and neither are rules of international law that statehood and therefore external constituted sovereignty hinge exclusively on an exercise of internal constitutive sovereignty and that any internal legal order is automatically—without recognition or rule-application—externally sovereign as well. This possibility, however, does not cohere with state practice, as evidenced for example by the on-going discussion surrounding Kosovo's statehood. This brings us back to either the declaratory or the constitutive view on the role of recognition, or a combination of the two.

Taking into account the distinction between internal and external level, as well as the distinction between what takes place within the world of law and what takes place outside of it, both the constitutive and declaratory role of recognition cohere with the understanding of different types of sovereignty developed in this book. A constitutive role would mean that recognition of an internal legal order on the external plane has the same effect as welcoming a new chess player to a chess club: they will be allowed to play, but equally they will be held to the rules of chess while playing. The declaratory role of recognition meanwhile means that anyone can be a member of the chess club, provided that they fulfil certain criteria and show up at the meetings. Membership of the club is less arbitrary and better regulated under this understanding of it. While

[437] This option is closely linked to the argument Vidmar makes holding "that the effects of international recognition and non-recognition are determined by the underlying territorial situation and the mode of State creation." Jure Vidmar, 'Explaining the Legal Effects of Recognition', *International & Comparative Law Quarterly*, 61/02 (2012), 361-87 at 387.

both are possible, what remains true is that, if recognition is constitutive, it is difficult to argue that a new internal legal order should have certain duties—such as non-intervention—without recognising them as a state, unless those duties are laid down for non-state entities in international law. Meanwhile, the consequences of accepting the declaratory theory is accepting that unjustified non-recognition of an internal legal order which fulfils the criteria laid down in rules of international law means weakening the governing convention of international law.

4.6. Concluding Remarks

Sovereignty, in its various conceptions, has not only been the subject of theoretical discussion by scholars of law, philosophy, and international relations, amongst other fields, it has also played an important role in many issues of our current times. We have considered the dynamic and relationship between the European Union and its Member States, with each claiming sovereignty for itself, the notion of humanitarian intervention, discourse surrounding entities such as Islamic State and in the discourse surrounding secessionist movements within states as examples.

In such discussions, different kinds of arguments on different levels are made; it pays to keep them as conceptually distinct as the different conceptions of sovereignty which are invoked, as well as the holders of sovereignty to whom those invocations are relative. In the context of secession, different holders invoke different kinds of sovereignty. The arguments advanced by the overarching state usually feature both the constitutive sovereignty of the entire people(s) of the state as well as the constituted sovereignty of the legal system according to which a secession is (or, depending on the system, is not) illegal. Arguments by the secessionist, by contrast, invoke the constitutive sovereignty of the people wishing to secede. This demonstrates that sovereignty is not simply a trump card to be played with the intention of ending a

discussion. Instead, there can be different claims to sovereignty and claims to different kinds of sovereignty. In the discourse surrounding the European Union and its sovereignty vis-à-vis the sovereignty of its Member States, the analyses of types of sovereignty situated on different levels reveal how legal pluralism and questions of competences are interconnected both in legal theory and legal reality as expressed, for example, by courts. Accepting the European Union as a *sui generis* legal system means that constitutive and constituted sovereignty both exist with regard to it. An alternative understanding, and one that currently and in the absence of further sociological studies and other research looks likely, is that the European legal system is a subset of international law. Under this understanding, the European Union has certain sovereign powers, but it does not have sovereignty. Even if the European Union possesses a form of sovereignty, this does not preclude the constituted sovereignty of its Member States, or vice-versa; nevertheless, the European Union's sovereignty might make the constituted sovereignty of its states superfluous ideologically speaking. This is not a discussion about who is sovereign—they both are, in different ways—or a discussion about who has which legal competences—this is determined by law and can easily be found out—but rather a political and ideological discussion of where decision-making power *should* be situated and for what reasons. The term "sovereignty" can be shorthand for this question, but the discussion is unlikely to be fruitful unless participants are clear about what they mean with the shorthand they use.

We also see that the argument that a state (or an alleged state) is constituted by divine authority is inaccurate; while such rhetoric exists both in history and in more recent times, for example in the case of IS, such arguments remain rhetorical and it is not divine authority constituting the state, if indeed it is constituted. Rather, it is the people giving it convention or endorsement consent and instantiating the governing convention/rule of recognition of the state entity in question. What is very well possible, however, is that the rhetoric invoking divine

authority is what convinced people to give their convention consent/to instantiate the governing convention.

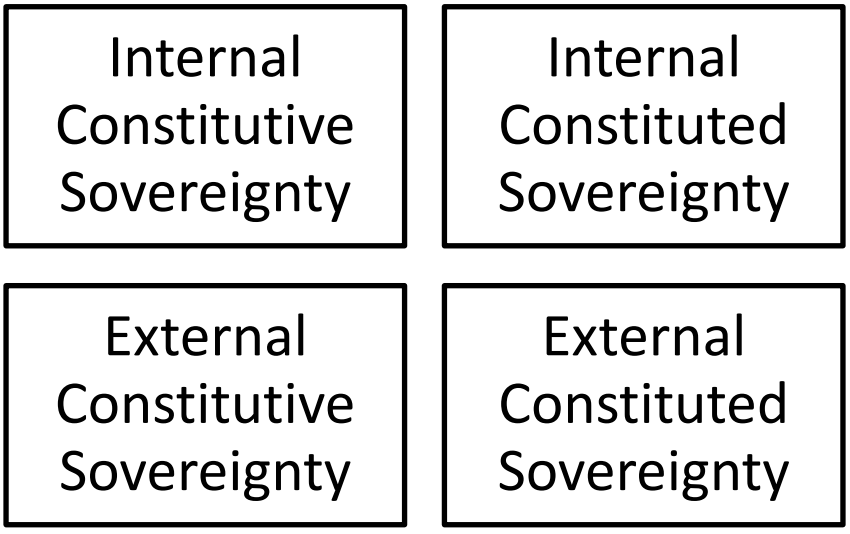
In short, what an application of the notion of sovereignty to current issues shows is that not only theoretically, but also in practical political discourse, it is vital to distinguish concepts of sovereignty and to be precise as to which holder of sovereignty reference is being made. On a legal, analytical, and academic level, conceptual clarity has value of its own. Also in political discourse, however, where sometimes it may be favourable to muddy the water, an awareness of the different meanings of "sovereignty" may help to avoid obvious fallacies or to point them out when an opponent makes them, thereby scoring points in the political arena. On any level, distinguishing clearly between meanings of "sovereignty" allows us to understand questions of our time better and prevents the term "sovereignty" from becoming the empty catchphrase it is sometimes accused of being.

Part 5: Conclusion

At the beginning of this book, the question was posed whether three people coming from three different backgrounds are likely to answer a question concerning sovereignty in the same way. The implied answer was that there are different conceptions of sovereignty and that the term means different things depending on the context in which it is used and depending on who is considered to be the holder of sovereignty. The analysis in this book has shown that this is indeed the case: "sovereignty" does not always mean the same thing.

5.1. What does "sovereignty" mean?

If "sovereignty" does not always mean the same thing, this raises the question what its different meanings are and when it means what. In this book, four different meanings of sovereignty have been distinguished: internal constitutive sovereignty (ICVS), internal constituted sovereignty (ICDS), external constitutive sovereignty (ECVS), and external constituted sovereignty (ECDS).



These four meanings of sovereignty can be grouped either by the level on which they are situated (internal or external to the state, corresponding to national or international) or by type of sovereignty and whether it is situated in the world of law or rather constituting it (constitutive or constituted). Distinguishing between internal and external sovereignty means a distinction with regard to the level or the plane on which sovereignty is situated within a multi-level society. There are of course distinctions between internal and external sovereignty other than that they are situated on different levels; however, given that the differences between constitutive and constituted sovereignty are far greater, these concepts provide a more useful starting point. On the assumption that the legal system of the European Union is truly *sui generis*, two further elements would have to be added this scheme, namely European Constitutive Sovereignty (EUCVS) and European Constituted Sovereignty (EUCDS). However, we have seen that in the absence of a clear theory of legal systems and further sociological research, arguments for the European Union's legal system as a subset of international law instead of a *sui generis* legal system with its own constitutive and constituted sovereignty prevail. The purpose of this book was to give the tools to consider "sovereignty" in a conceptually clear manner. The main tool offered is the distinction between the four aforementioned types of sovereignty.

5.1.1. Constitutive Sovereignty

Constitutive sovereignty is, as the name already suggests, something that *constitutes*. This raises three questions, however: firstly, what is constituted, secondly, how is this done, and thirdly, who does it?

The first and the last of these three questions are more easily answered than the second. Constitutive sovereignty constitutes a legal order. On the internal level, this is the state or the legal order for which the state stands.

On the external level, this is the international legal order. Constitutive sovereignty is exercised by a group of entities. On the internal level, these entities are individuals and the group is a people or even a set of peoples. Already here, it is important to note that it is not individuals acting on their own who are sovereign in this sense, but only taken together. On the external level, these entities are currently states, again acting together rather than independently.

The second question takes more explaining and also shows how it is that individual entities are not sovereign, but many individual entities (be they states or actual individuals within states) acting together can be and are.

Three different types of exercising constitutive sovereignty can be distinguished: the actual moment of constitution in which people or states first accept that they are governed by a legal system (e.g. when a new constitution is accepted), the state of maintenance, in which abiding by the laws of the constituted system instantiates the governing convention/rule of recognition of that system, and deconstructing the system (e.g. in case of rebellion or even secession against the wishes of the nation seceded from). These have been called, on the one hand, the *positive* side of constitutive sovereignty (initial constitution and subsequent maintenance of the legal system) and, on the other hand, the *negative* side of constitutive sovereignty (deconstruction of the legal system in question). These three different types, or the distinction between the positive and negative side of it, do not yet explain *how* constitutive sovereignty is exercised, only that it can be exercised with different effects.

Constitutive sovereignty describes the instantiation or non-instantiation of what Jean Hampton calls a governing convention and what HLA Hart calls a rule of recognition. The example of chess nicely illustrates what this is: assuming that we join a chess club, we accept—perhaps even without having read it—that the rulebook governing how chess is played will be applicable to all games of chess we play. We might not know

every single rule of chess and we do not determine in advance (or with hindsight) which rules we accept as being applicable to our games of chess. Instead, we accept that if we are to play chess, the rules of chess apply, and that, if we play chess and do not apply the rules, the rules will nevertheless be enforced. In short, we take a certain mental attitude towards the rules of chess (we accept them as applicable) and the rules are enforced even when we do not stick to them. These are the two components of a governing convention/rule of recognition: social attitude and efficacy. It should be noted, here, that the social attitude does not necessarily need to be one of praise or even consent: acceptance should be understood as an unambitious term here. The bare minimum standard is one of acquiescence. Efficacy means, of course, that the rules we thus accept are actually—at least usually—complied with.

Accepting the rule of recognition means taking an internal viewpoint to the system of law which is based on it. In other words, we can argue about whether or not the rulebook of chess applies to the playing of chess, but, once we accept that the rulebook governs chess games, we cannot at the same time hold that individual rules within the rulebook in general do not govern our games or at least not if the rulebook specifies that those rules are applicable. What we can do is give descriptive accounts of who in the chess club has the competence to amend the rulebook; we can argue that some rules should be amended; and, probably, we can leave the chess club again, which amounts to our saying that this specific rulebook no longer applies to us.

It is much the same with a legal system. Once a legal system is constituted, and until it is deconstructed, the rules of that system apply. This does not take away from the fact that we can study those rules, argue about them, or work on having them changed, but it does mean that we do so within the framework of that legal system and in accordance with its rules—and that if we do break the rules of the system, for whatever reason, this will mean enforcement against us. So the social attitude we—as a group—take and the enforcement of rules, irrespective

of our individual views regarding the system as a whole or individual rules within that system, together constitute and maintain the legal system. Individual actions, in themselves, whether they are geared towards accepting or deconstructing the system, do not constitute or deconstruct it in themselves, but they contribute to the constitution, maintenance, or deconstruction of the system. If one individual thinks the rules do not apply to him (or her), they will be considered a criminal, asked to pay a fine or otherwise sanctioned, depending on what rules they break. If the vast majority of individuals thinks the rules do not apply, and all individuals also act accordingly, most likely the system will fall. There are complications here, of course, such as when there is a small but very powerful enforcement cadre which still considers the rules applicable and enforces them against the majority. In such a case, the governing convention/rule of recognition is upheld only by the minority and, for the majority, a situation of mastery has arisen. Of course, it is relatively rare that the lines are quite so clearly drawn. Any action by an individual which applies the rules of the legal system (cf. any move made according to the rules in the chess rulebook) and any instance in which the rules are enforced (either because an individual has made a move according to the rules or because an individual was sanctioned for not following the rules) instantiates the governing convention and thereby strengthens it. Any non-application or non-enforcement of the rules also means that the governing convention is weakened. In neither case does the individual need to be aware that they are instantiating or non-instantiating the governing convention. Even without that knowledge or deliberateness, individual actions contribute to the constitution, maintenance or deconstruction of the legal system, but it is not the individual action standing alone that constitutes, maintains or deconstructs the system, it is the entirety of individual actions taken collectively.[438]

[438] NB: Collectively does not mean "in any coordinated, collective fashion".

This answers how constitutive sovereignty is exercised: through the collectivity of individual actions either instantiating or not instantiating the governing convention/rule of recognition of a legal system. This can be done on the internal level, i.e. when people constitute a state, or it can be done on the external level, i.e. when states adhere to (i.e. instantiate) or disregard international law. On the external level, however, we see that the enforcement mechanisms and the political will to use them are less pronounced than on the internal plane (depending on the state taken as a comparator, of course), which means that the governing convention/rule of recognition for international law is comparatively weaker than that of the national legal system.

On the internal level, the idea that all power within a state emanates from the people is often termed "popular sovereignty". The concept of internal constitutive sovereignty specifies how and in what way this is done and what it entails or, rather, what it does not entail: given the relatively unambitious scope of the requirement of acceptance/social attitude, internal constitutive sovereignty does not necessarily require democracy. It does not in itself mean that any state in which internal constitutive sovereignty is present is also a just or justified state. Instead, it explains where state power comes from (the people) and how this is done (a social convention); this does not entail any kind of judgement as to what kind of state it is or what form the state must take.

On the external level, there is no corresponding commonplace understanding of sovereignty to which external constitutive sovereignty can be linked. Nevertheless, states acting collectively constitute the international legal order via the same mechanisms (social convention) that individuals acting collectively constitute internal legal orders. External constitutive sovereignty therefore has explanatory value and fills a lacuna in our current understanding of sovereignty and the foundations of legal systems, as well as their connections. Admittedly, states, as such, cannot act in the same way that individuals can act. Instead, the actions of state officials are attributed to the state as a whole

and therefore count as actions by the state. Actions by state officials can be limited by a lack of competence given to them in the internal legal order, although this is mitigated by the assumption of legality on the international level. Hence, internal and external constitutive sovereignty can be compared and summarised under the same header of constitutive sovereignty.

It should also be noted that both internal and external constitutive sovereignty are matters of social attitudes and facts. This means that for the constitution of a legal system, e.g. in the case of secession from an existing state, questions of legality or illegality are only relevant when taking an internal viewpoint to the legal system and can only be evaluated from within the world of law. Constitutive sovereignty, however, is extra-legal. This means that constitution or deconstruction of a legal system does not find its basis in the world of law, but within social facts. Whether a group of individuals (a people) has the legal competence to secede is a very different question from whether they can *de facto* do so, from whether they have the *power* (instead of competence) to constitute a new legal order.

5.1.2. Constituted Sovereignty

Constituted sovereignty is dependent on the world of law, in contrast to constitutive sovereignty, which is situated entirely outside of it and independent of it. In other words, constituted sovereignty is a legal concept. As with constitutive sovereignty, we can make the distinction between the internal and the external level with regard to constituted sovereignty, with internal constituted sovereignty (ICDS) being dependent on the internal legal system and external constituted sovereignty (ECDS) being dependent on international law. Particularly for ICDS, differences between systems can exist; the concept of ICDS described here is not system-dependent, however, but rather a doctrinal

concept of ICDS. The same holds true for the concept of ECDS here presented.

Within the doctrinal concept of internal constituted sovereignty, a distinction can be made regarding the level on which ICDS is situated: this can be done either at a state- or at the organ-level. ICDS describes, on both levels, supreme legislative authority on a territory. ICDS on the state level attributes this supreme authority to the state as a whole: no organisation within the territory of the state can pass legislation of a superior status than the legislation the state itself can pass. This understanding of sovereignty settles the question whether church or state have superior authority, although it is equally valid for questions of superiority regarding any other organisation or association creating a system of norms valid on the territory of the state. On the organ level, the attribution is shifted to an individual organ within the state and the question is less whether it is the state or another organisation which is sovereign but which organ of the state has the final say. Understanding ICDS as situated on the organ level fails to take into account that organs can act as composite entities and that the state is such an entity. To situate sovereignty at the level of an individual organ also means understanding sovereignty as limited to what is called here "constitutional legislation", in the sense of legislative authority against which there is no legal recourse, particularly regarding the competences of the state as a whole. ICDS on the organ level does not amount to a collection of the competences of the state or the state organ, but only to the competence to legislate supremely. Situating ICDS on the organ level is a conceptual confusion.

With regard to both ICDS and ECDS, we have seen that sovereignty is the status of supreme authority which is dependent on the legal system, but it is divorced from the consequences of this status: a distinction has to be made between sovereignty and sovereign powers, rights, duties, and so forth.

With regard to external constituted sovereignty, meanwhile, there is no question as to which level this type of sovereignty should be attributed to: the sovereign in this sense is always a state,[439] and to say that a state is sovereign in this sense means that the state has the exclusive *claim*, in the absence of a more restrictive rule, to exercise state functions on its territory without outside interference, and that it is *prohibited*, in the absence of a more permissive rule, from interfering in the exercise of state functions on the territory of any other state. Furthermore, states have the *competence* to make more restrictive or more permissive rules. This permission, prohibition and competence do not constitute the meaning of "sovereignty", however, instead, they are attached (consequential rules) to the status of sovereignty, which is given by international law to those entities fulfilling the criteria for statehood (entrance rule). It is not clear how a sovereign entity loses its sovereign status (i.e. there is no clear exit rule). Understanding ECDS as a status means that states are not "more or less" sovereign but that sovereignty is a legal status applying equally to each of them, even where restrictive or permissive rules limit or expand their duties or their competences. Understood this way, external constituted sovereignty is a statement of the assumption that, on the territory of a state, that state holds all competences in the absence of rules to the contrary and none in the absence of rules to the contrary. As such, external constituted sovereignty describes the base assumptions around which international law is built.

The question might be raised how states can be both the authors and subjects of international law. This question, however, fails to take into account the distinction between constitutive and constituted sovereignty. When we make this distinction not only on the internal but also on the external level, we can explain how states can be subject to international law, even international law which they have not necessarily consented to, such as *ius cogens*. Rules of *ius cogens* fall under "more restrictive"

[439] Always, but not necessarily—this could change if the entrance rules for the status of sovereignty were changed.

rules; the idea that legal rules are applicable to states does not mean that states are not (or less) sovereign in an external constitutive sense.

5.2. Are states sovereign?

The above already answers another question which was raised in the introduction of this book, namely the question whether states are sovereign. The answer is that they are and that restrictive rules or rules granting a competence to intervene on the territory of another state (think here for example of rules concerning the Responsibility to Protect) do not violate a state's sovereignty in the external constituted (ECDS) sense, nor does it take away a state's sovereignty in the external constitutive (ECVS) sense. The latter is left wholly untouched by international legal rules.

The introduction of this book raised further questions, however: aside from "what does sovereignty mean?" and "are states sovereign?", it was also asked if there is a sovereign in every state, and how we can identify that sovereign. Having a theory of sovereignty (or rather: sovereignties) enables us to answer these questions as well.

5.3. Is there a sovereign in every state?

Answering the question whether there is a sovereign in every state depends, of course, on our understanding of sovereignty and of statehood. The question is geared towards the internal level, but even here we can distinguish between the constitutive and the constituted sovereign. It is clear that there is, for each legal system, a constitutive sovereign: on the internal level, it is always the people.

If, however, we ask whether there is a constituted sovereign in every state, the question becomes more difficult to answer. It implies that we search for internal constituted sovereignty on the organ level instead of on the state level, because otherwise the sovereign would not be *in* the

state; it would simply be the state. Situating internal constituted sovereignty (ICDS) on the organ level means that we must ask whether there is in every state one organ which has supreme legislative authority. In some states, this question is immediately answered by constitutional doctrine: in the United Kingdom, for example, Westminster Parliament is sovereign in this way. Does that mean that there is an IDCS sovereign in every state, however?

The implication here is that, logically speaking, there must be a final arbiter in all matters. Some scholars have put forward that this is the people, but to do so disregards that popular sovereignty takes place outside of the world of law, while we are currently searching for the supreme authority within it. The idea of a supreme authority within the legal system is in conflict with the notion of separation of powers put forward by Montesquieu. Nevertheless, it may well be possible that in each legal system there is an entity—let us call this entity the constitutional legislator—which has the competence to make rules against which there is no legal recourse. However, as we have seen, it is a conceptual confusion to search for the sovereign at the level of one organ of the state rather than identify the state itself as the constituted sovereign, because the state is as much a composite entity as its organs. For this reason, the question should not be asked in its present form.

5.4. How do we identify the sovereign?

As was the case with the previous question, this one, too, is not specific enough. We must first determine what type of sovereignty we are talking about before we can attempt to identify the holder of that type of sovereignty.

For internal constitutive sovereignty, it is necessarily a people that is sovereign in this sense.

For internal constituted sovereignty, it is either the state in general or an organ within the state, depending on one's understanding of where ICDS is situated. If ICDS is situated on the state-level, the relevant question to ask in order to identify the sovereign is whether the state has the status of supreme authority on its territory. If this is the case, the state is sovereign; if it is not, we must ask who has that status and this entity is then sovereign in this sense. More concretely, this would mean that if the legal systems of the Member States of the European Union no longer attached the status of sovereignty to themselves, but rather to the European Union, it would be the European Union rather than the state that would be sovereign in this sense. If ICDS is situated on the organ level, the question is which organ within the state has supreme legislative authority or, put another way, against the decisions of which organ within the state is no legal recourse possible? Where courts can rule in final instance, this would be the courts, unless a court's rulings and competences depend on higher norms, such as an amendable constitution, in which case amending the constitution would be a legal form of recourse and it would be the constitutional legislator who is sovereign in this sense. Again, however, we must consider here that it is not theoretically consistent to situated ICDS on the organ level.

On the external plane, things are simpler. To identify the ECVS holder, we must ask ourselves who constitutes international law; to identify the ECDS holder, we must ask who has, in the absence of more restrictive rules, the exclusive right and competence to exercise state functions in a territory. Currently, the answer to both of these questions is states, although there is one important distinction to be made between the two: for ECVS, it is the set of states, that is, states acting collectively that are sovereign. For ECDS, the status is attached to individual states.

5.5. A look to the future

So far we have determined the various meanings of sovereignty and answered questions concerning the holders of the different types of sovereignty. In Part 4 of this book, we have also seen how the different kinds of sovereignty can play a role in various discourses, both legal and political, and how they can be applied to questions of our time. Sovereignty has been and remains a key concept with regard to many issues, including but not limited to the relationship between the European Union and its members, questions of secession, and humanitarian intervention, in constitutional and international adjudication, as much as in constitutional and international legal theory.

We have identified different meanings of sovereignty, determined their locus and their holder. Doing so has linked notions of popular sovereignty with insights from analytical legal philosophy regarding the origins of a legal system, differentiated between constitutive and constituted sovereignty on various levels and untangled the paradoxical notion that people or states are simultaneously both the source and subject of law. The convention model of constitutive sovereignty explains how legal systems originate and fall; the analysis of the internal legal concept of constituted sovereignty answers questions of constitutional and international law. None of that, however, means that discussions surrounding sovereignty should now stop.

The theory developed in this book has focused on an explanatory and exploratory account rather than on any ideological considerations or evaluative statements. Explaining how a legal system is constituted does not offer any tools to evaluate the legal system. Similarly, giving criteria to identify the sovereign within a legal system does not make any kind of statement about whether or not it is good that this entity in particular should be sovereign, much less whether or not it is good that any entity should be sovereign. Equally, untangling different meanings of sovereignty does not entail that the different concepts will no longer be

used in academic, political or legal discourse, nor that they will not develop further. What the analysis of this book offers is the tools for conceptual clarity, for the sake of analytical and academic discourse but also for the sake of avoiding fallacies in political discourse and in allowing those involved in discourses in which "sovereignty" plays a role to identify what is meant by "sovereignty" and whether it describes the real issue at hand. Furthermore, we have seen, in applying the tools of this book to some of the discourses of sovereignty, that there is still need for future research, both sociological and legal theoretical in nature, for example as concerns the concepts of a legal system. A conceptually clear view of what forms part of the discourse surrounding sovereignty, and what does not, thus also opens our eyes to research questions that still require answers in the future.

What this book has done, in short, is to provide a rational reconstruction of "sovereignty" that is prescriptive in that it offers a precise and consistent theory of the different meanings of sovereignty, but not in that it answers questions involving sovereignty as such. In this way, the book does not seek to end discussions surrounding sovereignty; rather, it seeks to give useful analytical tools—in the form of different concepts of sovereignty—for the on-going discussions that still exist and will likely continue to exist for a long time.

List of Cases and Opinions

NATIONAL

Australia

Theopanous (1994) 182 CLR 104

Breavington (1988) 169 CLR 41

Canada

'Reference Re Secession of Quebec' [1998] 2 S.C.R. 217

United Kingdom

Thoburn v Sunderland City Council [2002] EWHC 195 Admin

EUROPEAN

Case 26/62, *Van Gend & Loos*, [1963] ECLI:EU:C:1963:1

View of Advocate General Kokott, Case C-370/12, *Thomas Pringle v Government of Ireland*, [2012], ECLI:EU:C:2012:675

'Hirst v the United Kingdom (No 2)', (European Court of Human Rights, ECHR 681, 2005)

INTERNATIONAL

'Case of the S.S. "Wimbledon" (UK v. Japan)', (Permanent Court of International Justice, Rep Series A No. 01, 1923)

'S.S. "Lotus" (France v. Turkey)', (Permanent Court of International Justice, Rep Series A No. 10, 1927)

'Island of Palmas Case (Netherlands v. USA)', (Permanent Court of Arbitration, Scott, Hague Court Reports 2d 83, 1928).

'Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)', (International Court of Justice, I.C.J. Reports 1986)

‘Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo’ (Advisory Opinion), (International Court of Justice, I.C.J. Reports 2010)

Bibliography

Academic

Baylis *et al.*
Baylis, John, Smith, Steve, and Owens, Patricia (2013), *The globalization of world politics: an introduction to international relations* (Oxford University Press).

Beaud
Beaud, Olivier (2012), 'Conceptions of the State', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press).

Besson
Besson, Samantha (2011), 'Sovereignty', in Rüdiger Wuolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law).

Bodin
Bodin, Jean (1955), *Les Six Livres du République*, trans. M. J. Tooley (Blackwell).

Buchanan
Buchanan, Allen (2013), 'Secession', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition; URL = <http://plato.stanford.edu/archives/sum2013/entries/secession/>).

De Búrca
de Búrca, Gráinne (2003), 'Sovereignty and the Supremacy Doctrine of the European Court of Justice', in Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing).

Carson
Carson, Allen (2004), 'Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention', *Pacific Affairs*, 77 (1), 9-27.

Castree *et al.*
Castree, Kitchin, and Rogers (2013), 'International Relations', in *A Dictionary of Human Georgraphy* (Oxford University Press, Oxford Reference; URL = < http://www.oxfordreference.com/view/10.1093/acref/9780199599868.001.0001/acref-9780199599868-e-968>), accessed 24 January 2016.

Coke
Coke, Edwardo (1817), *The Fourth Part of the Institutes of the Laws of England; concerning the Jurisdiction of Courts* (W. Clarke and Sons).

Craig
Craig, Paul (2013), 'The United Kingdom, the European Union, and Sovereignty', in Richard Rawlings et al (eds.), *Sovereignty and the Law* (Oxford University Press).

Crawford
Crawford, James (2007), 'Statehood and Recognition', in *The Creation of States in International Law* (2 edn.; Oxford University Press).

Cronin
Cronin, Bruce (2007), 'The Tension Between Sovereignty and Intervention in the Prevention of Genocide', *Human Rights Review*, 8 (4), 293-305.

Davia
Davia, Gregg Alan (1998), 'Thoughts on a Possible Rational Reconstruction of the Method of "Rational Reconstruction"', *20th World Congress of Philosophy* (Boston).

Dicey
Dicey, Albert Venn (1915), *Introduction to the study of the law of the constitution* (8th edn.; Macmillan).

Eleftheriadis
Eleftheriadis, Pavlos (2010), 'Law And Sovereignty', *Law and Philosophy*, 29 (5), 535-69.

Finnis
Finnis, J. (2014), 'Aquinas' Moral, Political, and Legal Philosophy', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition; URL = <http://plato.stanford.edu/archives/sum2014/entries/aquinas-moral-political/>).

Frändberg
Frändberg, Åke (2009), 'An Essay on Legal Concept Formation', in Jaap Hage and Dietmar von der Pfordten (eds.), *Concepts in Law* (Law and Philosophy Library: Springer).

Garner
Bryan A. Garner (ed.) (2006), *Black's Law Dictionary* (3rd Pocket: Thomson West).

Goldsmith & Posner
Goldsmith, J. L. and Posner, E. (2005), *The Limits of International Law* (Oxford University Press).

Goldsworthy
Goldsworthy, Jeffrey (1999), *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press).

--- (2010), *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press).

Greenwood
Greenwood, Christopher (2013), 'Sovereignty: A View from the International Bench', in Richard Rawlings et al (eds.), *Sovereignty and the Law* (Oxford University Press).

Grzeszick
Grzeszick, Bernd (2013a), 'Maunz/Dürig, Grundgesetz-Kommentar 69, Ergänzungslieferung 2013', *Grundsatz der Volkssouveränität, GG Art. 20 Rn. 60-77*.

--- (2013b), 'Maunz/Dürig, Grundgesetz-Kommentar 69, Ergänzungslieferung 2013', *Staatsgewalt, Rn 89-106*.

Hage
Hage, Jaap (2009), 'The Meaning of Legal Status Words', in Jaap Hage and Dietmar von der Pfordten (eds.), *Concepts in Law* (Springer).

--- (2011), 'A model of juridical acts: part 1: the world of law', *Artificial Intelligence and Law*, 19 (1), 23-48.

Hage, Jaap and von der Pfordten, Dietmar (eds.) (2009), *Concepts in Law* (Law and Philosophy Library: Springer).

Halpin
Halpin, Andrew (1996), 'Concept of a Legal Power, The', *Oxford J. Legal Stud.*, 16, 129-52.

--- (2007), 'Rights, Duties, Liabilities, and Hohfeld', *Legal Theory*, 13 (01), 23-39.

Hampton
Hampton, Jean (1997), *Political Philosophy* (Dimensions of Philosophy Series: Westview Press).

Hart
Hart, H. L. A. (1994), *The Concept of Law* (Clarendon Press).

Henderson
Henderson, Christian (2014), 'The Arab Spring and the Notion of External State Sovereignty in International Law', *Liverpool Law Review*, 35 (2), 175-92.

Herdegen
Herdegen, Matthias (2013), 'Verfassungsgebende und verfassungsändernde Gewalt', in Maunz/Dürig (ed.), *Grundgesetz-Kommentar* (69. Ergänzungslieferung; Beck-Online), Rn 7-12.

Hobbes
Hobbes, Thomas (1651) *Leviathan* (Andrew Crooke)

Hohfeld
Hohfeld, Wesley Newcomb (1913), 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale L.J.*, 23, 16-59.

--- (June 1917), 'Fundamental Legal Concepts as Applied in Judicial Reasoning', *Yale Law Journal*, 26 (8), 710-70.

ICISS
International Commission on Intervention and State Sovereignty (2001), 'The Responsibility to Protect', International Development Research Centre (ed.).

Kalyvas
Kalyvas, Andreas (2005), 'Popular Sovereignty, Democracy, and the Constituent Power', *Constellations*, 12 (2), 223 - 44.

Kelsen
Kelsen, Hans (1959), 'Sovereignty and International Law', *Geo. L. J.*, 48, 627-40.

--- (1970), *Pure theory of law* (University of California Press).

Kim
Kim, Samuel S. (1978), 'People's Republic of China and the Charter-Based International Legal Order, The', *Am. J. Int'l L.*, 72, 317-49.

Korab-Karpowicz
Korab-Karpowicz, W. Julian (2013), 'Political Realism in International Relations', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition; URL = <http://plato.stanford.edu/archives/sum2013/entries/realism-intl-relations/>).

Koskenniemi
Koskenniemi, Martti (2005), *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn.: Cambridge University Press).

--- (2010), 'Conclusions: vocabularies of sovereignty - powers of a paradox', in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press).

Lakin
Lakin, Stuart (2008), 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution', *Oxford Journal of Legal Studies*, 28 (4), 709-34.

Lindahl
Lindahl, Hans (2000), 'European Integration: Popular Sovereignty and a Politics of Boundaries', *European Law Journal*, 6 (3), 239 - 56.

Lloyd & Sreedhar
Lloyd, Sharon A. and Sreedhar, Susanne (2013), 'Hobbes's Moral and Political Philosophy', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition; URL = <http://plato.stanford.edu/archives/sum2013/entries/hobbes-moral/>).

Locke
Locke, John *Two treatises of government* (Awnsham and John Churchill).

Lowe
Lowe, Vaughan and Tzanakopoulos, Antonios (2011), 'Humanitarian Intervention', *Max Planck Encyclopedia of Public International Law* (Oxford University Press).

MacCormick
MacCormick, Neil (1995), 'The Maastricht-Urteil: Sovereignty Now', *European Law Journal*, 1 (3), 259-66.

--- (1999), *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Law, State, and Practical Reason; Oxford University Press) 222.

Maiolo
Maiolo, Francesco (2007), *Medieval Sovereignty* (Eburon Academic Publishers).

Margolis & Laurence
Margolis, Eric and Laurence, Stephen (2012), 'Concepts', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition; URL = <http://plato.stanford.edu/archives/fall2012/entries/concepts/>).

Maritain
Maritain, Jacques (1950), 'The Concept of Sovereignty', *The American Political Science Review*, 44 (2), 343-57.

Marmor
Marmor, Andrei (2010), 'The Pure Theory of Law', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition; <http://plato.stanford.edu/archives/fall2010/entries/lawphil-theory/>).

Möller
Möller, Hauke (2004), *Die verfassungsgebende Gewalt des Volkes und die Schranken der Verfassungsrevision : Eine Untersuchung zu Art. 79 Abs. 3 GG und zur verfassungsgebenden Gewalt nach dem Grundgesetz* (Hamburg University).

Morse
Morse, H. Newcomb (1987), 'Applying the Hohfeld System to Constitutional Analysis', *Whittier Law Review*, 9, 639-62.

Muller
Muller, Wim (2013), 'China's sovereignty in international law: from historical grievance to pragmatic tool', *China-EU Law Journal*, 1 (3-4), 35-59.

Nardin
Nardin, Terry (2013), 'From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention', *European Journal of International Law*, 24 (1), 67-82.

Orend
Orend, Brian (2008), 'War', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition; URL = <http://plato.stanford.edu/archives/fall2008/entries/war/#2>).

Peschel-Gutzeit
Peschel-Gutzeit, Lore Maria (1997), 'Unvollständige Legitimation der Staatsgewalt oder: Geht alle Staatsgewalt nur vom volljährigen Volk aus?', (NWJ 1997, 2861).

Philpott
Philpott, Dan (2010), 'Sovereignty', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition; URL = <http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>).

Raphael
Raphael, D. D. (1976), *Problems of Political Philosophy* (Revised Edition; Macmillan Press Ltd).

Raustiala & Slaughter
Raustiala, Kal and Slaughter, Anne-Marie (2002), 'International Law, International Relations and Compliance', in Walter Carlnaes, Thomas Risse, and Beth Simmons (eds.), *The Handbook of International Relations* (Sage Publications).

Raz
Raz, Joseph (1979), 'Kelsen's Theory of the Basic Norm', in *The Authority of Law: Essays on Law and Morality* (Oxford University Press), 122-45.

--- (1980), *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Second Edition; Clarendon Press).

--- (1986), *The Morality of Freedom* (Clarendon Press).

Reinold
Reinold, Theresa (2012), *Sovereignty and the Responsibility to Protect* (Routledge).

Roermund
Roermund, Bert van (2013), *Legal Thought and Philosophy: What Legal Scholarship is About* (Edward Elgar).

Ross
Ross, Alf (1958), 'On Law and Justice', in Hampstead, Lord Lloyd of (1972), *Introduction to Jurisprudence* (4th edn.; Stevens & Sons).

Van Rossem
van Rossem, Jan Willem (2014), *Soevereiniteit en pluralisme: een conceptuele zoektocht naar de constitutionele grondslagen van de Europese rechtsorde* (Kluwer).

Della Sala
Della Sala, Vincent (2012), 'Europe's Autumn: Popular Sovereignty and Economic Crisis in the European Union Beyond the Arab Spring: A New Era of Popular Sovereignty and Protest', *Whitehead J. Dipl. & Int'l Rel.*, 13, 35-44.

Schmitt
Schmitt, Carl (2005), *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago University Press).

Schrijver
Schrijver, Nico (1999), 'The changing nature of state sovereignty', *The British Yearbook of International Law*, 70 (1), 65-98.

Scott
Scott, James Brown (1939), 'Jean Bodin The Transition from Medieval to Modern Thought: Chapter XXIII', in *Law, the State, and the International Community*, 324-52.

Searle
Searle, J. R. (2010), *Making the Social World* (Oxford University Press).

Sen
Sen, Sarbani (2011), *The Constitution of India: Popular Sovereignty and Democratic Transformations* (Oxford University Press) 224.

Steinberg
Steinberg, Richard H. (2004), 'Who is Sovereign Commemorative Issue - Balance of Power: Redefining Sovereignty in Contemporary International Law', *Stan. J. Int'l L.*, 40, 329-46.

Strang
Strang, David (1996), 'Contested sovereignty: the social construction of colonial imperialism', *Cambridge Studies in International Relations*, 46, 22-49.

Thompson
Thompson, Mark R. (1996), 'Why and how East Germans rebelled', *Theory and Society*, 25 (2), 263-99.

Troper
Troper, Michel (2012), 'Sovereignty', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press).

Turchetti
Turchetti, Mario (2012), 'Jean Bodin', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition; URL = <http://plato.stanford.edu/archives/win2012/entries/bodin/>).

Turpin
Turpin, Colin Tomkins Adam (2007), *British government and the constitution: text and materials* (Cambridge University Press).

Vidmar
Vidmar, Jure (2012), 'Explaining the Legal Effects of Recognition', *International & Comparative Law Quarterly*, 61 (02), 361-87.

Vinx
Vinx, Lars (2016), 'Carl Schmitt', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition ; URL= <http://plato.stanford.edu/archives/spr2016/entries/schmitt/>).

Walker
Walker, Neil (2003), 'Late Sovereignty in the European Union', in Neil Walker (ed.), *Sovereignty in Transition: Essays in European Law* (Hart Publishing).

Weinert
Weinert, MatthewS (2007), 'Bridging the human rights—Sovereignty divide: Theoretical foundations of a democratic sovereignty', *Human Rights Review*, 8 (2), 5-32.

Wenar
Wenar, Leif (2011), 'Rights', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition; URL = <http://plato.stanford.edu/archives/fall2011/entries/rights/>.).

Winterton
Winterton, George (1998), 'Popular Sovereignty and Constitutional Continuity', *Fed. L. Rev.*, 26, 1-14.

De Witte
de Witte, Bruno (1995), 'Sovereignty and European integration: the weight of legal tradition', *Maastricht Journal of European and Comparative Law*, 145-73.

Wu
Wu, Chengqiu (2010), 'Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises', *Journal of Chinese Political Science*, 15 (1), 71-97.

Non-Academic

Amnesty International
Amnesty International (2014), 'Iraq: Escape from Hell: Torture and sexual slavery in Islamic State captivity in Iraq', in Amnesty International (ed.), (London).

Australian Government
Australian Government (2014). 'Islamic State', < https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/IslamicState.aspx>, accessed 23 February 2015.

BBC News
BBC News 'Catalonia president signs independence referendum decree', <http://www.bbc.com/news/world-europe-29390774>, accessed 22 February 2015.

--- 'Isis rebels declare 'Islamic state' in Iraq and Syria', *BBC News Middle East* <http://www.bbc.com/news/world-middle-east-28082962>, accessed 23 February 2015.

--- 'What is Islamic State?', *BBC News Middle East* <http://www.bbc.com/news/world-middle-east-29052144>, accessed 23 February 2015.

--- 'Scottish referendum: Scotland votes 'No' to independence', *BBC News,* <http://m.bbc.com/news/uk-scotland-29270441>, accessed 12 March 2015.

Euronews
Euronews, (2014), 'ISIL renames itself 'Islamic State' and declares Caliphate in captured territory'. <http://www.euronews.com/2014/06/30/isil-renames-itself-islamic-state-and-declares-caliphate-in-captured-territory/>, 23 February 2015

European Commission
European Commission (2015), 'Public Opinion: Eurobarometer surveys', (updated 24/02/2015) <http://ec.europa.eu/public_opinion/index_en.htm>, accessed 02 March 2015.

Freedom House
Freedom House, (2014), 'Number and percentages of electoral democracies, FIW 1989-2014'.
<http://www.freedomhouse.org/sites/default/files/Electoral%20Democracy%20Numbers%2C%20FIW%201989-2014.pdf>, accessed 30 July 2014.

Govan
Govan, Fiona 'Catalonia can call itself a 'nation', rules Spain's top court', *World News*
<http://www.telegraph.co.uk/news/worldnews/europe/spain/7861118/Catalonia-can-call-itself-a-nation-rules-Spains-top-court.html>, accessed 12 March 2015.

Gyldenkerne
Gyldenkerne, Elena 'Catalonian leader orders referendum on independence from Spain', <http://www.reuters.com/article/2014/09/27/us-spain-catalonia-idUSKCN0HM09120140927>, accessed 22 February 2015.

Irshaid
Irshaid, Faisal 'Isis, Isil or Da'ish? What to call militants in Iraq', *BBC News* <http://www.bbc.com/news/world-middle-east-27994277>, accessed 23 February 2015.

Mitchell
Mitchell, Paul 'Spain's Constitutional Court suspends Catalan independence referendum', <http://www.wsws.org/en/articles/2014/10/04/cata-o04.html>, accessed 22 February 2015.

Raad van State
Raad van State (2014), 'Voorlichting inzake de democratische controle bij overdracht van bevoegdheden en soevereiniteit', (Algemene zaken; Kamerstukken II 2013/2014, 33 848, nr 15).

SITE
Anonymous, (2014), 'ISIS Spokesman Declares Caliphate, Rebrands Group as "Islamic State"'. SITE Monitoring Service Jihadist Threat <https://news.siteintelgroup.com/Jihadist-News/isis-spokesman-declares-caliphate-rebrands-group-as-islamic-state.html>, accessed 23 February 2015.

VilaWeb
VilaWeb 'Declaration of sovereignty and of the right to decide of the Catalan nation', <http://www.vilaweb.cat/noticia/4076896/20130124/declaration-of-sovereignty-and-of-the-right-to-decide-of-the-catalan-nation.html>, accessed 12 March 2015.

Zeit Online
Zeit Online 'Katalanen stimmen für Unabhängigkeit', <http://www.zeit.de/politik/ausland/2014-11/referendum-spanien-katalonien>, accessed 22 February 2015.

Valorisation

Introduction

This annex will cover the valorisation of the doctoral thesis to which it is attached. A number of questions will guide this addendum on valorisation. These questions are concerned with, respectively, the social and/or economic relevance of the present research, the target group of the present research beyond academia, what activities or products can be created from the present research, and how innovative this research is. The last question asks for a plan to implement valorisation.[440] In the following, each of these questions will be answered and conclusions regarding the valorisation of the present research be drawn. Lastly, the addendum will be utilized to evaluate the value of valorisation in itself.

1. What is the social (and/or economic) relevance of your research results (i.e. in addition to the scientific relevance)?

Conversations about power never lose their relevance. Questions of who has power, who should have power and what kind of power, in what ways power can or should be used and what constraints exist are far from new, but they have not lost their relevance merely because they have been asked before. These questions point at choices—political, legal, societal and philosophical—that groups of people have to make whenever they come in contact with one another. That these questions have not been answered once and for all becomes clear in discussions surrounding humanitarian intervention, independence and secession, the openness of borders, who gets to decide on which state has to offer asylum to how many people—all these are questions that relate to power, whether in broad or very detailed strokes.

[440] Cf. Article 23 of the Regulations governing the attainment of doctoral degrees of Maastricht University.

Sovereignty has been used for a long time as a term to capture different ideas of power or power constraints, as well as to evade discussion of the above-mentioned questions. As such, the concept of sovereignty is of incredible relevance in a world in which globalisation, civil and economic instability in some regions, technological advances and the ensuing power for corporations, as well the increasing significance of organisations such as the European Union or the World Trade Organization all mean that existing power structures are changing. The societal relevance of a study of the meaning of the term "sovereignty" lies in the relevance of the term for political and societal debates. This book provides analytical tools not only for academics and researchers, but for politicians, reporters and people. Whether they use these tools depends on dissemination and I will talk about this in section 5 of this addendum.

2. (Target groups) To whom, in addition to the academic community, are your research results of interest and why?

As mentioned in the previous paragraph, the discussions in which sovereignty plays a role are not discussions of purely academic interest. Instead, these are discussions led by politicians and policy makers, they are picked up on by reporters and involve individuals in both small and quite fundamental ways. Regarding the latter in particular, it seems fair to assume that if people recognise what power they have and how they do or do not shape the legal system, how vast and far reaching their indifference can be and what it can mean, this might have an impact on the people, too. This PhD is analytical and deliberately non-polemic but the results of this PhD are, or at least should be, of interest to every single individual in a state, *especially* those unhappy with their state. Realise how much power you have if coordinating with others, search for means to reform the system from within, or revolt if you cannot do so. Equally, it is, or it should be, of interest to the international community, to help

realise where the states that the international community is protecting with the notion of external sovereignty find their basis. As such, this work also gives state representatives speaking in front of the General Assembly of the United Nations or even the Security Council analytical tools to shape their arguments in new and precise ways.

3. (Activities/Products) Into which concrete products, services, processes, activities or commercial activities will your results be translated and shaped?

There are a great number of possible examples of products, services, processes, and (commercial) activities into which academic work in general can be translated. Many of the more concrete examples such as patents, licenses, or software are not applicable for the present work. However, other examples of activities or products are non-academic publications, possibly in newspapers or journals. The present work can be translated into such products. In how far this will be done is a matter for section 5 of this annex.

4. (Innovation) To what degree can your results be called innovative with respect to the existing range of products, services, processes, activities, and commercial activities?

My PhD has no relationship whatsoever to existing products, services, processes, activities, or commercial activities. Its innovation lies in the thought behind it. The value or innovative character of philosophy cannot and *should not* be measured in economic terms (see also section 6 of this annex).

With regard to activities such as newspaper articles or non-academic publications, as well as with regard to academic publications, however, the innovativeness of this work lies in its analytical character. Much of the work on sovereignty seeks to answer political and philosophical

questions on the basis of a legal concept; this work, instead, seeks to prescribe not political or philosophical viewpoints, but rather a number of logically consistent definitions of sovereignty. In other words, this thesis does not give immediate answers to questions of politics or policy, but it gives the tools to have analytically clear discussions on this matter. It is the hope that these tools will allow all those involved in the discussions to avoid misunderstandings or misdirection. It is this approach of offering tools to develop answers, instead of providing possible answers, that shapes the innovativeness of this work.

5. **(Schedule & Implementation) How will this/these plan(s) for valorisation be shaped? What is the schedule, are there risks involved, what market opportunities are there and what are the costs involved? If the dissertation addresses valorisation itself, this can be referred to in the addendum.**

The nature of this thesis limits the kinds of products into which this work can be translated. This has advantages and disadvantages.

A clear advantage is that the products into which it can be translated are very cost efficient: the only costs involved are those of the author's time. This is because the only types of products it can be translated into involve nothing but words: newspaper articles, policy papers for the European Union, or other non-academic publications as well as academic publications with a less theoretical focus than the majority of the present book are all possible. Another advantage is that there are no risks involved in creating such products.

The above also points towards another advantage, namely a certain degree of flexibility. For newspaper articles or policy papers, no strict implementation schedule is necessary. Nevertheless, it can only be beneficial to set clear goals, which for this research are the publication of a policy paper for the European Union regarding the use of "sovereignty" in the discourse between the EU and its Member States and a summary of

the findings of this thesis in less theoretical terms which can be disseminated via websites such as that of the Montesquieu Institute. This will be done within a year of the publication of this thesis.

A clear disadvantage of the nature of this thesis, on the other hand, is the fact that there are no market opportunities for products created on the basis of it, aside from its potential use in educational materials. Equally, the effect of any product will be neither immediate nor necessarily visible. Words do not cure cancer and analytical clarity of arguments does not translate into money. The question is, however, whether all research needs to do so. In the following section, we will consider this in more detail.

6. Evaluating Valorisation.

In the previous five sections of this annex, it has been shown that the value and innovativeness of the present thesis lie in the fact that it offers tools to politicians, journalists and individuals to improve the mode of discussion concerning power and power relations in current societies. That these discussions exist and have societal relevance and that it is desirable for them to be held on as high a level as possible and in as clear a manner as possible should go without saying. Misunderstandings do not help anyone when it comes to decisions regarding the power distribution between the European Union and its Member States, humanitarian intervention or similar issues. In all these discourses, the term "sovereignty" plays an important role and this thesis offers the tools to frame these discourses in clearer terms.

Every doctoral thesis has to justify its own existence and give an answer to the question what its value is. Having done so in accordance with the standards set forward by the university, I would now like to dedicate a few words to the issue of what defines the value of research and what values are – or seem to be – acceptable for the sake of *valorisation*. I would like to add as a prelude to the following section the statement that

I am aware that universities do not exist in a vacuum and are therefore touched by societal, economic, and political developments. Nothing in the following should therefore be construed as placing responsibility squarely and solely on the shoulders of universities. The matter is as much a political issue as it is an institutional one, where the institution in question is of course a university. This, however, should not stop us from addressing the issue.

Article 23 of the Regulations for obtaining a PhD at Maastricht University offers a definition of knowledge valorisation. It reads, "Knowledge valorisation refers to the **process of creating value from knowledge,** by making knowledge suitable and/or available for social (and/or economic) use and by making knowledge suitable for translation into competitive products, services, processes and new commercial activities (adapted definition based on the National Valorisation Committee 2011:8)."[441] This seems to imply that knowledge does not have value. The precise phrasing does not even suggest that knowledge does not have sufficient value, in which case one might use the clause "the process of creating *further* value from knowledge" but rather indicates that knowledge as such does not have value, that we need to create this value through the process of valorisation before it can be valuable.

This is in my opinion a flawed view on the importance of knowledge in our society, if perhaps one that grows more and more pervasive. Let us consider a well-known metaphor to showcase why I am of the opinion that this is flawed and somewhat short-sighted. If science means standing on the shoulders of giants, and our goal is to reach the heavens, where giants are a metaphor for research, and the heavens are a metaphor for economic and societal impact, is it really wise to value only those giants that have already reached the heavens? Should we not value also the ones

[441] Art. 23 of Appendix 4 of the Regulation governing the attainment of doctoral theses, Maastricht University (2013). Emphasis added.

that have broad shoulders, but are not very tall, the ones that are perfect for standing on so that another giant can climb onto their shoulders and reach the heavens? Valorisation gives the impression that this is not the case.

It is entirely possible that this impression is not the purpose of an increasingly stronger focus on valorisation, but whether it is intentional or not, that is the effect of it.

My main point here is not that only *Grundlagenforschung* or only theoretical knowledge has value—quite the opposite. Research that can be translated into immediate societal or economic effect is necessary and valuable—but it is valuable not only because it has societal impact or an economic effect. It is valuable because it is knowledge and knowledge put into practice. The main point is and should be that knowledge has value in itself and that it has this value independently of its societal impact or potential economic value. These things, too, are valuable, but they are not the sole source of value in our society, nor should they become the sole thing we value.

Perhaps it is too ideological for the annex of a thesis that strictly disavows making ideological value judgements; certainly it is more ideological than is expected in an annex dedicated to valorisation. Nevertheless, if a university no longer values knowledge in itself or gives the impression that knowledge in itself is not valuable, this does not strike me as a societal development that should go without comment.

Curriculum Vitae

Antonia Maria Waltermann was born in 1989 in Cologne, Germany. She obtained her bachelor's degree (LLB) in European and Comparative Law from Maastricht University in 2011 and her master's degree (LLM), with a focus on international and human rights law, from the same university in 2012. During her master's, she followed the Master's Honours Programme and worked as a student assistant for the department of International and European Law. In September 2012, she assumed a position as lecturer for the Department of Public Law, and began working on her doctoral thesis under the supervision of Jaap Hage and AW Heringa, which she completed in 2015. Since October 2015, she holds a position as assistant professor of legal theory and philosophy at the Department of Foundations of Law at Maastricht University.